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INDEPENDENT NATIONAL SECURITY LEGISLATION MONITOR

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

PUBLIC HEARING
DAY 3

MONDAY, 21 NOVEMBER 2022 AT 9:00 AM (AEST)
CANBERRA, ACT AUSTRALIA

BEFORE: **MR G. DONALDSON SC,** INSLM
MR M. MOONEY, PRINCIPAL ADVISER

EXHIBIT LIST

DAY 3
Date: 21/11/2022

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THE PUBLIC HEARING RESUMED AT 9:04 AM

ACKNOWLEDGEMENT OF COUNTRY AND WELCOMING STATEMENT BY GRANT DONALDSON SC

MR DONALDSON SC: Good morning, everybody. As we begin this hearing, I acknowledge the Ngunnawal people, the traditional custodians of the land on which we meet today.

My name is Grant Donaldson, and I am the Independent National Security Legislation Monitor. This is a public hearing conducted pursuant to section 21 of the Independent National Security Legislation Monitor Act 2010 and it is part of my Statutory Review into Division 105A of the Criminal Code.

This hearing is being transcribed and is also being live streamed and a record of this public hearing will be maintained.

On my left is my ever-helpful principal advisor, Mark Mooney.

This is a further public hearing following two days of hearings in relation to this review that occurred on the 22nd and the 23rd of June 2021. As I outlined then, in reviewing Division 105A, I'm required to consider whether it contains appropriate safeguards for protecting the rights of individuals, whether it is proportionate to any threat of terrorism or threat to national security, or both, and whether it remains necessary.

Ahead of the hearing in June, I received written submissions from Commonwealth agencies but I think it would be fair to say that those submissions represented, in some respects, policy views of the previous government. I accepted then that agencies and departments had not had sufficient time to brief incoming ministers to determine if those particular submissions reflected the views of the new government. So, accordingly, at the final session of those public hearings, I outlined some of my preliminary thoughts to officers appearing for the Commonwealth agencies and raised various topics with them, and invited further submissions.

The Attorney-General's Department and the Department of Home Affairs have each provided supplementary submissions and I'm grateful for those. In light of those additional submissions, the purpose of today's hearing is essentially two-fold. With the benefit of those submissions from the Attorney-General's Department and the Department of Home Affairs, representatives of these departments will appear today to address those submissions and to respond to any questions that I might have.

We also have representatives joining us from the Australian Human Rights Commission and the Law Council of Australia. These organisations have previously provided written submissions and representatives attended the previous public hearing. They are back again today, in light of the supplementary submissions from the Attorney-General's Department and Home Affairs, which they have considered.

I am also pleased to note and grateful for the Australian Federation of Islamic Council's most helpful further submission, which has been provided for the purpose of today's hearing, and I've had regard, obviously, to that and to other private submissions that I have also received.

Before we start with the first of the people who are going to assist today, I will outline some of the issues which will be the focus of today's hearing. These are not the only issues but some of the issues that will be focused upon.

The first issue is the relevance of certain factors that are set out in section 6 (1)(b) of the Independent National Security Legislation Monitor Act. As I noted, my Act requires that in this review I consider whether Division 105A remains proportionate to think threat of terrorism or threat to national security and whether it remains necessary.

In determining those issues of necessity and proportionality, there are some factors that I'm considering and seeking to understand whether they are relevant to those questions of proportion and necessity, and I'll be most interested in people's feedback on those matters. One of those matters is the experience of countries that share Australia's values and traditions, that have been confronted by violent extremism since 2001.

The United Kingdom, for instance, has experienced many acts of violent extremism that have resulted in spectacular and coordinated violent events. Many lone wolf attacks, hundreds of deaths, and countless serious injuries and damage to property. Yet the United Kingdom does not have anything like a continuing detention order and I'll be interested to hear people's views as to whether that is relevant to the task before me.

I also note that in the recommendations of the New Zealand Royal Commission into the terrorist attack in Christchurch on 15 March 2019, there were no recommendations in that royal Commission for the institution of a post-sentence detention regime for terrorist offenders. And, as I understand it, there is no equivalent to continuing detention order in Canada. So I will be interested in people's views as to whether those matters are relevant to the task before me.

Another factor that I'll be inviting people to comment on, if they're able, is the relevance, if any, of recidivism rates of those who have been convicted of

terrorism offences. In a 2021 publication of Hodwitz relating to the terrorism recidivism study, which was published in the seminal journal Perspectives on Terrorism, he disclosed that in a Dutch study that followed 189 terrorist offenders released between 2012 and 2018, there was a re-offending rate of under 6 per cent, which contrasted with the recidivism rate for non-terrorist offenders in Holland of approximately 50 per cent.

In Belgium in respect of a cohort of 557 so-called jihadist related extremists the recidivism rate between 1990 and 2019 was 2.3 per cent. In Spain during the period of 2004 to 2018, the recidivism rate was seven per cent, although that included offences committed while offenders were imprisoned. In the United Kingdom, between 2013 and 2019, of those who had served sentences for terrorism offences had been released, 3 per cent had re-offended. There's a well-known publication by Professor Andrew Silk who has great expertise in this area, that also discloses that between 2001 and 2008, of the 196 convictions for terrorism related offences in the United Kingdom, 100 offenders had been released by 2009 and of those, 100 offenders, none had re-offended as at the date of Professor Silk's report.

So I'm interested in those matters and interested in the relevance of recidivism and these recidivism rates to the task that is before me in considering necessity and proportionality. I should also note by way of introduction that there is an important paper by Professor Thomas Renard, who is the director of the International Centre for Counter-Terrorism in The Hague that was published in the CTC Sentinel which is a general published by the Combatting Terrorism Centre at the United States military academy at Westpoint and Professor Renard - and this was in 2020 - he made the following observation at the end of his very thorough paper, and he noted the following:

> "The threat of terrorist recidivism and reengagement is limited. Although every case of terrorist re-offending is one case too many the fear of recidivism appears to be disproportionate compared to its actually occurrence. It is interesting to note that in existing studies low recidivism rates were encountered across different forms of terrorism and in different contexts.
>
> As a wave of terrorist offenders are about to be released from prison in the coming months, the conclusions of this article should be pondered carefully by policy makers and counter-terrorism practitioners. The take-away should not be to discard the threat of recidivism altogether. The monitoring of released terrorist offenders and preventing their relapse is a clear and necessary task of security services, as even a small number of recidivists can still constitute a most serious threat in the short to longer term. However, this article clearly supports the need for evidence-based

policies aiming to increase public security while mitigating potentially counterproductive effects of indiscriminate fear-based responses".

I'll be interested in people's views as to those sentiments, which are also sentiments expressed by Dr Hodwitz in his paper in the - or that I referred to earlier and an interest in people's views as to the relevance of those factors to the questions that are before me as to proportionality and necessity of Division 105A or parts of Division 105A.

The second issue that I'll be interested in being assisted in relates to the objects of Division 105A. It's a matter I considered at the last hearing but I am hoping to revisit it again, and that is whether the objects of the division which are currently limited to protecting the community from the risk of serious Part 5.3 offences should be expanded to include rehabilitation of offenders and their reintegration into the community.

The third issue that I'll be interested in hearing from people about today relates to Australia's relevant international human rights obligations, and I have been greatly assisted by the Attorney-General's Department in their various submissions dealing with this issue. In particular, the Attorney-General's Department helpfully set out the International Instruments pursuant to which Australia has obligations to prevent acts of terrorism.

The most recent of those is security council or UN Security Council Resolution 2396 and it is interesting that that resolution refers expressly to rehabilitation and reintegration of offenders as necessary responses to terrorism. At the last hearing and in many of the submissions, reference has been made to Article 9.1 on the International Covenant on Civil and Political Rights which prescribes universal rights to liberty and security of the person and the freedom from arbitrary arrest and detention.

There are various reports of various bodies, including the UN Human Rights Committee that deal specifically with Article 9.1 and in particular the General Comment Number 35 in 2014 of the committee, and I will be inquiring of people who appear before, or appear today, as to the relevance of some of that jurisprudence. And I am looking forward to discussing today with the representatives of the Attorney-General's Department their supplementary submission which responds to matters I raised on the last occasion in this respect.

The fourth issue that will be the focus of attention today relates to the risk assessment process in Division 105A. People who appeared at the last occasion might wonder what else there could possibly be to consider, having regard to the consideration of this issue on the last occasion. But since June of this year, I have undertaken an enormous, along with others, an enormous amount of work of the

risk assessment process under Division 105A and, in particular, have regard to the manner in which relevant - the relevant expert process is used in the division.

Relevant experts without going through the detail of the legislation, provide reports, which provide an assessment of the risk of an offender committing a serious Part 5.3 offence if they are released and they are provided to courts when courts make decisions in relation to making a continuing detention order or an extended supervision order. Part of that process that is undertaken by relevant experts in Australia is utilisation of a tool, a risk assessment tool, known as the VERA-2R.

Rights to that tool are owned by one of its developers, Dr Elaine Pressman and Dr Pressman licences institutions throughout the world to use and administer the tool and to train people in its use. The Department of Home Affairs in Australia is, in Australia, the sole licensee of VERA-2R and I will be interested in people's views as to whether there are issues as a result of that arrangement.

Further, until September 2022, the department was unable to make material available for research in relation to the VERA-2R and, again, I'll be interested to learn whether there are consequences that have flown from that. In the course of this review, I became aware that Dr Emily Corner completed a project for the Department of Home Affairs and a report entitled Testing the Reliability, Validity and Equity of Terrorism Risk Assessment Tools. That report was provided to the Department of Home Affairs in May 2020.

The report has not been published or disclosed to defendants in applications under Division 105A. Dr Corner's report was provided to me pursuant to a compulsory notice to produce with a notation from the Department of Home Affairs that it contains operationally sensitive information. I have formed the view that that report does not contain operationally sensitive information. The executive summary of the report states that:

> "This research project undertakes a holistic and impartial analysis of the VERA-2R to demonstrate the extent to which these risk assessment instruments" -

Just pausing there, there were two risk assessment instruments that were considered by Dr Corner, VERA-2R was one and another instrument, Radar, was another. So Dr Corner assessed to determine whether the instruments accurately classify offenders or overestimate or under estimate the risk they pose. Dr Corner went on:

> "This research project also provides the most comprehensive overview of the state of the empirical knowledge of the causes of radicalisation and terrorism to date."

She noted that this was the first piece of research to be performed on those instruments. In her summary of the review, she noted that the overall outcomes of this research have identified that both VERA-2R and the other tool, Radar, lack a strong theoretical and empirical foundation and have poor interrater reliability and questionable protective validity. There is much confusion as to the risk specification of the instruments, that is what setting the instrument should be applied in and which individuals should be subject to assessments.

She noted that the theoretical and empirical evidence base cited in the instrument user manuals and supporting documentation is of poor quality. She noted that her research identified that for the sample employed, VERA-2R offered poor predictive validity, and concluded the summary with this:

> "The lack of evidence underpinning both instruments has potentially serious implications for their validity and reliability. Without a strong theoretical and empirical basis for factor inclusion it is not reasonable to anticipate that the instruments are able to predict their specified risk with anything other than chance."

Division 105A contains provisions which require the Minister in applying for a continuing detention order or an extended supervision order to include and to provide to the defendant and the court any report or document upon which the Minister intends to rely, and to provide all material facts of which the Minister is aware that would reasonably be regarded as supporting a finding that the order should not be made. In the course of this hearing today, I will be exploring whether the provisions that currently exist in Division 105A require amendment, having regard to the circumstances of the non-publication of Dr Corner's report.

The fifth issue that I'll be exploring today relates to the ESO specified authority. Provisions of Division 105A enable a court to impose conditions on an ESO that have the effect of delegating certain powers and discretions to a specified authority including a power to permit exemptions from certain conditions.

A matter that I'll be seeking assistance on with people today is whether a body such as the post-sentence authority under the Victorian Serious Offenders Act 2018 is a suitable model for dealing with extended supervision order review and supervision, and administration. And I'll be very interested to hear from both the Attorney-General's Department, the AFP, and the Department of Home Affairs as to how consistency in the administration of any extended supervision order regime will be able to be affected throughout Australia.

So they are the matters that I am hoping to touch on today, or among the matters I should say. After that, perhaps overly lengthy introduction and I'm sorry to have taken so much time, but if we could then move on to be addressed by representatives of the Australian Human Rights Commission and we have with us Graeme Edgerton who has frequently been of great assistance to me and to my predecessors. So thank you again, Graeme, for coming.

And we have Lorraine Finlay who has been able to join us from London. And I'm very grateful, Lorraine, that you have made the time in, I'm sure what is a busy schedule over there, to come along today. So thank you very much. Now, were either or both of you wanting to say something by way of introduction today?

MS FINLAY: Yes, if it was possible to make an opening statement, that would be appreciated.

MR DONALDSON SC: Yes, certainly, Lorraine.

MS FINLAY: Thank you. Well, thank you, first of all, for the invitation to provide evidence today and particularly for accommodating my appearance remotely. I apologise for not being there in person but as you've already noted, I appear on behalf of the Australian Human Rights Commission, together with Mr Graeme Edgerton, Deputy General Counsel.

We understand that the primary reason for today's hearing is to take evidence from government agencies who have, following the recent federal election, now provided supplementary written submissions to the review. We have reviewed those supplementary written submissions provided by the Attorney-General's department and the Department of Home Affairs. In this opening statement, I will refer to some of the issues that you asked the agencies to comment upon and that you covered in your opening remarks.

Importantly, you asked whether the regime established by Division 105A of the Criminal Code is consistent with Australia's human rights obligations. Given the grave risks to the community posed by terrorism, an appropriate post-sentence regime with effective protections against unjustified detention and other human rights infringements can be a reasonable and necessary response, noting particularly as we did in our opening statement during the earlier public hearing, the various human rights engaged when protecting the Australian community from terrorism.

However, such regimes are extraordinary measures and can only be justified in limited circumstances. In my opening statement at the last hearing, I identified four requirements to ensure that such a regime is compliant with human rights.

First, there must be strong evidence about the likelihood of future risk. Second, preventive detention should only be used as a last resort. Third, there must be regular periodic reviews to assess whether detention or other restrictions on liberty continue to be justified.

And fourth, those subject to preventive detention must be separated from prisoners serving a sentence of imprisonment and treated in a way that is consistent with their status. The supplementary submission from the Attorney-General's Department deals with the last three of these requirements when discussing human rights compliance but not the first, namely, whether there is strong evidence about the likelihood of future risk.

In a sense, this is the key to the entire regime. The Commission's written submission identified real concerns with the current reliability of risk assessments in proceedings under Division 105A. Those concerns seemed to be confirmed by the conclusions in the report provided to the Department of Home Affairs conducted by Dr Emily Corner, that you've referred to this morning.

If it is not possible to meaningfully assess the future risk that a particular category of offender poses, if as your summation of the Corner report suggests, it concludes that it is not reasonable to anticipate that the instruments are able to predict their specified risk with anything other than chance, then there is not a proper basis to continue to detain offenders after the expiration of their custodial sentences. Any such detention would be arbitrary in the international law sense because it would not be justified as reasonable, necessary and proportionate on the basis of reasons specific to each individual.

The commission has proposed two changes to the current regime on the assumption that it is possible for assessments of risks to be validly made. First, courts should be made aware of the limitations of existing risk assessment tools. The best way to ensure this is to require experts to identify limitations in their assessments when providing them to the court. If the Commonwealth is aware of significant limitations in risk assessment methodology that it relies upon, it appears that it would also have an obligation to disclose those limitations to the defendant.

Secondly, there should be an independent risk management body that accredits experts, conducts research and develops risk assessment tools. This would provide greater assurance that risk is being assessed in an objective, independent way. Experts who are appointed to provide evidence to the court should be accredited by this independent body. There are models for such a body in other jurisdictions, such as the Scottish Risk Management Authority, which has been operating successfully since 2005.

The authority is required by statute to set standards and issue guidelines on the assessment and management of risk, particularly the risk posed by violent and sexual offenders. The authority also accredits experts who provide evidence in the High Court in cases where preventative detention orders are sought. We recommend that a similar structure be implemented in Australia for risk assessments under Division 105A.

In relation to some of the other points that you raised this morning, the commission would support an amendment to the objects of Division 105A to include the rehabilitation and reintegration of offenders into the community. This would make the Commonwealth regime consistent with the regimes in place in New South Wales, Victoria, Queensland and the Northern Territory. In practice, the potential for reintegration may also have a bearing on the assessments made by a court about future risk and whether an offender could be managed in the community or must continue to be detained.

The commission would also support the establishment of a national body to coordinate, monitor and administer the operation of the ESO regime. Such a national body could promote consistency in the conditions attached to ESOs, particularly where discretions are given by the Criminal Code to specified authorities. The Victorian post-sentence authority appears to be a good model for such a body.

We also have some brief comments from two of the additional points that you raised with agencies at the end of the last hearing. You asked the agencies whether one factor that should be taken into account when determining whether a terrorist offender is eligible for the PSO regime is the length of sentence that they were given. The Attorney-General's Department said that this is not an appropriate consideration because the decision to impose a PSO is based on an assessment of future risk rather than punishment for past conduct.

However, eligibility for the regime is currently based on past conduct. A person must have been convicted of a terrorist offence in order to qualify for the regime. It is consistent with the policy underlying the regime and we would say appropriate for the seriousness of a person's conduct to be taken into account in determining whether the PSO regime applies to them.

You also asked the agencies whether a continuing detention order that is made after a person's sentence expires should commence on the date the sentence expires or on the date the order is made. The Attorney-General's Department said that this should be left to the discretion of the court. The commission considers that there are strong arguments in favour of all CDOs commencing on the date the person's sentence expires.

When this regime was first introduced, one of the safeguards emphasised by the government to ensure that the regime was not arbitrary was that the period of detention authorised by a CDO must not exceed three years. Ensuring that CDOs commence on the date that a person's sentence expires would be consistent with this original policy intent, and ensuring that the making of interim detention orders do not have the effect of extending out the maximum initial period of post-sentence detention.

Thank you again for the invitation to provide evidence today and I would particularly like to acknowledge your office and record our appreciation for their assistance in facilitating arrangements for today and particularly my appearance remotely. We're happy to answer any questions that you may have.

MR DONALDSON SC: Okay, thanks very much, Lorraine. Do you want to say anything, Graeme?

MR EDGERTON: No, thank you very much.

MR DONALDSON SC: Alright. Thank you. Could I just ask you, Lorraine, is it the position of the Australian Human Rights Commission that rehabilitation and reintegration into the community are not requirements of international law in relation to post - that is, that they be a purpose of post-sentence detention? Is it your submission that they are not requirements of international law?

Sorry. I have expressed that poorly. In relation to rehabilitation and reintegration, I think you indicated that there were four requirements under international law in relation to post-sentence detention regimes and their validity, and that an object of post-sentence detention be the rehabilitation and reintegration into the community. I did not understand you to say that that was one requirement under international law. Is that correct or am I misunderstanding you?

MS FINLAY: We weren't, in that submission, relating to express requirements under international law in terms of rehabilitation of an offender, more referring to broad requirements to ensure that any regime is compliant with human rights, and that's where the proportionality, necessity, et cetera, comes from.

MR DONALDSON SC: Right. Because I must say, for my part, I had looked at the UN Human Rights Committee General Comment 35 in 2014 as stating at least that committee's view that any regime of post-sentence detention must have - must have - as its object, rehabilitation and reintegration of defendants into the community.

MS FINLAY: That could be -

MR DONALDSON SC: Now, I am interested in your body's view as to whether that actually is a requirement of international human rights obligations to which Australia adheres, or not?

MS FINLAY: Well, look, it would certainly sit consistently with the requirements about proportionality, necessity and justification. So, in that sense, it's consistent with those broader requirements, and certainly if you look at General Comment Number 35, that seems to be the approach that has been taken in relation to that particular interpretation. And I think as well, when you look at General Comment Number 35, it talks about the likelihood of a detainee's committing similar crimes in the future, which is another factor towards which then rehabilitation, and the like, may well be a relevant factor.

MR DONALDSON SC: Yes. It's not the only factor -

MS FINLAY: No. Of course.

MR DONALDSON SC: - dealt with in General Comment Number 35, but it seemed to me that General Comment 35 was fairly plain that, in the committee's view in any event, a requirement of, or an aspiration for rehabilitation and reintegration into the community was an aspect, or was a requirement of a post-sentence detention regime complying with Article 9.1 of the covenant.

MS FINLAY: And can I say, and it's not directly relevant, and then I might see if Mr Edgerton has any other comments that he'd like to make. But certainly when we talk about Australia's broader international human rights obligations and particularly in relation to any orders of detention, be they punitive or otherwise, I've recently been in Geneva for the Committee Against Torture, Sixth Periodic Review Into Australia's Compliance with the Convention Against Torture and certainly policies towards rehabilitation are something that that committee saw as coming squarely within Australia's obligations in relation to the Convention Against Torture and overall detention regimes. So I think that's consistent with the view you're putting forward.

MR DONALDSON SC: Yes. And it seems to me that if I'm persuaded that it is either an aspect of Australia's international human rights obligations or I might say, Australia's anti-terror obligations, because I referred in my opening to UN Security Council resolution, which dealt with countries' obligations to combat terrorism. But included in that particular resolution was a requirement that there be a focus on rehabilitation of terrorist offenders.

So they're not only necessarily human rights obligations, but they're seen as an aspect of Australia's anti-terrorism obligations. And if I'm persuaded that it's either required by Australia's international human rights obligations or that rehabilitation

and reintegration into the community are good things, then they should be expressed in the division it seems to me.

MS FINLAY: That would seem to be the logical conclusion that follows from the line of reasoning you've just developed.

MR DONALDSON SC: And I say that for this reason: that I am aware that rehabilitation, or efforts at rehabilitation and reintegration into the community occur, but they occur as fact and that's a policy choice, no doubt, that Executive Government has made in relation to these matters. But different governments may have different views on these matters at different times. But if there's a statutory obligation, then there's a requirement for it.

MS FINLAY: Well, and I would also note that under international human rights law there may be differing weight given to that particular characteristic depending on the circumstances. You're talking about, for example, The Convention on the Rights of the Child gives a particular emphasis to those types of requirements and that wouldn't be applicable in the circumstances that we're talking about. So the fact that it is a factor doesn't necessarily mean the weight given to it will always be the same, but we would certainly accept that it's a relevant factor to be considered.

MR DONALDSON SC: Well, I think that's an interesting point, because let us say that the objects of Division 105A were amended to include - so stayed as it is now but included rehabilitation and reintegration. A relevant expert, plus the court is required to have regard to the objects of Division 105A in performing the tasks that they perform.

I would imagine that if rehabilitation is an object and its simply stated as an object along with the protected objects of the division, an issue may arise as to which of those two objects might take priority in the circumstances that they were inconsistent. Do you understand what I'm referring to there?

MS FINLAY: Yes.

MR DONALDSON SC: Because in various Commonwealth legislation, the NSI Act is an example where, in the legislation there it's expressly provided that if there is an inconsistency between, you know, in effect, Australia's national interest in protecting information and a defendant or an accused's right to a fair trial, the former prevails. So one thing that is exercising my mind is whether a priority type provision like that, if the objects of the division are to be amended, would be required.

I think I've thrown that at you cold and I've got to say I've got a fairly well-developed view of my own on this. But if you have anything to add without

notice to you beforehand, I would be interested in hearing it, Lorraine or Graeme. But if I've put you on a spot and you don't have a view then please just say so.

MR EDGERTON: I understand that in New South Wales and Victoria there is a priority that applies, and rehabilitation, reintegration is seen as a secondary priority.

MR DONALDSON SC: Yes.

MR EDGERTON: So there's definitely precedent for that. I mean, in a sense, they are mutually reinforcing.

MR DONALDSON SC: Yes.

MR EDGERTON: So the CDO regime is about continuing detention but it's not about indefinite detention. It's about managing risk.

MR DONALDSON SC: Yes.

MR EDGERTON: And the ultimate aim is that people's risk is reduced and ultimately removed so that they can reintegrate back into the community. So there is a linkage between risk and the objects of rehabilitation, and I think in some senses they are mutually reinforcing.

MR DONALDSON SC: Yes, and it only becomes an issue, of course, if there's inconsistency between a protective purpose and a rehabilitative purpose, if I can put it that way.

MR EDGERTON: Yes.

MR DONALDSON SC: I must say, for my part, it's a bit difficult to conceive of that, actually.

MR EDGERTON: And I think it would allow the court to take into account a broader range of considerations. So this issue came up when the first CDO was sought in relation to Mr Pender.

MR DONALDSON SC: Yes.

MR EDGERTON: And it was put to the court that one thing that they could take into account in assessing risk was whether Mr Pender had better prospects of rehabilitation in the community rather than in detention.

MR DONALDSON SC: Yes.

MR EDGERTON: And the court said that they weren't permitted to take that into account in the risk assessment process.

MR DONALDSON SC: Yes.

MR EDGERTON: And part of the reason for that was that rehabilitation and reintegration were not objects of the division as they were in New South Wales and in Victoria.

MR DONALDSON SC: Yes.

MR EDGERTON: They could take into account past attempts at rehabilitation, because that was sort of one of the specific matters that could be taken into account in risk assessment, but not future prospects of rehabilitation and particularly whether it would make a difference if that happened in detention or in the community. So I think expanding the objects would allow a greater range of relevant matters to be taken into account by a court in that risk assessment process.

MR DONALDSON SC: And I think it'd be fair to say that reading in between the lines of Justice Walton's judgment in Pender, his Honour was rather disappointed that he wasn't able to take that matter into account. I think perhaps probably because it was commonly done under the New South Wales schemes, that may have been.

MR EDGERTON: Yes.

MR DONALDSON SC: Alright. Thank you for that, that's very useful. Could I just clarify one other matter with you from the commission's point of view. I've not understood the commission to be contending that there are any particular international human rights obligations that would be offended by an extended supervision order scheme per se. That is, there are no international human rights obligations to which Australia adheres that would suggest that the scheme, as provided for under the Act, as it's currently expressed, would contravene an international human rights obligation?

MR EDGERTON: I don't think so. I mean, the commission's been supportive of having an ESO regime and having that introduced particularly as a less restrictive alternative to the CDO regime itself.

MR DONALDSON SC: Yes, I was just after your help because we've looked fairly hard at that and I formed the view that there doesn't seem to be an international human rights obligation that this division offends in that respect.

MR EDGERTON: I think that's right. I mean, perhaps it's just worth reinforcing the primary point that the Commissioner was making, that any regime of this nature depends on accurate assessments of risk.

MR DONALDSON SC: Yes. Alright. So can I ask you some questions then about 105A.4, which is the conditions of detention. So - but also I think we'll get into the ESO regime as well. So as you've indicated, Lorraine, and as is set out in your various written material which is, as always very helpful, that provision requires that those who are serving, or subject to a continuing detention order must be maintained if they're detained in detention, if they are detained in a prison, they must be detained in circumstances that are consistent with their status; that is, status as a person who is not serving a term of imprisonment.

And one of those issues of status, which is specified in the Act, is that they be kept separately or separate from the general prison population. And I note in the Attorney-General's Department most recent submission that some of the carve-outs or provisos for that, I think the Attorney-General's Department accept may be the subject of repeal.

One issue, though, both with the - that regime for detention, but also the regime for ESOs is how it would be possible to ensure conformity between the different states if a person was either detained in, say, Victoria as opposed to Western Australia or was subject to an ESO where a person was domiciled in Victoria as opposed to, say, Western Australia.

I think the starting point for all of this has to be that the conditions have to be equivalent throughout the states and territories and I'd be surprised if anybody quibbled with that. Then the issue would be ensuring or having some confidence that that actually occurs and whether the best way of doing that would be to have somebody independent of government that was tasked with overseeing conditions of detention and perhaps the means by which ESOs were administered or even administering ESOs themselves.

So, again, if I can use Victoria as an example, and I use Victoria because Mr Benbrika, who was the first person subject to a CDO was detained in Victoria and I visited the facility, for instance, and Victoria - Victoria's own serious offender legislation has a requirement like subsection (4). And so if you look at the circumstances in Victoria, there is a particular facility in Victoria that has been constructed.

I can assure you that in Western Australia there is nothing like that, and so if there was to be a person the subject of a CDO in, say, Western Australia, I'm not sure how that could, in fact, occur. Again, in New South Wales, it would be interesting to see how that requirement of subsection (4) was actually effected in New South Wales.

So I would be interested in the Commission's view as to whether you think that there would be a need for some sort of oversight of both a CDO scheme and an ESO scheme to ensure that there was, firstly, equivalence between the different jurisdictions and, secondly, that the courts' orders were being administered appropriately?

MS FINLAY: The short answer is yes. And, again, if I could perhaps give a brief response and then turn to Mr Edgerton for anything additional he'd like to add. In essence, the core of the point that you're making is not just that there needs to be a requirement for that consistency and treatment, but it's the practical implementation of that requirement over a period of time that's critical. And that's where the monitoring becomes absolutely essential because there are countless examples not only in Australia but around the world of where minimum conditions that might be provided for in legislation or where there might be a strong legislative framework aren't always translated into practice. And that's really the critical aspect of this. So we would say it's firstly important to get details from agencies about how the obligation of consistency would be met but, secondly, to have that ongoing monitoring.

And we certainly would recognise that there may well be challenges in that, particularly given that we're dealing with a relatively small number of people, of course, in a system that covers an extremely large physical area. But we would simply emphasise the fact that practical challenges in and of themselves don't negate human rights obligations and this is a very clear human rights obligation.

MR DONALDSON SC: Yes. Was there anything you wanted to add to that, Graeme?

MR EDGERTON: I think that there are real benefits in having a single authority that does monitor the conditions for people subject to CDOs and also compliance with the ESO regime. The Victorian model is a really good model in that respect, in the sense that they've got sort of review and monitoring functions but they're also what, under the Commonwealth regime, would be the specified authority. So they're also the body that gives directions to individual people subject to an ESO. One concern that the commission had raised -

MR DONALDSON SC: Can I just interrupt there, Graeme. I don't think the Victorian post-sentence authority is involved in the review of detention. It's more in relation to ESOs, as I've understood it. But in any event, I think it's - I think they may be separate issues but ESOs, they certainly - and, in fact, don't really exercise an oversight body but they're the administrative body that really administers the ESO regime in Victoria.

MR EDGERTON: Yes.

MR DONALDSON SC: And I think that's a problem to say, "Oh, just translate the Victorian scheme nationally" because what occurs to me would be very difficult - can I just pause there? We've met with the authorities, and it's an extremely impressive body, I must say, and the amount of - you know, the detailed involvement in every person subject to an ESO in Victoria is truly extraordinary. But I think a body sitting in Canberra that was dealing with somebody subject to an ESO in Darwin, you could not have the service that the Victorian post authority does.

So if we're thinking, or if I'm thinking I suppose, of having some sort of body that provides something independent of government in relation to ESO, I think it's more an oversight body rather than the actual implementing body. And we're going to hear today from the AFP and Home Affairs and probably the AGD as well as to how these schemes are going to be administered outside of Victoria and perhaps New South Wales. But I think it will have to be an oversight type body rather than actually an administrative body.

MR EDGERTON: Yes, I understand and then sort of making sure that in each of the jurisdictions that they have oversight of, that there is some consistency with the way that things are operationalised on the ground.

MR DONALDSON SC: Yes. Look, I don't have any doubt - well, we're here, but I would be very surprised if anybody from the Commonwealth said, "No, uniformity is not something we are aiming for, we will just, you know, delegate it to the states and they will get treated the same way a dangerous sexual offender does" for instance. I'm sure I'm not going to hear that. But nonetheless coming from Western Australia and having some understanding of how something like supervision orders are administered in Western Australia, they're not administered the way they are in Victoria, I can assure you and that can't happen under a Commonwealth scheme.

MR EDGERTON: I think one of the issues that we'd raised in our initial written submission about specified authorities was just the breadth of people who could be a specified authority and one of our recollections was that it really just be limited to people who are involved in law enforcement. So I think having more of a structure around who is giving those directions, be it, you know, oversight in a central body of law enforcement authorities in each state and territory, I think that can only be an improvement.

MR DONALDSON SC: Yes. Well, that's interesting in itself because generally - again, I think in New South Wales, for instance, some of their schemes are really run through parole authorities rather than law enforcement, depends what you mean by law enforcement authorities, really. But, yes, who the designated authorities is going to be and who will administer an ESO in each of

the states is something we'll hear about today. But, again, I think uniformity is the key to that and there being an assurance that there is uniformity.

The other thing is, and again you may not have considered this and I'll be hearing from the Commonwealth people about this, but it's my understanding of 105A that the obligation under subsection (4) is entirely independent of the court. That is, the court does not have to be satisfied that such a separate detention regime exists. That is, for instance if the courts not satisfied that it exists, the court can't order a CDO. And whether - and if that's the case, then the requirement of 105A subsection (4) is really an obligation that would be difficult to review if it was not complied with - I think.

And, again, if that's right, and I'll hear from the Commonwealth people because I do know that evidence has gone before courts in these applications in relation to this matter, but if that is right, then it seems to me that it may be appropriate to have some sort of oversight body in relation to the detention conditions as well; and it could be the same body as we've been discussing in relation to the ESOs, if that's - if that's the case. That all sounds sensible by the nods that I'm receiving.

MR EDGERTON: I think that's right. It doesn't seem like 105A(4) that a court separately has to be satisfied of.

MR DONALDSON SC: That's my understanding, but again we'll hear from the Commonwealth people shortly in relation to this. And I'm not saying that people aren't trying to comply with it but it's just whether it can be - it is the subject of review if there is a difficulty, that is the issue.

MR EDGERTON: Yes, you might just be limited to a prerogative writ type action, saying there has been a failure to comply with a duty.

MR DONALDSON SC: Yes, and that would be a pretty hard case to run and particularly if you've been in prison for 10 years and don't have any income and equally there would be interesting issues as to the forum at which that argument would be had because, of course, these would be state bodies, like in Victoria it's the Corrections Victoria that actually administer the facility. Anyway, there are issues there, all of which I would have thought would be avoided if there was an oversight body, if I can put it that way.

MR EDGERTON: Yes.

MS FINLAY: If I could just add in briefly, what you've said highlights to my mind the importance of ensuring that an oversight body has that preventive function, because, really, the challenges in this in terms of enforcing those obligations really do highlight the need of preventing those problems from arising

in the first place by ensuring that consistency is operationalised right from the beginning.

MR DONALDSON SC: Yes, I think that's exactly right and, in a sense, of course, it was fortuitous that the first person - fortuitous that the first person to be subject to a CDO was from - was in Victoria where the 105A subsection (4) is really a mirror of the Victorian provisions. Had it happened in another state, I suspect there would have been, you know, administrative complications with all of that.

But even still, I am sure that reasonable people could form different views as to whether, for instance, the conditions in which Mr Benbrika is kept are consistent with his status as a person in detention who is not a prisoner. I'm quite confident that reasonable people could have different views on that. And, again, not necessarily in relation to the physical structure in which Mr Benbrika is kept or anybody else is kept.

But, really, the conditions of confinement; that is, are the restrictions on who a person can see while they're in detention rigorous? So if a person is kept in - is subject of a CDO, is kept in a facility that has a larger cell and more time wandering around a facility than a prisoner would have, but the person is subject to exactly the same restraints on visiting, for instance, and I'm not saying this is a case with Mr Benbrika but, you know, it's conceivable, would that be consistent with 105A.4.

And there I would imagine that reasonable people could have different views and if that's the case, it seems to me that there needs to be some sort of independent body that satisfies itself that the requirement is being met. Or the other thing you do is dump it on the court, which, for my part, I would be reluctant - well, I don't think that that would be as sensible a way of dealing with the issue than some sort of independent authority.

MS FINLAY: But also independent authority to ensure that there's consistency amongst those potential reasonable differences across the country.

MR DONALDSON SC: That's the other point, Lorraine, even if you dumped it on the court, of course it's being dealt with different state and territory supreme courts. So they couldn't deal with these issues of consistency, really, in any sensible way either, I wouldn't have thought. Alright. So Mark, have you got any issues that you wanted to raise with -

MR MOONEY: Well, just I suppose going back to the question of risk assessment, in your submission you indicated that, you know, the proportionality - and you emphasised again this morning the proportionality of the scheme is highly dependent on the ability to accurately predict future risk. And I

guess in light of the opening statement today indicating the findings of the Corner report, and I know you obviously haven't seen the report in full, but would the sorts of conclusions that were highlighted there cause you to go the next step and say that overall the CDO scheme is not proportionate?

MS FINLAY: I would preface everything by saying it's difficult to draw definitive conclusions given that we haven't seen the report, and that is part of the issue: the fact that, you know, there hasn't been the public research and understanding developed in relation to this particular issue and to the risk assessment process and, as we noted, that process really is the key to this entire regime.

So it is enormously concerning to us that these sorts of questions are being raised and that there doesn't seem to be an avenue to ensure that the risk assessment process allows us to meet that requirement of proportionality. The sections of the report that were read out in the opening statement this morning, really about it being unable to determine anything beyond chance, does raise serious questions, in my mind certainly, about whether it would meet the proportionality requirement.

And, you know, it also does seem surprising, given the report was dated May 2020 I understand, noting that was prior to the trial of Mr Benbrika, which occurred in November and December 2020, and so it was prior to the two CDO proceedings conducted to date. It's surprising that the report wasn't disclosed in either proceeding because it would seem to be highly relevant, particularly considering the importance of the VERA-2R assessments in those two proceedings.

MR DONALDSON SC: Yes. Well, we will be hearing from the departments about all of that. But I think one thing I should say about this is there is material that exists, that is to the effect that the VERA-2R tool is the best tool that is available to undertake the task. It exists. There are also people around, and this is the reason why I referenced research before, there are people who say that it is very difficult to conduct research into VERA-2R and Australia's an example.

So there are complexities and subtleties in the process or in dealing with VERA-2R and any assessment tools, although other assessment tools don't have some of those complexities that VERA-2R have. But one thing that has always concerned me about this regime and it may be the answer to it all, is that the scheme of Division 105A is that the court must have regard to these relevant expert reviews, whether they would be admissible or not. And I must say that the burning torch of determining admissibility of expert evidence is something that I think could well be applied to this sort of evidence.

It's also, I think, plain, and I don't think anybody would doubt it, that one of the difficulties with violent extremist offenders is that because the numbers are so small there will never be able to be developed actuarial tools that will assist with these questions in the same way that actuarial tools exist with sexual offenders, for instance. And so assessments of risk of those involved in violent extremism will always - will always - involve a great deal of professional judgment.

It's just whether the structure provided to the professional judgment by tools like VERA really assist the court as much as they've been represented as doing, and that's why I think, as you said, Lorraine, it's concerning that when there is material about that is relevant to the utility of these tools, that it's not provided to the court.

MS FINLAY: Well, I think that's correct, and there are just a few points to briefly make in response. The first is that I think you're entirely right in terms of risk assessment always being difficult when you're talking about looking at future risk. The key factor to weigh against that in relation to this regime is to always acknowledge the extraordinary nature of the regime and the significant consequences that attach if there is assessed as being that risk.

So I think that is the first point to note. The second is it may be this risk assessment tool is the best tool available. But if it is still an inadequate tool in terms of assessing future risk, then that's problematic, particularly given the extraordinary consequences that attach to the assessment of risk in relation to these particular cases.

And as we raised in our written submissions, and again in our opening statement, I think probably the final point to note is our assessment that, at the very least, some of the difficulties surrounding this tool would be ameliorated somewhat if the limitations of the tool were known to the court, and if that was part of the requirement for the risk assessment being considered that those limitations were actually expressed to the court and those qualifications were attached.

Because it was interesting reflecting on the various reports and assessments around recidivism that you referred to in your opening statement, I didn't understand any of those to suggest that risks should be ignored or that in relation to future terrorist activities there aren't potentially significant risks that need to be considered. But they all referred to the need to have evidence-based assessments and to make sure that we weren't overstating risk, because of the serious consequences that attach to effectively detaining somebody at the conclusion of a custodial sentence; which, again, is an extraordinary regime from a human rights perspective that can be justified, but only if it meets those requirements of compelling reasons, proportionality, necessity, etcetera.

MR DONALDSON SC: Well, and it may be that any and all of these assessment tools that deal with violent extremism are adequate for particular purposes.

So - and they were developed actually for the purpose of dealing with behavioural issues of these sort of offenders while in jails, and it may be they're perfectly adequate for those - for that purpose.

They may be perfectly adequate - when I say "perfectly adequate", the shortcomings that exist in relation to them may be a price worth paying in relation to how prisoners are managed within a prison. Maybe even how they're managed in the community - that is, what are appropriate terms of an ESO and how those matters could be managed.

But it may be that having regard to the shortcomings of - well, the nascent nature of research in relation to this area, that they are not appropriate tools to be used for determining questions of detention, which, after all, are about as spark an affront to a person's human rights as one can imagine. But anyway, these are the things I'm pondering and grappling with.

MR EDGERTON: - on the question that Mark raised, which is given, you know, the new report that we're now aware of from Dr Corner, does that undermine the integrity of the regime? I think one thing that's important to bear in mind is the history of the introduction of this regime in the first place. So when the CDO regime was first introduced in 2016 there wasn't a tool.

So the regime was introduced first, with the expectation that a tool would follow that would allow the prediction of risk. We've now heard fairly damning evidence in relation to the accuracy of the tool, questionable, predictive validity. I think there has been an assumption baked into the regime that you can predict risk.

MR DONALDSON SC: Yes, that's exactly right. It's been assumed in the tool - in the regime that there is a tool.

MR EDGERTON: Yes.

MR DONALDSON SC: And, as you know and there's papers that have been written on this, the process that the Commonwealth went through in arriving at VERA-2R as the tool that was going to be used, it has been assumed that there is a tool and I think because of that assumption it's then being put into the legislation that the court must have regard to the assessment based on the tool.

MR EDGERTON: Yes, and I think that that was also highlighted in one of the Benbrika proceedings, it might have been the first instance proceeding.

MR DONALDSON SC: It was the first one.

MR EDGERTON: Where the suggestion from some of the experts.

MR MOONEY: Yes, Dr Davis.

MR EDGERTON: Yes, you can't predict risk.

MR DONALDSON SC: So the whole basis of Mr Benbrika's challenge to the assessment was that the tool was an inadequate tool.

MR EDGERTON: And the answer, I think, from the judge was, "Well, the legislation tells me that you can make this assessment of risk and so I can dismiss that argument that the risk assessment tool isn't good enough because the legislation tells me that I can form a view."

MR MOONEY: And he cited previous cases in New South Wales where the tool had been relied on. But of course, one is left to speculate what he may have made of Dr Davis's evidence if he had had the benefit of the Corner report.

MR EDGERTON: Absolutely.

MR DONALDSON SC: Thanks very much, as always, to the commission and to you, Lorraine and Graeme in particular for, I know you're ongoing work and interest in relation to these matters. So thanks very much for coming along today.

MR EDGERTON: Thank you.

SESSION 1: AUSTRALIAN FEDERAL POLICE

MR DONALDSON SC: Alright. So next we've got the AFP people. Just wander up.

MR DONALDSON SC: You're Sandra Booth.

MS BOOTH: I am Sandra Booth.

MR DONALDSON SC: Very nice of you to come along, thanks very much.

MS BOOTH: Thank you.

MR DONALDSON SC: And good to see you again, Ian, thanks very much for coming along again. Now, I've got a few questions for you today, because I'm very interested in how a few things practically operate that I don't understand. Did you have some opening observations that you wanted to make?

MR McCARTNEY: Very shortly, Mr Donaldson, and again thank you for the opportunity to appear at this hearing on your Review of Division 105A of the Criminal Code. As we've previously said, we strongly support the work you're

undertaking in the review of the Commonwealth post-sentence order provisions. When AFP appeared earlier this year with the Attorney-General's and Department of Home Affairs you raised a number of questions and observations with the collective agencies.

We are aware that both AGD and Home Affairs have responded in writing in relation to those queries focused on the policy aspects. AFP provided input and views on operational aspects to inform those responses. We're also aware both of the agencies are appearing later on today. The AFP is happy to provide further information in relation to operational experience with these provisions.

From our perspective, while it's still a relatively new framework, post-sentence orders serve as an important function in managing the compounding risk posed by high risk terrorist offenders to the Australian community. This is complex and this is resource-intensive work. To give you a sense of the scale of the current workload, I'll provide some updated statistics. As at 10 November the AFP is monitoring five individuals in the community with further interim control order application before the court.

MR DONALDSON SC: That's control orders and interim supervision orders?

MR McCARTNEY: That's correct. In addition, 20 of the 54 offenders currently serving terrorism sentences are scheduled for release within the next five years, and a further 26 alleged offenders are before the courts with many active terrorism investigations on foot. I'd like to reiterate our position that in the AFP's experience, some terrorist offenders do continue to hold extremist beliefs even after serving a sentence of imprisonment.

It is critical there are effective frameworks to monitor those individuals in the community, and your review will ensure the framework for post-sentence always remains fit for purpose. I also want to provide an assurance that in the AFP's experience potential use of these orders are considered in a proportionate way with careful consideration of risk. For those subject to orders, each individual is treated proportionate to the risk to the community.

Each of the conditions sought are reasonably necessary, appropriate and adapted to the risk posed by that individual. Finally, Mr Donaldson, I would like to briefly address a key issue raised in your opening statement to ensure you're aware of the AFP's position. On the interoperability between ESOs and control orders, we will refrain from providing a policy view, but note both frameworks remain critical to the work of AFP and our operational partner agencies.

I would like to assure you that in practice there is no overlap between the schemes. Where an individual is eligible for an ESO, an ESO will be considered. Control orders will only be sought where the individual is not eligible for an ESO. The

individual is otherwise eligible for an ESO but is either sentenced to a time served or released early, meaning they are technically not eligible at that point an ESO can be considered and, of course, unconvicted individuals who nevertheless pose a threat risk to the community. Happy to take your questions, Mr Donaldson.

MR DONALDSON SC: That's very interesting to know, Ian. So in relation to control orders - because I actually - you weren't here, but I cut out bits of the opening and I didn't actually mention that. But there is obviously an overlap between, in a sense, between ESOs and control orders because they serve - well, it seems to me they actually are intended to serve quite different purposes and what you've said this morning, I think, reinforces that.

So if a person who is in detention, they will not be considered - you don't have the thought process, "Let's let them out for a couple of months and then think about a control order then". Like, it could happen that somebody's released unconditionally, something happens in that, in a period of time and then an application is made for a control order. But for a person who is in detention, the only orders that you consider are CDOs or ESOs?

MR McCARTNEY: Correct.

MR DONALDSON SC: Okay. Alright. That's helpful. Now, could you help me with this, and again these are practical issues. So an application is made for a CDO and the various papers are prepared. Relevant experts are asked to express an opinion on the risk of an offender committing a serious Part 5.3 offence if they're released into the community and then one of the questions that also has to be addressed is whether an ESO is actually adequate to deal with the risk.

Now, it seems to me that too much is asked of a relevant expert here, because a relevant expert actually can express a view on the risk of an act or acts of violent extremism if they are released. How that translates into an offence under Part 5.3, they may have no idea about actually, because those provisions, as you know, are quite complex, some of them.

And so when these matters go before the court, the court sort of takes the view of the relevant expert as to the risk of violent extremism if released. And they are acts of violent extremism not that a person holds extremist beliefs but is that going to manifest itself in a particular way. Then I would have thought the AFP would provide evidence, and I know that Commissioner Lee -

MR McCARTNEY: You've promoted him. He would be happy with that.

MR DONALDSON SC: Yes, I'm not meaning to be impolite but I just can't remember his rank but, anyway, I know that he's given evidence in these matters before, which really goes to the question of, well, the risk assessment tells us that

here is a likely factual scenario. Were that to occur, that would constitute one or other of these offences. I think that's what happens currently, isn't it?

MR McCARTNEY: Yes, I think you've described it really well. But, Mr Donaldson, I might pass you to the subject matter expert who deals with this.

MR DONALDSON SC: Yes. I want people who know what they're talking about. So is that how it happens, Sandra?

MS BOOTH: It is, Mr Donaldson. So ultimately when the AFP does look at the material with regards to that risk that they're assessing lots of different pieces of risk. So it's not just the expert, it's also what other witnesses are giving in that environment as well. So it's a collection of material.

MR DONALDSON SC: I see. So you would look not only at the risk assessment report, but the whole of the evidence that is put up to determine whether having regard to all of that evidence or material, what the consequence of all of that would be for the commission of an offence?

MS BOOTH: Yes, that's correct, the expert advice, potentially information from Corrections and other witnesses that might be brought forward where that material is posed to us as the deponent, for us to consider. And during that period of time prior to their release, we also conduct a pre-release investigation. So we work with all our partners including the Attorney-General's Department and our state and territory partners, ASIO and others, Corrections, and at times we bring Health and other people into the room as well.

MR DONALDSON SC: And so in you forming those views, having regard to all of those interactions that you have, some of that may go into evidence at the hearing, but some of it may not necessarily go into evidence at the hearing because it may be background information, for instance?

MS BOOTH: That's correct. That's definitely correct.

MR DONALDSON SC: Okay. Well, that's what I thought happened, and you can see that in the decisions that I've read transcripts as well. Then the issue becomes, I think, more complicated because the task for the court as well, if there is an application for a CDO is effectively is an ESO adequate to deal with the risk, and that's a really tough question, I would have thought.

MR McCARTNEY: It is, but I think it goes to some of the evidence that Assistant Commissioner Lee gave in relation to the Benbrika case.

MR DONALDSON SC: It goes to what, sorry?

MR McCARTNEY: I think that's some of the evidence that Assistant Commissioner Lee gave in the Benbrika case.

MR DONALDSON SC: He did, that's right. So the AFP will also give evidence in relation to that issue, and is part of the evidence that is given in relation to those matters deal with resourcing issues? I assume it does.

MS BOOTH: Well, resourcing is not considered as part of the risk of the individual, and obviously in the evidence that we give is in relation to the risk.

MR DONALDSON SC: Yes.

MS BOOTH: So resourcing is an internal issue for us to work through as to how we'll manage that within the community, or if it's to be a CDO obviously there's not a requirement for us to have people on the street looking after that. But it's certainly not part of the equation as to whether we can manage it in the community or not.

MR DONALDSON SC: And so if an AFP officer was to give evidence that, well an ESO can't - CDO is the only way that this can be dealt with, well just going back one step because another thing that has intrigued me about these provisions is that's really the question, that is a CDO so detention is the only means that the risk can be dealt with. That's the question, really, isn't it? And the AFP will give evidence in relation to that and, effectively, you're saying there are no terms of an ESO that could adequately deal with that risk?

MR McCARTNEY: Not as a restrictive measure.

MS BOOTH: Not as a restrictive measure.

MR DONALDSON SC: But I'm just meaning in real terms.

MR McCARTNEY: That's correct.

MR DONALDSON SC: There is no way that that person can be in the community even with the most strenuous restrictions on their liberty that deal with that risk?

MR McCARTNEY: Correct.

MR DONALDSON SC: And are there - is there other evidence that's given in relation to that in these hearings, Sandra? So when the court comes to determine that, the court has to form its own view, of course, but there's evidence given by the AFP in relation to that. And the relevant expert, I think, also provides evidence in relation to that issue?

MS BOOTH: So the relevant expert does provide information or evidence in relation to that issue, and the AFP deponent will also provide their own evidence based on that material that we spoke about gets collected. In the circumstance where you're talking about Mr Lee's evidence, he made it quite clear as to his view on why that couldn't be managed within the community in relation to that -

MR DONALDSON SC: This is Benbrika you're talking about?

MS BOOTH: Yes.

MR DONALDSON SC: Alright. Thank you. That's very helpful to clarify that process. Now, can I ask you some questions about terms of, or how ESOs are likely to be managed, and I'm aware that it's pretty new ground for everybody. But it's quite likely that in the course of time there will be people who are subject - well, it may be that there are people who are subject to an ESO in, say, Victoria and another person subject to an ESO in another state. I take it you would accept that they have to be dealt with in an entirely consistent way?

MS BOOTH: Yes, Mr Donaldson, we have an architecture which places the candidate through a process in which we consider what their risks or vulnerabilities are. That's called a Rehabilitation Compliance and Enforcement Group, and then there is a Terrorist Offender Review Committee which sit underneath that architecture. Those same structures sit across the whole of the country.

So regardless of where a person comes out, they're considered through the same measures and in the same way with the evidence that's available to that group. So they'll sit down and have a consideration around what do we actually need to mitigate the risk in the community? Is there another way of doing it? Is there a less restrictive measure to the CDO? Is the ESO appropriate? And how do we make that ESO work to ensure that we get the operational requirements that we need, but also that the therapy and rehabilitation are there as well.

MR DONALDSON SC: So who is in the Northern Territory going to be responsible for the administration of an ESO?

MS BOOTH: So from the administration perspective, both the Attorney-General's Department and the AFP will come together with a state and territory police force and other agencies in that location and work together with them. The AFP will be responsible for enforcement of that order. However, the collective group that comes together will be replicated the same way as it would be in Victoria and New South Wales, but with Northern Territory partners.

MR DONALDSON SC: I see. So the AFP would be - and so the AFP would be the specified authority?

MS BOOTH: That's correct.

MR DONALDSON SC: Under the Act?

MS BOOTH: Yes.

MR DONALDSON SC: And so would you then - would there be AFP officers on the ground dealing with those issues?

MS BOOTH: So in our smaller states we obviously have AFP officers in all states and territories and all the capitals. So we work with our local law enforcement partners to make sure that we have enough resources, and we work together to make sure the risk is mitigated appropriately. But we will have people on the ground and we do have people on the ground to do that work.

MR DONALDSON SC: So it would be an actual AFP officer who would be the specified authority?

MS BOOTH: That's correct.

MR DONALDSON SC: One thing that is exercising my mind is whether, having regard to the differences that exist between the states, whether there would be some benefit in having an oversight or a review body in relation to the administration of ESOs. That is, the way in which they're practically administered in states could be the subject of oversight by a body. Do you think anything along those lines is necessary?

MS BOOTH: Mr Donaldson, it's very early in the process and the legislation, obviously you're aware, we've only got the two current ISOs with two candidates, one in Victoria and one in New South Wales. At this point in time I think that the current measures that are in place are appropriate and they consider the conditions and the issues quite well and they work with the state and territory partners quite well. It'd be my view that it's very early in the process to bring in more architecture over the top of what exists currently.

MR DONALDSON SC: Yes.

MS BOOTH: And, as you know, we work quite closely with our joint counter-terrorism teams who have a very defined structure that has been developed over several years. We've tried to emulate that as much as we can with mature relationships with our partners, and I feel that we're positioned quite well,

noting that we are very early and conscious that we may need to navigate a way forward as issues arise.

MR McCARTNEY: I mean, it could create some confusion if there's not clarity in terms of delineation or responsibility in terms of what the AFP role is, which has a role in relation to obviously (indistinct) enforcement. But also I think it's fair to say there's significant oversight that exists at the minute, including through yourself, Mr Donaldson, in terms of the work that we do in this space.

MR DONALDSON SC: Well, what is the significant oversight because I don't consider - I don't look at ESO conditions and how things are being administered on the ground and I know it's very early days with ESOs, I understand that well, but what oversight would there be?

MR McCARTNEY: Well, I think it's the courts have probably the most primary oversight in terms of the work we do in terms of the conditions or the applications we're aiming to achieve. I mean, over and above that there's obviously oversight in relation to the operation of the AFP through the Ombudsman and ACLEI and further other agencies.

MR DONALDSON SC: Yes. I'll give you an example, you would know in New South Wales have schemes for post-sentence orders in relation to, well under the HRO scheme in New South Wales and we've met with people there. They were very helpful in providing information. But their post - or their equivalent of ESOs are really administered in a way that is incredibly detailed as to what is permitted and not permitted and incredibly resource-intensive.

The courts are not going to have - and we've heard from people who say those schemes are set up or designed for failure and they are incredibly detailed and complex and it doesn't surprise me that people would not necessarily comply with every miniscule condition. That's not to be critical of anybody, but they are very detailed provisions.

The courts not really going to have any visibility on whether - on how ESOs are, in fact, being administered, certainly if they're going to be done on that level of detail. So the courts not going to have any visibility. I suppose the Ombudsman - I suppose the Ombudsman might. But the Victorian scheme - do you have any - do you have an understanding of how the Victorian post-sentence authority goes about its work?

MS BOOTH: Do you mean in the violent offending space?

MR DONALDSON SC: Yes.

MS BOOTH: The relatively new legislation that they passed or -

MR DONALDSON SC: Yes.

MS BOOTH: Yes, so I have not a great detail or a great knowledge of it, but I certainly have an awareness of it.

MR DONALDSON SC: Yes, so that's a, in simple terms it's a separate statutory body that actually is responsible for the administration of ESOs. So under Division 105A the equivalent of that body will be the AFP, because you'll be responsible for it. You may delegate some powers to state partners in relation to performing particular tasks.

So, again, and I know it's early days, if an ESO is being - so an ESO in the Northern Territory is being administered by Corrections or police in the Northern Territory, or they're assisting with it. So would an AFP officer in the Northern Territory be involved in effectively every decision that would be made in relation to that?

MS BOOTH: That's correct. So those RCEG and talk meetings that I spoke to you about are co-chaired by the AFP and the Attorney-General's Department. So in each decision that's made the AFP is present. If it's an operational decision as to a breach or a compliance issue with regards to any condition in that ESO, that's a decision for the AFP. The AFP will make decisions with regards to any activity that they need to take whether it's a warning or whether it's an arrest for a breach, in consideration of who the partners are relevant to that decision.

For example, if it were a therapeutic issue or a rehabilitative issue, the AFP would consult thoroughly with the agency that's providing those services to ensure that it was appropriate and it wasn't leading towards risk. So if we see a risk escalation, that's a decision that we may make independently.

MR DONALDSON SC: Yes.

MS BOOTH: But if it's a breach or a technical issue, as were you suggesting before, we do that through consultation, and obviously we work a lot with the candidates to build rapport and make sure they actually understand their conditions.

MR DONALDSON SC: So this ESO architecture that you've got in place, is that in the applications that are going to be made for ESOs, is that put before the court and the courts advised of the existence of that particular architecture?

MS BOOTH: As in the meeting structures that sit behind any operational decisions?

MR DONALDSON SC: Well, what you described today as to, you know, the various bodies that are involved in compiling plans and the means of administration of these things in particular jurisdictions.

MS BOOTH: Not to my knowledge in the two matters that are currently before the court. I am the deponent in the Mr Pender matter.

MR DONALDSON SC: Right.

MS BOOTH: And in the Hadashah Sa'adat Khan matter, I am - I don't believe it was - it was raised.

MR DONALDSON SC: But I assume - is any of that reflected in the terms of the ESO, proposed terms of the ESOs themselves? Sorry. We've got them here. Yes. But you can tell me, you are the deponent in Pender. So the architectural issues, are they actually incorporated in any way into the actual terms of the ESO itself?

MS BOOTH: No, they're not because the decision is around the specified authority.

MR DONALDSON SC: Yes.

MS BOOTH: Which is the AFP officer or it says the AFP Superintendent, so that anyone moving through that role can have that decision-making ability.

MR DONALDSON SC: Yes, okay.

MS BOOTH: Yes. Noting that those two forums are the higher end and obviously there are working level forums every day. So partners meet every day to discuss candidates and what needs to happen.

MR DONALDSON SC: Well, yes, but that's - as I'd understood it these are people who might be in the pipeline, for instance, but -

MS BOOTH: In the pre-release space. Yes.

MR DONALDSON SC: Yes, alright. Okay. So - yes, it is pretty early days in relation to ESOs at the moment, isn't it? But I think there's one application that was dealt with a couple of weeks ago, simply for an ESO, wasn't it? It was not a CDO.

MS BOOTH: So you've had an extended supervision order for Blake Pender which was an ISO and you also have one for Hadashah Sa'adat Khan recently as well in Victoria. So two in different states.

MR DONALDSON SC: And I think Khan was heard a couple of weeks ago, wasn't it?

MS BOOTH: That's correct, yes.

MR DONALDSON SC: And the ISO was made but there's an ESO application -

MS BOOTH: That's correct.

MR DONALDSON SC: - on foot, isn't there?

MS BOOTH: Yes.

MR MOONEY: Just following up on the experience to date, I know, as Grant has said it's very early days, but in terms of the architecture, so you're obviously - within New South Wales and Victoria, you're dealing with different agencies. So could you just explain a little bit about those differences between the Khan ESO and the Pender ISO in terms of, are there third parties involved in some of the conditions or are you dealing with State and Territory officials?

MS BOOTH: Certainly. So the big difference is the provision of the rehabilitation and therapeutic services.

MR MOONEY: Yes.

MS BOOTH: So in Victoria that service is provided by the Attorney-General's Department.

MR MOONEY: Sorry, in Victoria by the -

MS BOOTH: Attorney-General's.

MR MOONEY: - Attorney-General's Department.

MS BOOTH: That's right.

MR MOONEY: And they've got arrangements with - so who's actually delivering those services?

MS BOOTH: So probably best I allow them to answer that question, noting the arrangements that they may have, I don't have all the details of.

MR MOONEY: Yes.

MS BOOTH: However, they are responsible for providing that service within the state of Victoria.

MR MOONEY: Right.

MS BOOTH: In New South Wales we work with Community Corrections and obviously still with the Attorney-General's Department but the service provider there is Community Corrections.

MR MOONEY: Is Community Corrections. So in Victoria it's a third party, it sounds like a third party provider, but all of all of us -

MS BOOTH: Or an employee of. But I'll leave it to the Attorney-General's Department.

MR MOONEY: Yes, to the Attorney-General's Department. And so far, again I suppose it's too early to say, but have you had a chance yet to pick up any differences in the way that's playing out practically, having those different arrangements in place?

MS BOOTH: It is too early to answer that. Noting we have one person in the community and one person who is now not in the community.

MR MOONEY: Yes.

MS BOOTH: So that it is very, very difficult to answer that question.

MR MOONEY: Yes. But it's fair enough to say that just in relation to New South Wales and Victoria there are different players involved in managing those conditions on the ground?

MS BOOTH: There are different players in managing those conditions on the ground. However, the same agencies are represented in that architecture.

MR MOONEY: Yes, in terms of the structure.

MS BOOTH: Yes.

MR MOONEY: But on the ground the arrangements are different?

MS BOOTH: Slightly different, yes.

MR MOONEY: Yes, and it's yet to be seen how that plays out?

MS BOOTH: Yes.

MR MOONEY: Yes.

MS BOOTH: And the reason why that -

MR DONALDSON SC: And so what are the differences?

MS BOOTH: So in Victoria the therapeutic and rehabilitative services are provided by the Attorney-General's Department.

MR DONALDSON SC: So there's that difference.

MS BOOTH: That's the difference.

MR DONALDSON SC: But I mean is there a practical difference in the way things are done?

MS BOOTH: No. I mean there's case managers in each state and those case managers look after the individuals and they come back through our architecture to be informed. So there is no practical difference other than it's undertaken by the state in New South Wales, and it's not undertaken by the state in Victoria.

MR DONALDSON SC: So who determines the plan that's put in place for rehabilitation, for instance?

MS BOOTH: The case manager in each state. It's just the case manager in New South Wales is with Community Corrections, and the case manager in Victoria is with the Attorney-General's Department.

MR DONALDSON SC: So let's say, and if you don't have experience in this just say so, but with a dangerous sexual offender, say, is the plan for rehabilitation ordinarily, you know, in effect, delegated to the case worker? As I understood you were describing that with a -

MS BOOTH: So I can't answer that question. What I can say is in this circumstance the case manager liaises with, and works with, other state services to provide whatever is required for that candidate. But I'm very conscious that I am not a case manager, and that role is provided by the Attorney-General's Department not by the AFP. So I may leave that question for them, if I can.

MR DONALDSON SC: Yes, and would there be any concern that the level of expertise required both with case managers and actual rehabilitative services exist in all of the states and territories?

MS BOOTH: The only two states that we've had to do it in so far are in New South Wales and Victoria, and my understanding is that all those services are available, just being done slightly differently by the case manager in each state. And I only mean that "slightly differently" as in its provided by Community Corrections and the Attorney-General's Department.

MR DONALDSON SC: Yes. So you don't yet have an understanding of whether, say, that could be done in South Australia?

MS BOOTH: I believe it could be. And our engagement with our state partners show that those services are available in every state but because rehabilitation and therapy does not sit with the AFP, it sits with the Attorney-General's, they're not conversations that I dive into. I leave that with the Attorney-General's to advise.

MR DONALDSON SC: So has this particular function that you're referring to there, has that recently gone to the Attorney-General's Department in the rearrangement?

MS BOOTH: That's correct. It was with the Department of Home Affairs previously. Post-MoG it's the Attorney-General's Department.

MR DONALDSON SC: I see, so with the rearrangement of all of these matters that's now gone to the Attorney-General's?

MS BOOTH: That's correct.

MR DONALDSON SC: I understand. Well, it is pretty early days on ESOs, it seems, which has posed an issue for me in this report because I look at how things practically operate and the ESOs just really haven't practically operated much yet.

MS BOOTH: That's correct.

MR DONALDSON SC: And so could you just help me here. Those numbers you gave earlier, and I know there's a process to be gone through, I think you said 20 of 54 people who are currently in detention are coming out within the next five years.

MR McCARTNEY: That's correct.

MR DONALDSON SC: I actually thought it was more - thought it was more recent; that it was something like 19 or 20 coming out within the next two years, but it's five years.

MR McCARTNEY: Yes.

MR DONALDSON SC: And if there's going to be somebody having a look at how ESOs are operating, are you able to hazard a guess as to what would be a good time for that? Look, I would assume of that 20 a number will likely be applications for ESOs.

MR McCARTNEY: I think it's fair to say that it's under assessment. I might just pass to Sandra again.

MR DONALDSON SC: I'm not tying you to anything.

MR McCARTNEY: No, no.

MR DONALDSON SC: And if you can't say for particular reasons, don't say. But it would seem to me that it would be a good idea for somebody at some stage to have a look at how ESOs are practically operating, and they're not really practically operating at the moment. I'm just trying to get an understanding of whether there would be a logical time for that to occur?

MS BOOTH: It's difficult to hazard a guess on that, Mr Donaldson, but I would suggest probably the 24 to 36 month mark where you actually see some of these people come out into the community and the conditions are explored more.

MR MOONEY: And the differences between -

MS BOOTH: The differences between candidates. And of the 20 of the 54, the comment that you made there, obviously that number can increase as well, depending on short sentences and pleas, et cetera.

MR DONALDSON SC: Yes.

MS BOOTH: So the number for us is quite fluid and moves regularly.

MR DONALDSON SC: Well, equally there may be some people who are not subject to any post-sentence order; others who may be conduct to CDOs. We just don't - just don't really know at this stage.

MS BOOTH: That's correct and that's why I think that 24 to 36 months would be appropriate because of those candidates there will be some who potentially don't get an ESO or a post-sentence order.

MR DONALDSON SC: Yes. That's very handy to know. I'm very grateful for your advice on that because you're the best people to have that, that particular understanding. Alright. Well, that was quicker than I thought. You hit the nail right on the head.

As I think I said to you on the last occasion, I think Mr Lee was here as well, I'm just very interested to know how things actually operate. I've had access to, and read, the transcripts of all of the matters, so I have an idea of how it works.

I am a little intrigued, I must say, though, by evidence that is given along the lines that CDOs are the only way that you can deal with this person. I know that's predictions and it's not - it's not a perfect world. But that must be - that must be quite tough evidence to give, having regard to all of the circumstances and factors that have to be taken into account, but undoubtedly, given with the best of intentions. Alright. Is there anything else that you wanted to ask? I'm sorry to have taken, not taken up the whole of your time but that's good for everybody if we can move through quicker.

MR McCARTNEY: Thanks very much.

MR DONALDSON SC: Is there anything else you wanted to add?

MS BOOTH: No.

MR DONALDSON SC: Okay. Thank you very much for your time. Its morning tea time. Alright, so then if we come back a little bit before 11.15. Thank you.

THE HEARING ADJOURNED AT 10:49 A.M

THE HEARING RESUMED AT 11:16 A.M

SESSION 2: LAW COUNCIL OF AUSTRALIA

MR DONALDSON SC: Right to go. Thank you. Also, this is the resumed hearing. I'm very grateful, as always, to have the assistance of the Law Council of Australia for the purpose of this review, and I have hogged the time of the Law Council a bit because representatives of the council appeared at the last hearing and were very helpful, and I'm grateful again that the Law Council has made very senior people available to assist with this part of the review as well. And, again, I think I say this in every review but I'm very grateful to the effort that the Law Council puts into all of the written material that I receive as well. It's always very, very helpful. So representing the Law Council, we have Lloyd Babb SC, David Neal SC and Nathan MacDonald. Was anybody wanting to say something by way of introduction before we get into asking a few questions?

MR BABB SC: Yes, thank you. I've got a brief opening statement. On behalf of the Law Council of Australia we extend our gratitude for the opportunity to appear at this public hearing of your Statutory Review of Division 105A of the Criminal

Code which authorise the making of both continuing detention orders and extended supervision orders.

As you know, the Law Council has made extensive submissions on post-sentence - the post-sentence regime for high risk terrorist offenders since its introduction. Our primary position remains that continuing detention orders are not a necessary or proportionate response to the threat of terrorism and shouldn't be renewed beyond their current sunset date of December 2026.

The focus of the Law Council's appearance today is to respond to the supplementary submissions of the Attorney-General's Department and the Department of Home Affairs relating to the compatibility of Division 105A within international human rights law, the eligibility criteria and the procedure for determining conditions, access to justice and legal assistance, and the admissibility and appropriateness of relevant expert evidence.

The Law Council concurred with the reasoning of the United Nations Human Rights Committee including in its communications in relation to Fardon and Tillman. In those cases, the Human Rights Committee concluded that both the Queensland and New South Wales post-sentence detention regimes for dangerous sexual offenders breached the prohibition on arbitrary detention.

There are two aspects of the government's justification that require further scrutiny in this regard. Firstly, the Law Council considers that the continuing detention order scheme fails to meet the requirement that post-sentence detention only be used as a last resort. The Law Council considers that further amendments are required to ensure, in the courts consideration of whether an ESO will be an alternative to imposing a continuing detention order, whether the conditions of ESOs and the conditions of control orders can be tailored to meet the specific risks posed by the offender. The Law Council does not support any statutory fetter on the ability of the issuing court to take into consideration measures that it identifies as being less restrictive than a continuing detention order.

Secondly, the Law Council is not satisfied by the justification provided by the Department of Home Affairs that the requirement for conditions in post-sentence detention will, in practice, be distinct from the conditions for convicted prisoners serving a punitive sentence. The Law Council considers that the power of the Minister to make arrangements for the accommodation of offender's subject to a CDO should be subject to explicit human rights based pre-conditions. To enable effective scrutiny of those conditions, a strengthened statutory framework for public reporting is required, as well as - as was recommended by the Parliamentary Joint Committee on Intelligence and Security in October 2021.

The longstanding position of the Law Council has been that amendment is required to the offences specified in paragraph 105A subsection (3)(1)(a) that

allow for a convicted person to be the subject of a continuing detention order. These offences should be defined by reference to the actual sentence imposed on the person, not merely by a broad category of offence and their applicable maximum penalties.

The Law Council supports this consideration being structured by mandatory statutory considerations that the court must assess in determining the person's risk of committing a serious terrorism offence if released into the community, including, for example, the nature of the offending, the fault elements of the offence, and the views of any parole authority concerning the release of the offender on parole. The Law Council reiterates its concern that there is a lack of an established body of specialised knowledge on which to base predictions about a person's future risk of committing a terrorism offence.

In this regard, the Law Council is concerned that the VERA-2R Risk Assessment Tool has not been subject to sufficient independent peer review required to instil confidence in its theoretical and empirical foundation. Additionally, the Law Council has previously recommended the accreditation for training practitioners in VERA-2R be conducted independently and at arm's length from the Department of Home Affairs.

In relation to the admissibility of evidence from relevant experts in the assessment of an offender's risk of committing a serious offence, the Law Council considers that the court should not be subject to an express statutory obligation to consider a report of a relevant expert as part of its assessment of the offender's future risk. Instead, the admission and treatment of such a report in CDO and ESO proceedings should be left to the general discretion of the court to admit relevant evidence and determine its weight.

Finally, on the issue of legal assistance, the Law Council notes the Attorney-General's Department is still considering the implementation of the PJCIS's October 2021 recommendations in this regard. The Law Council supports the establishment of a dedicated Commonwealth legal assistance funding program for the provision of legal assistance to persons responding to applications for preventative orders, including Division 105A orders, as well as control orders, and that it should include seeking variations or revocation of existing orders. Thank you again for the opportunity to appear. We are happy to answer your questions.

MR DONALDSON SC: Certainly. Thanks very much, Lloyd. Did you have anything you wanted to say, David?

MR NEAL SC: No, no, that's a joint opening statement.

MR DONALDSON SC: Alright. Thanks very much. So perhaps if I could start with last first -

MR BABB SC: Yes.

MR DONALDSON SC: - and the legal assistance because I've heard - I've heard a number of reports of complexities in the system dealing with legal aid. And, again, part of this is the beauty of Federation, really. But I would imagine in all states there are going to be delays in dealing with applications for legal aid through legal aid bodies, and I know in relation to Mr Benbrika that was certainly - that was certainly the case.

I think the first port of call was the Legal Aid Commission, or whatever it's called in Victoria, who then went through the processes of the Commission to then make an offer of, or a grant of aid that was nowhere near sufficient to deal with a matter of this complexity. And I think it's the case that, at least for the foreseeable future, these are always going to be complex matters and, in particular, in relation to expert evidence that's going to be dealt with at these matters - with these matters. And people can't be put in the position, it seems to me, of not knowing whether they're going to be adequately resourced until far too late in the piece, you know, essentially for the order to end before, before the matter gets dealt with.

MR BABB SC: Yes.

MR DONALDSON SC: And I think it's one of those - and some of the people here are old enough of course to remember the dramatic changes in the legal aid system in the or when Daryl Williams was the Attorney-General where the Commonwealth's contribution to legal aid was reduced significantly. And I think with matters of this complexity, I think it's very fair to suggest that the Commonwealth's going to have to step up and deal with these matters, and partly because, as I said, I think the system fails when these matters are dealt with by the court after the expiration of a sentence. On any view of it, that's the system, the system not working. So I take that - I take that very much on board.

MR NEAL SC: Could I add, I'm also the co-chair of the Access to Justice Committee of the Law Council and these issues in relation to control orders have been around for some time. I was counsel in Causevic which involved massive amounts of surveillance documentation and the like, and the arrangements for legal aid were very difficult, wholly inadequate, and given the scale and the quantity of those things, it was altogether unreasonable to burden already strictured state legal aid budgets with expenses of this sort.

And you may already be aware but the issue has come up, to some extent, in the analogous sphere of the fund that the Attorney-General's Department administers in relation to expensive criminal cases. That was reviewed two years ago by Robert Cornall and there's a report that's only just been released on a Freedom of Information basis, about that fund and about the need to top it up in relation to

expensive criminal cases, and it may well be a suggestion here that the - in relation to these post-detention orders and control orders, that somehow or other that could be worked into that fund and that the scheme should be administered through that body.

MR DONALDSON SC: I'd understood, David - sorry, I understood, David, in relation to that fund that it's still administered through the state legal aid bodies. Is that right, or is it administered independently?

MR NEAL SC: My last information about it was when Robert Cornall was speaking to us about the way it was funded and, as I understood, and certainly at the time of Causevic it was administered through the Attorney-General's Department directly. So I am just not familiar enough with that what current state of play is, but both the funding of and then the guidelines that will govern the distribution of the funds, but the great problem with that fund was they had an allocated budget of about $20 million but that if there were some very large criminal cases, Commonwealth cases, going at the same time, it didn't take long to eat through that. And I understand one of the recommendations emerging from Robert Cornall's report is that the amount of funding be now adjusted to be - provide a more capacious regime.

Obviously, though, if these cases are now going to be included in that scheme that would have other funding implications as well, given as you say, the expensive nature of the - the case that I did, the control order case but also Benbrika obviously.

MR DONALDSON SC: Well, the other thing with these sorts of schemes is there have been to be mechanisms for decisions to be made promptly in these matters as well, and that is not only that aid is going to be granted but the basis upon which it's going to be granted, so that people know the amount of resourcing that they're going to be able to - or the resources that they're going to be able to have, and that it be adequate.

So there's a timing issue and a quantum issue involved in all of those. But it's certainly a matter that I'm very alive to. I've heard a lot - I've heard a lot about it from a number of people, and the processes that currently exist for dealing with it are complex. So I'm likely to be recommending that there be change to that. But it's a matter that I will be dealing with, with the Attorney-General's Department later on today to see what appetite there is for that.

MR MACDONALD: Can I just add on the quantum budget has a line item for that particular fund under the Attorney-General's portfolio, and we're conscious at the Law Council that that particular quantum is going down as at the '23-'24 financial year.

MR DONALDSON SC: This is in relation to 105A.

MR MACDONALD: This is the Expensive Commonwealth Criminal Case Fund, so it might be worth raising with the Attorney-General's Department this afternoon.

MR DONALDSON SC: Sorry, the line item in relation to the criminal fund?

MR MACDONALD: Yes, the quantum.

MR DONALDSON SC: Yes. Well, I must say, for a number of reasons, I wouldn't want funding for these matters to actually be viewed as part of that process. That was my initial inclination when - because I've thought about these issues before. And I say that for two reasons: one, these are not criminal matters and they are quite clearly not criminal matters; and, secondly, I think there's enough strain on that particular budget without piling these matters on it. And I think that in some respects, there are going to be complexities in these matters at least until the risk assessment process either matures significantly or changes are made to it.

And I think it gets back to another point that you made - that you mentioned, Lloyd, in your introduction, and that is concerns that may exist about the risk assessment processes under the Act at the present time. And I think one way of dealing with those is - one way only, but is to require that they be admissible, these opinions. And if they're admissible in accordance with the current laws as they exist, well, then they're admissible.

But that would mean - that would have to mean that the defendant as well has access to relevant expert evidence and maybe relevant expert evidence that challenges the basis of the Minister's assessment, which at least for a few cases are going to be complex, I would have thought.

MR BABB SC: I think that's quite right. I agree that this - that it's far better that there not be interim orders. And when one looks at the scheme and the fact that an application can only be brought close to the end of --

MR DONALDSON SC: Yes.

MR BABB SC: -- your sentence period, the need for immediate access to legal funding is clear. That time limitation is very significant in that regard.

MR DONALDSON SC: Whereas it may not be necessarily in a criminal prosecution.

MR BABB SC: In a criminal case, you can delay the criminal case pending the grant of aid. But, here, it's going to necessarily mean any delays are going to mean that an interim order's required. And when we're looking at the cohort of people who might be the subject to these orders, anything that can be done to make it seem procedurally fair and to offer them the right sort of legal assistance at the earliest possible time is significant. And I'd also endorse your view that, at least in the short-term, these cases are going to be hotly contested on the question of risk assessment. And that, I think, will be a time-consuming process for those advocates who are trying to make sense of the material.

MR DONALDSON SC: It's interesting you say that, because one thing that's intrigued me a bit is it may or may not be because these matters have been before the courts in New South Wales under the HRO scheme for some years now. And they have a similar provision requiring the court to have regard to reports. But I must say I have been a little surprised that there's been less agitation about the admissibility, if you like, of some of this material.

It's interesting, I'm from Western Australia and when the Dangerous Sexual Offenders legislation was introduced in Western Australia, there were two very famous decisions early on: one by Justice Hasluck and another by Justice McKechnie, both very fine judges and very experienced, and the effect of both of their Honours' judgments was, "The risk assessments that have been put up here are wholly unconvincing and even though I'm required to have regard to" - and explained why - "and even though I'm required to have regard to them for the purposes of this, I have regard to them and dismiss them" and then ordered the release of the two individuals concerned.

But, of course, their honours - they were hotly contested issues as to the utility of the particular tools that were being used in those matters because they were effectively test cases funded by the Aboriginal Legal Service. But there just doesn't seem to have been anything equivalent here with these sorts of risk assessment tools that are used with extremist violence, and I must say it concerns me a bit. Even if - and as I mentioned before, there's a report that we've had access to by a Dr Corner that has recently come to our attention but there's a fair bit of material that is about in relation to these tools. So I would expect that there's going to be another case in relation to risk assessment processes here fairly soon.

MR BABB SC: I think so. I'm interested in - I can see the commercial reasoning for not disclosing all the methodology behind the assessment tool but I'm not sure about the gaming of the tool.

MR DONALDSON SC: I think I said earlier that that's what's stated.

MR BABB SC: What's stated. I know that from having done high risk sex offender applications that the Static 99 tool is just that: It's static, and it's unable to

be gamed because it really is only taking into account past objective behaviour and coming to an objective measure. It really doesn't take into account the individual's attitudes and changes in those attitudes.

MR DONALDSON SC: I think - the response, I think, to that would be that there are differences between an actuarial tool which a lot of the sexual offender tools are, so-called actuarial tools, and tools like VERA-2R which go more to assist a professional judgment rather than application of an actuarial tool. But, you know, certainly in dangerous sexual offender cases, before they got to the stage of having validly, or accepted valid actuarial tools, there were a number of cases, certainly in Western Australia, where these things were just thrown out.

I don't really know why that hasn't happened in New South Wales. Part of it, I think, is likely that these are matters to which the court must have regard, and I think the other explanation is there really is, or has been, a dearth of research in relation to some of these tools. And so they are difficult to challenge other than on the grounds of saying, well, there's not enough research that's been done.

MR NEAL SC: Certainly when we did the original submission on this, we consulted with people who are experts in the field, in this field, about various predictive tools that are around, and the very strong point made to us was that unlike the sexual offenders case, it's the lack of, really, empirical information about large numbers of cases which does exist in that field and gives it some degree of an empirical base; whereas the very small numbers involved in these sorts of cases makes that empirical base, you know, the more difficult to discern.

And I noted then the - in the material that you have in your opening for this hearing, that the very low percentages of people who actually are reoffending and the question that occurred to me was: well, how good would those tools have to have been to predict the two per cent who reoffended in one or other of those jurisdictions. It's a very big ask.

MR DONALDSON SC: I think that's right, and part of the reason why I noted in my opening statement the research, which I understand to be accepted, I think - until very recently I think that there were quite considerable issues as to the reliability of some of these numbers. But I think as a result of the study that's been done in Europe, that Dr Hodwitz's paper refers to, my understanding is that those numbers are now generally accepted as authoritative. But I think it would come as a surprise to many people, those recidivism rates for terrorist offenders. If you look at the general criminal population, these would have to be one of the lowest - you would know, Lloyd - but would have to be one of, if not the lowest, rates of recidivism for any category of offender.

MR BABB SC: The lowest that I've seen, and a dream in relation to other types of offending.

MR DONALDSON SC: Yes, and it's not only low, you're actually talking about a very small number. And so it's, you know, statistically, it's even more significant, it seems to me. The rates of violent extremism offending are minute, just from the numbers that were given to us by the AFP earlier. So there are 54 people serving sentences for offences against Part 5.3 of the Code which came in, in 2001. 54, that would be lower, I would imagine - or what the murder rate be in New South Wales? It would probably be --

MR BABB SC: 80 a year.

MR DONALDSON SC: 80 a year. Well, that puts it in perspective, or not puts it in perspective but that's an aspect of perspective, I would have thought, as to the numbers that we're talking about.

MR BABB SC: Yes.

MR DONALDSON SC: It's not to say, of course, in something else that I noted in the opening that any risk of reoffending is too big a risk, but it's a matter of how - how the community best responds to that risk, I think.

Could I ask you something, because it's a matter that intrigues me very much as well, that you referred to in your opening remarks, Lloyd, about the Part 5.3 offences themselves, because the way the division works at the moment, of course is that it is the risk of the commission of a serious Part 5.3 offence is the focus of it. But those offences are - over a certain maximum term - those sentences are of a widely disparate nature, those terrorism offences.

MR BABB SC: Yes.

MR DONALDSON SC: And, again, as I'm sure you would know, if you look at the category or the types of offending in relation to these offences over time, there seem to me to be two large cohorts. One of them is people who went to prescribed areas, basically went to Syria at a time when that was a prescribed area, and that's a particular offence under the Act. But the other group, observable group, it seems to me, are those convicted of the so-called precursor offence, and that's 100.6, and they're very unusual offences.

I'm not saying they're not serious offences but they're unusual offences where there is no - there's no attempt, there's no conspiracy, there's actually no positive act toward a determined terrorist act occurring. So if you think about - and so what you have to do is have a view of committing a terrorist act and then take, in effect, any step pursuant to a plan, and that step can be a relatively minor step, and for that you can get 15, or you can - people have got 15 years and more.

I just really do wonder how those determining whether there is a threat of somebody committing a precursor offence actually go through the process of working that out. I'm not saying it's impossible to do but I'm not sure - I'm just not sure that people who are engaged in the risk assessment process understand the breadth of some of these offences. But then, again, it goes through to the AFP certainly are and AFP officers give evidence in relation to these matters. But is the scope of the Part 5.3 offences, I had understood you to say is generally a concern for the Law Council?

MR BABB SC: It is. We feel that some of those preparatory offences, for want of a better word because they're not typically preparatory, perhaps are too broad. And that you could look at targeting particular offences that may be seen as - as being of the greatest risk. And then also we would support a requirement that the finding of the sentencing judge, which is going to reflect the objective criminality, be a basis upon which the availability of 105A is triggered.

MR DONALDSON SC: Well, it's interesting you say that because I was looking for - I've a fairly well advanced draft of my report in this - but there's an observation of Justice Bongiorno in one of the Victorian case, of course a judge of great experience in these matters, and it goes something along the lines, the most discernible characteristic of these sorts of offences is complete incompetence. These people bumbling into, you know, because they've got thoughts of doing something for an ideologically or religiously motivated purpose, but, beyond that, with some of these matters there's not very much at all really. And, of course, holding a radical ideology is not a criminal offence. It's the consequence of those things that is the issue.

So, yes, it's interesting. You may recall that the first person to hold this role, Bret Walker, he suggested that there was no need for control orders because the offences were so broad under the legislation, particularly the precursor offences, that anybody who was of any concern would be prosecuted, and so control orders were totally unnecessary. So that was a view as to the scope of these offences at that stage.

So that, you must say - sorry, David I'll just finish. So the issue in relation to these offences is really beyond the scope of this - of this review, but they are very broadly expressed offences under 5.3. Sorry, David, I cut across you then.

MR NEAL SC: Just in this context, in one of our earlier submissions on this issue, the suggestion was that another control, if you like, on the operation of these orders was to scale it off the actual sentence imposed. And so that someone who was not subject - who was subject to a sentence of seven or more, perhaps, would be the one that might fall into that category. That's another suggestion that struck me as germane to this.

MR DONALDSON SC: Yes. I've looked at that fairly careful - or very carefully, I must say because I had the same idea, and what I must confess I found quite difficult was when you look at every sentence that's been posed, and the sentencing remarks in each of the relevant offences, which I've done, it is pretty difficult to draw a line, I've got to say. And those sorts of things will always be arbitrary but no more arbitrary than saying it's an offence that carries a maximum term of particular amount.

MR NEAL SC: That's the real rub. It's not as if the existing scheme is not arbitrary by just being over-inclusive.

MR DONALDSON SC: Yes, quite so. But it's very tough to come up with a number, I must say, having regard to the practice that we've had. But as I think you say, there's arbitrary limits in all parts of this scheme. So it's certainly a matter that I'm looking at.

MR NEAL SC: Given what a serious departure this is from normal sentencing principles, and having in mind questions of proportionality, some better limitation than what the maximum sentence is surely should be done.

MR DONALDSON SC: Yes. Another matter that occurred to me is whether there might be different limits for applications for CDOs or ESOs. Perhaps, but I don't know. I think the prior question in all of that is whether CDOs are themselves a proportionate and necessary response to matters, and if they're not, then the ESO scheme would more or less stand alone. And I think in relation to the ESO scheme, a lot of concerns that have been expressed, such as the Gateway Inn and also the matter to which you have regard looking at whether they're going to go out or how they're going to go out, I think that some of those concerns would fall away if CDOs were abolished, actually.

I must say I've not heard any - I've not heard any, or received any submissions that are, in principle, opposed to ESOs. I don't think anybody is suggesting that ESOs, as a matter of principle, are disproportionate or unnecessary, and I know that's the Law Council's view as well.

MR BABB SC: Yes, that certainly is our view.

MR DONALDSON SC: Could I ask you something about the 105A subsection (4) which is the incarceration provision. And so the principles - well, there's a couple of assumptions in that. One is that a person can be detained in custody, effectively in a jail, and that that detention can be consistent with their status as a non-prisoner, which, you know, is an assumption you have to make because that's what the legislation says. So a person can be detained in custody in a prison but only in circumstances that is consistent with their status as a non-prisoner.

And then subsection (2) says if a person is detained in custody in a prison it must be in a facility separate from the general prison population. And there are various carve-outs or provisos to that, some of which I know the Attorney-General's Department now accept are too broadly expressed. Some of the issues with that, though, seem to me to be quite obvious in that Victoria, for instance, has a facility that is intended to comply or respond to that because the Victorian legislation has the same provision in it for their dangerous sexual and violent offenders, and so Mr Benbrika is in that, in that unit.

But the obligation under the section, as I understand it, is an obligation that's not reviewable, for instance, by the court. The court simply makes the order and the aspiration that the conditions there be consistent with the status of the person as a non-prisoner is a statutory obligation. I'm not sure who it's imposed on, but it is at a practical level, it seems to me, not reviewable other than by some sort of administrative action or judicial review. And you think it would be difficult to get legal aid to do one of these matters; I would have thought it would be pretty much impossible to get legal aid to seek a review of that.

So that, I think, is a concern, not only in relation to the physical circumstances in which people are kept - I've seen Mr Benbrika's arrangement. What concerns me more, really, is the conditions; that is, what access does a person have to visitors, what access do they have to reading materials or recreational activities? And those matters are really beyond any sort of review at the moment. It seems to me like a person's put into a facility which the court has no real visibility over, although I know that in some of these cases there are affidavit evidence put before the court as to what the facility is. But it's not a matter that the court - the court can't say, "I'm not satisfied that you don't have a facility, therefore I'm not going to order a CDO." I don't think the court can do that.

Then one has the issue of different circumstances in different states. As I said, Victoria actually has this facility. You would note, David, I don't think there's a facility in New South Wales that is - are dangerous sexual offenders in New South Wales kept in a separate facility from the general prison population? They're certainly not in Western Australia and don't think anywhere else, actually. I think it's only really in Victoria.

And so if you have a person subject to a CDO in Western Australia, say, who has to be kept separate from the criminal population, I'm not, I have no idea what they would do. They'd have to try and do something, I suppose. But it just seems to me that there needs to be some process of review of that to ensure that the aspiration in subsection (4) is being met, and even if the body can't assure that it's being met, the body can report on it, I would have thought. Do you have anything to say about something along those lines?

MR BABB SC: Yes. We, at the Law Council, very much agree that there are two issues. Firstly, subsection (4) really doesn't resonate in any guarantee, and it could be that it could be made to resonate, and there be a number of different ways that that could be done.

MR DONALDSON SC: What are your thoughts there?

MR BABB SC: Well, you know, one of the best ways to achieve that would be that it's a condition of making an order.

MR DONALDSON SC: Yes.

MR BABB SC: So that would be the most likely way to get action.

MR DONALDSON SC: That is, the court has to be satisfied that conditions exist that conform with subsection (4)?

MR BABB SC: Yes.

MR DONALDSON SC: And then the difficulty with that, sorry - that would be fine for subsection (2), that is that there's a separate facility.

MR BABB SC: Yes.

MR DONALDSON SC: But what concerns me even more about that is really - is the other conditions, not the physical structure, as such. It's the other conditions which couldn't really be incorporated in an order. I don't think the physical conditions could be, Lloyd.

MR BABB SC: Yes.

MR DONALDSON SC: But other conditions might not be. But that's not to say there's no other way of dealing with that second issue.

MR BABB SC: No. No, and there should be. It's an extraordinary measure and one that should take into account the human rights of the person who's subject to the order.

MR MOONEY: Because one of the issues that we found is that cutting across all this, if a court makes a decision that somebody is at unacceptable risk of committing a serious terrorism offence, then immediately within the prison system they are given the highest security classification. So even though they may, as Grant said, be housed somewhere separately, their conditions don't reflect a non-prisoner but more keenly reflect the fact that --

MR DONALDSON SC: Well, they reflect a prisoner who is subject to the maximum security classification.

MR MOONEY: Yes, and so all of the limitations that go with that maximum security classification apply to them as they would to a prisoner classified in that way. So the practical difference of their living conditions is - is minute, yes.

MR BABB SC: And, in fact, it could be that it's even more onerous in some ways than a sentenced prisoner if you're isolated so much so that it's almost reflected in subsection (2)(d) where it allows for the offender to elect to be accommodated or detained with the general population, which some people may do in order to have access to services and company than is available in gen pop.

MR DONALDSON SC: We've heard evidence from people with great expertise in these matters already to that very effect; that is, with some prisoners - with some people this will be a very negative experience particularly when you're talking about rehabilitation and attempts to reintegrate. And the other thing, again this is a theoretical issue, the facility in Victoria, for instance, is used for dangerous sexual offenders as well. So you could have people who are in there pursuant to this scheme of a risk of committing a terrorist offence, in there with a person who is at risk of committing a serious sexual offence.

Well, they may not get along particularly well. It might not be much company, from that - from that point of view. So I don't know. I think the whole design of subsection (4) is interesting. We're going to treat you differently to prisoners by isolating you completely.

MR BABB SC: With respect, it smacks of an attempt to meet the human rights requirements without there being any guarantee for that to actually take place.

MR DONALDSON SC: Well, I think there's certainly no guarantee. Perhaps the other way of dealing with it is that you can't have detention in a prison.

MR BABB SC: Yes. That has traditionally been problematic. We know that in relation to forensic mental health patients that, in the large part, they're detained in prison as well. So it's not been an easy nut for the state to crack in terms of what are the high security alternatives to prison.

MR DONALDSON SC: Yes, exactly right. And I think it's - I hope the AGD people are not swallowing their tongues, but I'm not going to be recommending that, as it happens. But it is a problem and it's - I think it's as much a resourcing issue as much as anything else. But what can't happen is we can't have a circumstance in which lip services - I'm not saying it is - but we can't have a circumstance in which lip service is paid to this aspiration in subsection (4) and

that the provisos are so broad that, in reality, these people are confined in solitary confinement permanently.

MR BABB SC: And the --

MR NEAL SC: I just wanted to add here that, look, it does seem to be - it always seemed, upon introduction, to be - not to be a realistic requirement but is there, as Lloyd was suggesting, I think, to soften the blow of having continuing detention orders at all. But for the counter argument continuing detention orders, because that reality would not be delivered, is just another reason why one would say continuing detention orders shouldn't be there.

MR DONALDSON SC: Well, I think it would be fair to say, and I think the Commonwealth is to be applauded, that the terms of subsection (4) comply with that aspect of Australia's international human rights obligations in relation to post-sentence detention. That is, it's quite clear, it seems to me, that it is a requirement of international human rights law that people who are subject to these orders are not kept within the general prison population.

And so the provision responds to that. And I'm not suggesting that lip service is paid to it, but we cannot have a system where - we cannot have a circumstance where that might occur and there's no means of reviewing that or people not knowing about it. So I think there are ways - I think that there are ways of dealing with that.

MR BABB SC: And then evaluating it. Who's assessing these criteria?

MR DONALDSON SC: It would have to be an independent body.

MR BABB SC: It really does need to be because you could see different commissioners of Corrections in different jurisdictions.

MR DONALDSON SC: They can't be reviewing themselves. And again, even within different states, and I'm sure territories as well, like we all know New South Wales, for instance, we've met with a body who has an excellent body that deals with conditions in gaols. Western Australia, for instance, has a reviewer of custodial services which doesn't stop children being incarcerated in adult prisons and being brutalised, but nonetheless such a body exists. But it's just not uniform throughout the states. And so if there is to be a body that reviews compliance with subsection (4), it has to be an independent body.

And the thought that has occurred to me is there may be some utility in having a body that does that in relation to extended supervision orders as well, and I say that for this reason: that extended supervision orders will always be - well, you could have somebody doing one in Darwin, somebody on an extended supervision

order in Victoria, and logic tells you there may be quite real differences to how that is administered.

Now, we had some senior people from the AFP here earlier this morning who have some confidence that that won't occur due to administrative arrangements that exist within the AFP and within government generally. And we just don't know yet because we haven't had enough ESOs to know whether that's going to work or not. But it would seem to me that a - having an oversight body that reviews compliance with the obligation under subsection (4) and that the ESO regime is operating as I think everybody expects that it will, and that could be a single body that has to be independent. There may be some good sense in that.

MR BABB SC: Yes, I certainly agree with that.

MR DONALDSON SC: Could I ask you another thing that troubles me a great deal about this, this whole matter, and I think everybody who's looked at this in detail understands the complexity of the task with which Division 105A deals. But the absence in the object of the division to rehabilitation and reintegration of defendants into the community is, I think, a stark omission, even though there is reference in the division to rehabilitation and the like but that it is not an object of the division, I think has very real implications.

One of them is, for instance, that the court is required to have regard to the objects of the division in making an order, and because it's not an object nor is it dealt with anywhere else expressly in there, a court in making an order doesn't have regard to rehabilitation or reintegration of a defendant, and, for my part, I think that that is a glaring omission. And, again, I'll be interested in speaking to the officers of the Attorney-General's Department, but it seems to me that that is also an international human right obligation that Australia has in relation to these schemes as well. I think the Law Council has helped me on this before.

MR NEAL SC: Yes, we have and do again.

MR DONALDSON SC: Yes. I must say, for my part, it's just a glaring omission from the regime and it just has to be there. One of the complications with it, I suppose, and I don't think you were here this morning when we had the Human Rights Commission people here, but let's say you have, you know, two general objects of the provision are protection of the community and rehabilitation and reintegration of a defendant, and the court has to have regard to both objects. What of a circumstance where they're inconsistent? What does a court do? And as we know, there are sometimes in legislation like this, priority provisions. Well, if they're inconsistent you give greater priority to one not the other. I must say my initial view on all of that it's difficult to see those two things are going to be inconsistent.

MR BABB SC: I'd agree with that. I think they're so interrelated that rehabilitation is the best means of protecting the community and to ignore it is to ignore the realities of continuing detention orders which is that at some stage the person will be released, and then the best hope for protecting the community is that they no longer hold the views that they once held. So I'm aware of provisions that do prioritise objects but I don't think it would be necessary in this instance. I can't see an inconsistency.

MR DONALDSON SC: Well, it's just difficult for me to conceive of a circumstance where you would have evidence that the best way for this person to be rehabilitated is to undertake a process in the community on a supervision order. Yet, the only way that you can resolve the risk of reoffending is to have this person subject to detention. Even if that was the evidence, I assume a judge would have - an unlikely event I would have thought - but a judge would probably have little difficulty in saying: well, if the rehabilitation services can be provided in the detention facility, even if it's not ideal, that's what's going to happen, I would have thought.

MR BABB SC: Yes.

MR DONALDSON SC: But it just doesn't seem to me - I really don't like those priority provisions very much, I must say. There's a provision in the NSI Act which is that primary consideration for the court in making a decision is, in effect, protection of the information. And if that is inconsistent with a fair trial, then protection of the information prevails. I'm just not sure that those two things are, in a real and practical sense, likely to be inconsistent that often.

MR BABB SC: No. The only instance that I can think of where I'm supportive of it is, for example, in relation to youth justice issues where they will list a number of purposes but prioritise the wellbeing of the child as being a priority.

MR DONALDSON SC: Yes.

MR BABB SC: There, I can see it, where it's a beneficial emphasis upon one of the purposes.

MR DONALDSON SC: Yes.

MR BABB SC: But here it's likely, likely not to be beneficial to the individual. Interestingly, I have had - I have seen the arguments about rehabilitation play out in New South Wales where in relation to serious sex offenders, it's said that the only demonstrably effective program is the Cubit program which is only available in custody, and at times that has been largely a precondition of the movement from custody to either parole, or if your head sentence has expired, an ESO.

MR DONALDSON SC: That is, you have to undertake the course?

MR BABB SC: Yes.

MR DONALDSON SC: As best you can outside.

MR BABB SC: You need to undertake the in-custody rehabilitation course to move on to the next stage. But that had a lot of efficacy and demonstrable effect behind it that was, I think, quite persuasive to the courts in their determinations.

MR DONALDSON SC: Yes.

MR BABB SC: So, you know, it's - you know, it's something that has come up. I think, that argument, that the best rehabilitative model is available in the community with this specialist who only provides services in the community is certainly something that's come up regularly in serious sex offender applications.

MR DONALDSON SC: And it also occurs to me that one benefit of, I will call it, an oversight body but the body that we've been discussing in relation to both subsection (4) but also perhaps in relation to ESOs is that body would also have responsibility for at least reporting on the services that have been provided by the government for rehabilitation and reintegration into the community, because again, that, if it's going to be an object or an aspiration, that has to be tested or able to be tested or reviewed, it seems to me.

So this body that I have in mind will have important tasks dedicated to it, but it seems to me really critical tasks, because I think we've all seen circumstances in which - I'm not suggesting this is the case here - but we've all seen circumstances in which lip service is played to rehabilitation by government.

MR BABB SC: Yes.

MR DONALDSON SC: And particularly if we're talking about detaining people or keeping people in detention, and part of the reason for them being in detention is so that they receive rehabilitative services. I think there has to be some way of being satisfied that they are being delivered. They have got to be accepted as well as delivered, but they can't be accepted unless they are delivered.

MR NEAL SC: And available, yes.

MR DONALDSON SC: Now, Mark, was there anything else that you wanted to ask anybody while we were here?

MR MOONEY: In his opening and you've discussed it, the report that was critical of the VERA-2R, do you have any thoughts about whether that should

have been disclosed under the provision for exculpatory material as it is, and if that provision should be clarified to put that beyond doubt if need be?

MR BABB SC: I am astonished that it wasn't considered to be disclosable, to be honest. That is crucial information for anyone who's wanting to mount a case in relation to whether there is an unacceptable risk. So I think it's very important information that needs to be available.

MR DONALDSON SC: Yes, I think to be fair, we are going to hear from Home Affairs later on today, they are in a couple of paragraphs from the introduction. Having said that, I have satisfied myself, after great care, that they're representative of the report. But, again, I've looked at the provisions in the Act which deal with disclosure and there's two, two types, really.

One is the AFP Minister has to provide all the information, material, that they are relying on and also, in effect, exculpatory material, and it will be interesting to hear what the Department of Home Affairs has to say about that particular document. But one thing that doesn't exist here, and at the very least I'll be making recommendations about this, is that the Commonwealth DPP guidelines in relation to prosecutions have much more prescriptive obligations in relation to disclosure. And, in fact, one of the obligations in disclosure requires them to provide expert reports that they have which would cast any doubt upon any of the expert opinions that were expressed by experts called by the Crown in a prosecution.

Now, whether something along those lines in a guideline will be enough is something that I'll be exploring. But if you look at the provisions as they're currently drafted, it's 5(3) and 5(2), I think, they're pretty broadly drafted and should pick up, one would have thought, everything that is generally disclosed by prosecutors, anyway. Having said that, I'm aware of the issues that arise from time to time with prosecutorial disclosure. But after I've heard from the Department of Home Affairs, I'll be concluding my views on these provisions. But just as a starting point, it doesn't seem to me that the obligation should be any less than that of a prosecutor.

MR BABB SC: No. I think, although we know this is not punitive, the effect is that it impacts -

MR DONALDSON SC: To deprive a person of -

MR BABB SC: - of their liberty. And there's two reasons why the similar disclosure obligations should apply. One is the impact of the Act, and the second is it's a fair obligation in relation to a model litigant. So noting that the government would always want the right result achieved in an individual case, then the best way for that is for relevant material to be available to the parties.

MR DONALDSON SC: Well, the other circumstance perhaps peculiar to this, to this regime, is of course is the Department of Home Affairs that is the sole licensee in Australia of the VERA-2R tool. And there is certainly a view that as a result of that it is really the only body that is capable of undertaking research in relation to the tool. So I think, subject to what I hear from the department later on today, I think that this is an issue that I'll be addressing, and whether it requires legislative change or can be dealt with in some other way, I'll have to think about.

Can you just tell me, though, those of you who have been experienced in it, is your experience with the Commonwealth DPP disclosure statement that it is a good and useful instrument, that they've published?

MR BABB SC: Yes. I think it's a very good -

MR DONALDSON SC: It seems thorough.

MR BABB SC: It's very thorough and it's actually - it deviates slightly from the common law. It really does focus in on - on genuine relevance to the issues at hand rather than being hypothetical. So I think it gives the states some confidence that you don't have to over-disclose in a way that's going to give a tidal wave of material to someone who's trying to prepare the case.

MR DONALDSON SC: Yes.

MR BABB SC: It really does require a focus on, on the individual case.

MR DONALDSON SC: As I said, as I think I mentioned, I was - when I looked at it again, I hadn't looked at it for some time I must say, but when I looked at it again it does have a specific provision that deals with expert material. And so it really does descend to a fair degree of detail, certainly more extensive than other types of those documents that I've seen. That's good to hear.

MR BABB SC: Yes, and I think disclosure is, it's a challenge -

MR DONALDSON SC: Yes.

MR BABB SC: - for the state, particularly in the digital age. So I think clear guidance and practical examples like those that appear in the Commonwealth guideline are really useful.

MR DONALDSON SC: Well, it's interesting you should say that because it occurs to me that it's probably not as great a challenge in these sorts of applications as in some others for this reason: these people have been in prison for a long time.

MR NEAL SC: Yes.

MR DONALDSON SC: So, you know, the government's pretty much aware of everything that's been going on for that period of time and to the extent there's other material out there, well, you'd think - or somebody who served a 15-year sentence, you'd think that that 15-year period would be the most relevant. But, anyway, we'll see. Is there anything else, Mark?

MR MOONEY: No, I think that's covered it.

MR DONALDSON SC: Was there anything else, Lloyd or David or Nathan that you wanted to mention to me? Could I thank the Law Council again very much. As I said earlier, the Law Council's always been fantastic in their responses to INSLM reviews, not only in the written material but also, we have very experienced practitioners who are very familiar with the issues coming along and helping me. So I'm very, very grateful. So thank you all very much. And now we will stop and come back at 1.30. Thanks very much.

MR BABB SC: Thank you.

THE HEARING ADJOURNED AT 12:25 P.M

THE HEARING RESUMED AT 1.28 PM

SESSION 3: DEPARTMENT OF HOME AFFAIRS

MR DONALDSON SC: Okay. Thanks very much. So this is resumption of the hearing today and the first session we have representatives of the Department of Home Affairs. So Richard Feakes the First Assistant Secretary, Counter-Terrorism Coordination Centre. Welcome and thank you, Richard, for coming.

MR FEAKES: Not at all.

MR DONALDSON SC: And Tim Roy who's the Assistant Secretary, Countering Violent Extremism Branch, and welcome to you, Tim, and thanks for your help thus far. Do you have anything you want to say by way of introduction?

MR FEAKES: I don't have an opening statement but if it helps, can I just make a few very brief opening remarks which might help to frame the conversation?

MR DONALDSON SC: Sure.

MR FEAKES: The focus and attention you're giving to this piece of legislation, it's important legislation, serious implications for offenders. So transparency and reviewing, as you're doing, is really important. So support your work, think it's a

good thing to do. You know, since 1 July there has been a change in Commonwealth responsibilities from the HRTO regime.

MR DONALDSON SC: It was, Machinery of Government, MoG changes, yes.

MR FEAKES: It was MoG changes. So from 1 July -

MR DONALDSON SC: So can you tell us, because I am interested to know -

MR FEAKES: I'll do that now in, sort of, big picture terms.

MR DONALDSON SC: Yes.

MR FEAKES: Previously, HRTO regime was the responsibility of Department of Home Affairs. Much of those responsibilities have now shifted to the Attorney-General's Department. What has not shifted to the Attorney-General's Department, however, are two aspects which we retain, our department retains.

MR DONALDSON SC: So it's basically everything has gone to AGD except these two.

MR FEAKES: Everything else but these two.

MR DONALDSON SC: Yes.

MR FEAKES: The first is, you know, what you might call generally building the national capability for the HRTO regime through funding but also working with the states and territories on understanding better their capability and where gaps might lie. So that sort of capability building across the Commonwealth remains with Home Affairs.

MR DONALDSON SC: And that's in relation to high risk terrorist offenders?

MR FEAKES: Correct.

MR DONALDSON SC: So -

MR FEAKES: Not control orders, which is a separate issue altogether.

MR DONALDSON SC: Okay.

MR FEAKES: That's with AFP.

MR DONALDSON SC: And what if a preventative detention order - so that's the Part 105 orders, there hasn't been one of those?

MR FEAKES: 105 continuing detention order?

MR DONALDSON SC: No, that's 104, isn't it?

MR FEAKES: 105.

MR MOONEY: 105.

MR DONALDSON SC: Sorry, continuing detention order is 105A.

MR FEAKES: So we -

MR DONALDSON SC: Control order is a 104.

MR FEAKES: 104.

MR DONALDSON SC: Meaning detention orders are 105?

MR FEAKES: Yes.

MR DONALDSON SC: There hasn't been one of them yet?

MR FEAKES: No, that's right. But for CDOs, ESOs, that sort of national capability, that's with us.

MR DONALDSON SC: But not control orders?

MR FEAKES: Not control orders. That's with AFP.

MR DONALDSON SC: And does this capability for HRTO, is that part of a bigger function within Home Affairs, or is it -

MR FEAKES: Well, it's part of a -

MR DONALDSON SC: Or is it a particular area on its own?

MR FEAKES: It's a particular area within my division, but my division has responsibility for a whole range of other CT related issues of which one is this national capability I mentioned to you.

MR DONALDSON SC: Yes, and so sorry to interrupt you, Richard -

MR FEAKES: That's okay.

MR DONALDSON SC: - but when you talk about capability what does that actually mean?

MR FEAKES: So it means -

MR DONALDSON SC: What are you trying to develop capability in?

MR FEAKES: Well, we're trying to develop capability to allow states and territories to give effect to the legislation. So the legislation, as you know, under whatever section it is, 105.4, I don't know, has requirements around accommodation, for example. We'll talk more about that.

MR DONALDSON SC: Yes.

MR FEAKES: So we've been trying to work with states and territories on understanding where their limitations might lie, where the gaps lie, and then we provide funding to the states and territories, as we have to New South Wales and Victoria, to fund them to house individuals on CDOs. But, essentially, you know, it's a relatively new regime, so actually getting a grip on what the challenges are that the states and territories face in terms of giving effective to the legislation, if and when it arises because there's an individual in their jurisdiction, we've been working with them to understand better that. It's sort of capability mapping, you might call it.

MR DONALDSON SC: Yes, and if I could give you an example. One thing that I've noted publicly a couple of times is having a requirement in the legislation that imposes specific obligation in relation to rehabilitation and reintegration of offenders into the community. So would that be viewed as a capability that because, let's say if it's a CDO it would have to be delivered within the prison environment. If it was an ESO it would have to be delivered, you know, some other way.

MR FEAKES: Yes.

MR DONALDSON SC: So would that be something that would be done by your group?

MR FEAKES: Well, it might be something that my area focuses on, but in terms of the actual delivery of the rehabilitation -

MR DONALDSON SC: No, you don't do that.

MR FEAKES: I don't do that but it's not a Commonwealth function. As you know, it's a State and Territory function. So in Victoria it would be done through the, I think it's its SIS program.

MR DONALDSON SC: Yes.

MR FEAKES: In New South Wales through the prison. So if that was stipulated in the legislation, then that would continue to be a function of jurisdictional -

MR DONALDSON SC: But can I ask you that, because I didn't understand that. So let's use the Victorian prison arrangement where you've been there, you know what I'm talking about, so the unit that Mr Benbrika is in, for instance.

MR FEAKES: Yes.

MR DONALDSON SC: So you have an agreement with the Victorian Government in relation to that, and they provide - and I've been there - they provide the hardware and the software, if I can put it that way.

MR FEAKES: Yes.

MR DONALDSON SC: Do they then report back to you in relation to any of that, or you just have an agreement with - that you will deliver this service and when the contract comes up in X years' time you look at it again?

MR FEAKES: So we've got, in Victoria cases and New South Wales in fact, we have an overarching agreement which, you know, sets out, you know, responsibilities and requirements writ large. Sitting under that, we have a specific arrangement as it pertains to the individual who is - who is under a CDO, and that includes requirements for suitable accommodation. That agreement and the arrangement, I think are signed by ministers, either minister or secretary, I think it's dependent. And then we would - we, you know, maintain close touch with the jurisdictions, including through the relevant governance bodies.

So we have got something called a Terrorist Offender Review Committee and sitting under that the RECG, which is the Rehabilitation Enforcement Compliance Group. One is the sort of strategic officer. The second, RECG, is at the EL2 level. That brings together all of us here, AGD, our department -.

MR DONALDSON SC: Yes, I was going to say the AFP on that as well.

MR FEAKES: - AFP, but the jurisdictions to talk about how these orders are progressing how it relates to particular individuals and that would encompass conversations around accommodation.

MR DONALDSON SC: Okay. Thank you. I understand now. That's capability.

MR FEAKES: That's capability. The second one was we retain responsibility for administration of the VERA-2R assessment tool.

MR MOONEY: So that includes the community practice?

MR FEAKES: Community practice. So training, certification, eligibility and we're supported by a community of practice. And then since - since 2017 until now we have trained about 400 practitioners and we have certified a little bit over 100. Tim's branch also has responsibility for something called the Centre of Excellence, which was part of a budget measure in '21-'22, establishment of that Centre of Excellence. And one of the mandates of that Centre of Excellence will be to advance research on risk assessment tools. So that's - that's a really important aspect of Tim's branch and the Centre of Excellence. And then so those are the two key elements of the HRTO regime that reside with us.

MR DONALDSON SC: And could I just ask you, so that's essentially the development of and - well, development of the capability in relation to risk assessment for terrorism offenders, is essentially a group or a function, which is then held by Home Affairs?

MR ROY: That's right, and it goes beyond support just to the HRTO regime. It's for countering violent extremism, for practitioners more broadly, which includes early intervention, corrections based programs, law enforcement of which support to HRTO is just a subset.

MR DONALDSON SC: But in relation to that, Tim, that's not a matter that generally you would associate with the Commonwealth's sort of administrative responsibility. So somebody's showing incidents of violent extremism, risk behaviours in Adelaide -

MR ROY: Yes. So we -

MR DONALDSON SC: How do you - what would your lot do in relation to that?

MR ROY: We coordinate the National Intervention Program Framework that supports through funding and the setting of guidelines, as well as research and best practice, the programs that are delivered in each state and territory. Depending on the size of the jurisdiction, our support financially might be a component of broader support.

MR DONALDSON SC: Yes.

MR ROY: Or in some smaller states it might be the entirety of the financial support they get. And we provide a national consistency and the guidelines under

which those programs operate, but in each state and territory they will look different depending on the jurisdiction and which agency delivers those services.

MR DONALDSON SC: Yes. Okay.

MR ROY: So ultimately the program delivery is a matter for the states and territories.

MR DONALDSON SC: Right. That's interesting because one of the things that is intriguing about the 105A scheme of course is there are a lot of things that would have to be done by the states at some stage and ensuring uniformity, for instance, in the way ESOs are administered, the way detention is administered in the states. I'm sure everyone would accept that they have to be - somebody can't be treated fundamentally differently in Victoria than they are in Adelaide because the facilities are different. So -

MR ROY: That's right, although from the perspective of our CVE programs we talk about national consistency and not uniformity, given some programs will be delivered by a policy agency in one state and then a police force or a police agency in another state. So they do look different depending which jurisdiction they are operating in.

MR DONALDSON SC: Okay. So that's interesting. Thank you for that. So the CVE function is really a part of that area that doesn't relate to HRTO?

MR ROY: That's right.

MR DONALDSON SC: And that's what you've got left.

MR FEAKES: That's what we have got left.

MR DONALDSON SC: I didn't mean that, they're the two functions.

MR ROY: I should say it can relate to HRTO where we have got a high-risk CVE program, where we are funding a program in a state or territory that is delivering solutions for high risk individuals. In terms of how they apply that to a HRTO case will be a matter for them.

MR DONALDSON SC: Yes, I'm interested in that, Tim, because one of the things that I'm likely to be recommending here is that, or in this review is that the objects of the division be altered to include as objects rehabilitation and reintegration of defendants or offenders into the community. Now, I know that you and others would say, "Well, that happens. You know, we do that" but there's no statutory obligation on you to do it and there's no way of reviewing whether what's done is good, bad or hopeless.

So I am intrigued to see if we can come up with a mechanism that ensures some of that. So with CVE, which is not part of 105A, there's no - well, there is no, necessarily no uniformity throughout the states with how that is done. Let's say then with administration of ESOs and I know we don't really have any yet and it's very early days with ESOs, but I would have this concern that if that is, you know, effectively evolved to the states that there may be issues of conforming practice there as well. I should say the we had, as always, very helpful people from the AFP earlier and they were confident that that wouldn't happen. But -

MR FEAKES: Can I just respond, and Tim will have views on this too but just on that point of conformity, uniformity and consistency, the governance bodies that I mentioned are useful in that respect in terms of engaging directly with the states and territories. But what may be equally important is a group that we've just got agreement to set up through the Australian New Zealand Counter-Terrorism Committee, ANZCTC and under the auspices of the ANZCTC we have got agreement to set up what will be a HRTO working group.

And that will bring together all representatives from states and territories to talk about some of the issues you're raising. So I think in terms of developing a consistent capability that will necessarily have variances one jurisdiction to the other but, you know, bottom line an individual shouldn't be treated radically different. I think that working group will be useful and it hasn't met yet but we have just got agreement to do it.

MR DONALDSON SC: No. And - thank you, I didn't know about that, but that's good to know. And no doubt that's a good thing. But what I would have thought would also be a good thing is that there be a body independent of government that can provide some assurance that this is actually working. That is, that what you get in Western Australia is what you get in Victoria on an ESO, with a CDO, those sorts of things.

It would be an oversight body as opposed to a body. Like, I'm sure you know that in Victoria they have a separate body that administers ESOs, for instance. But that's very granular, you know, it actually administers the whole scheme or the whole way that it's done. So it's separate, actually quite separate from government.

MR FEAKES: Is that the Scottish model? Is there a -

MR MOONEY: Post Sentence Authority.

MR DONALDSON SC: But my difficulty with translating the Victorian scheme into 105A is they literally deal with these people face-to-face and on the ground. Well, it's pretty difficult to do that if you've got a body in Canberra and, you know, an offender in Darwin. So - but anyway, that's what I'm thinking about. I don't - I must confess I'm not a great one for bureaucracy.

So I'm not thinking of some massive bureaucracy imposed on this, but really an oversight body that can report and perhaps even provide reports to a court if needs be, on annual reviews and the like. So that's one thing that I'm thinking about. I don't expect you to tell me whether you think it's a great idea or a bad idea. But what you've told me, Tim, actually I think is consistent with my impression that consistency between the States in some of these things may be an issue at least initially. And so perhaps some sort of oversight body, at least for a period, may be useful.

MR FEAKES: Yes. And I guess -

MR DONALDSON SC: And if the oversight body exists and after a time -

MR FEAKES: That's right.

MR DONALDSON SC: - you don't need it anymore because everything is working appropriately, that would be a good result.

MR FEAKES: Yes. I guess just on that, legislation was passed when, in 2017, I think, for CDO and ESOs much more recently, but it's still a relatively new regime and the number of, you know, offenders that have been put on orders as we talked about is very few. So we are, you know, we are learning as we go a little bit.

MR DONALDSON SC: Well, it's interesting again. I understand that completely and when we spoke with the AFP officers this morning, I said to them, "Well, now is probably not the best time to reviewing how ESOs working" because -

MR FEAKES: We don't have any, in effect.

MR DONALDSON SC: - we don't have any, you know, in effect.

MR FEAKES: Yes. No. It would be much better to have a sort of body of evidence if you like and when we will we have that?

MR DONALDSON SC: Two to three years.

MR FEAKES: I was going to say three years.

MR DONALDSON SC: That was the view of the AFP people as well so that's handy to know probably for a successor of mine or someone else. Okay. Thank you for setting out how the responsibilities have now been, you know, re-allocated. One thing that concerns me and I know you're aware of this because we have spoken about it before is under the legislation there are obligations on the AFP Minister to disclose information to applicants and to the court.

A matter that I have seen recently is the report that's commissioned by Home Affairs by Dr Corner, and I know the circumstances on which that report was commissioned. And I understand the administrative arrangements that exist between Home Affairs and Dr Pressman in relation to VERA-2R. And can I say I have heard from many people here that perhaps the biggest issue with VERA-2R is the lack of research, and not only lack of research but also difficulty in undertaking research and that, I think, derives from the fact that it's a proprietary tool.

And there is a perception and not yours, it's owned by Dr Pressman, she can do with it whatever she likes, but also a tool that there is a concern that over familiarity with the tool can lead to the tool becoming ineffective and so if research is not discouraged it's pretty difficult to undertake. And I was heartened when you told me two weeks ago that since September there's now been some relaxation on the capacity of Home Affairs to commission research and to - and I also understood it to be to provide data for research to occur.

MR FEAKES: That's right, yes.

MR DONALDSON SC: And can I say it seems to me it's a wholly positive thing. But Dr Corner's report's a concern and I'm not running a commission of inquiry into why Dr Corner's report was not provided in the Benbrika matter. I have a view, having read it and knowing a lot about the Benbrika matter, that that should have been disclosed. But I suspect you're going to have to answer for that somewhere else fairly soon. So I have a pretty firm view of that and I don't need your response unless you want to give me a response.

The issue that flows out of that for me is that is, to me, really quite a significant failure of the legislative scheme, and what changes can be made to the legislative scheme to ensure that a report of that importance gets to the place where it should be. You're aware of the provisions of the Act which deal with disclosure. It seems - I don't know why it wasn't disclosed, but the regimes that currently exist should have picked it up.

But one thing I'm considering is requiring compliance with the Commonwealth DPP disclosure provisions which are quite specific, and perhaps imposing some of them that deal specifically with the product of research as legislative obligations

on the government, which would basically be you, whoever is responsible but in practice that will be you.
So that will make the position as clear as it can be in relation to those matters. Do you want to respond to any of that?

MR FEAKES: Yes, just - I'll respond briefly but Tim can pick up on it. You mentioned the licence and the conversation we had a couple of weeks ago where we have varied the licence, so that now tool may be made available to researchers for research.

MR DONALDSON SC: Can I interrupt there, Richard, I'm sorry, but one thing that has been said to us is it's not only the availability of the manual and the training materials with VERA, it's actual access to data.

MR FEAKES: Yes.

MR DONALDSON SC: And what's come out of that? Is that research going to be undertaken?

MR ROY: Well, that's - I mean, that's data that often the Commonwealth or usually the Commonwealth doesn't have, because it's usually who has been delivering programs.

MR DONALDSON SC: Right. So usually it'll be New South Wales Corrections actually.

MR ROY: That's right. So there's a difficulty in much of the cases out of our hands.

MR DONALDSON SC: So in relation to that, the position is under the new variation you wouldn't necessarily have access to that data to provide to a researcher?

MR ROY: So the agreement is that we can now provide the VERA manual, score sheets and some of the relevant VERA material to a research that we have commissioned for the purpose of research, to enable them to do the research.

MR DONALDSON SC: I see.

MR ROY: But as for case studies that have been generated out of different jurisdictions, then that would be a matter for those jurisdictions.

MR MOONEY: For those jurisdictions.

MR DONALDSON SC: Alright. Thank you. Sorry Richard.

MR FEAKES: The only thing I add is, you mentioned research and I think right across the board not just in Australia as it relates to VERA, but this is a new nascent area of risk assessment and, you know, we're learning a bit as we go. And I know the -

MR DONALDSON SC: Which is why research is so important.

MR FEAKES: Which is why research is so important. That is true and I think, is it the Dutch Institute of Forensic Psychology is currently doing its own research on validation so that's a very good thing. But it's not just VERA-2R as it relates to Australia, but there's a broader, you know, gap in research, which needs to be done. And, of course, you know, the other obvious thing, it's a bit glib, but you know we are going to continue to need research as we go because terrorism will continue to evolve and the VERA-2R tool itself has evolved over, you know, the three iterations so it goes to your point that research is really important.

MR DONALDSON SC: Well, I would say two things about that. One is the Hague institute that you refer to, one of the interesting things about them is they hold the licence in, I think, Europe and there's a great deal of research that has been done as to the validity of research that is commissioned by the owners of tools as opposed to independent research. Now, that's not to be critical of anybody, but often you see that that sort of research is undertaken to enhance the tool rather than to objectively look at the tool and whether it's working.

And then again it seems to me another difficulty with what you've just said, Richard, is what you would be doing is doing work to improve the tool, which means you've put your eggs in the VERA-2R basket and you put your eggs in the VERA-2R basket some time ago.

MR FEAKES: We did.

MR DONALDSON SC: Bernard Ripperger has written a paper and there were agreements about it at the time. I don't know whether you cease to be committed to VERA-2R at some stage.

MR FEAKES: Yes, look, just on that, yes, we identified the VERA-2R tool in whenever it was 2017 with support from - some, you know, Australian practitioners. I think you know that, you know, when that VERA-2R tool or there's a risk assessment CDO application, the practitioners are not, neither instructed to use the VERA-2R tool nor required, you know, not to use any other tool.

I mean they can use VERA-2R tool in conjunction with the hair PCLR, the VHS. It so happens that they've chosen to use the VERA-2R tool in conjunction with

others or by themselves. So, yes, we put our eggs in that basket, but it doesn't preclude use of other tools by practitioners.

MR DONALDSON SC: It would be pretty odd, though, wouldn't it for the AFP Minister to be making an application for a CDO and have a risk assessment that didn't use the VERA-2R tool?

MR FEAKES: I think, I understand what you're saying. I think in the case of Benbrika and others, other tools have been used. So I think service of levelling and whatever it is, the capability management inventory, and in the second case there was other tools that were used yes in conjunction with -

MR DONALDSON SC: Pender.

MR FEAKES: Correct. You know, hair, PCLR, VHS and the trap 18.

MR DONALDSON SC: Yes. Well, I think it would be - again, I think if - it would be fair to say if you read the judgments that have come out and I've read the transcript as well there's a fair emphasis on VERA-2R. It didn't surprise me, because your applications and you own the tool.

MR ROY: Yes, that's right and it is the case that the bulk of government practitioners in corrections context that are dealing with large cohorts are using that as one of the first tools.

MR DONALDSON SC: Absolutely. Certainly in New South Wales.

MR ROY: And you are right the Corner report was commissioned with the aim of improving the tool and that was certainly the recommendations that Dr Corner had were not to disuse it or find an alternative, but were to improve the tool and the factors underpinning it. Having said that -

MR DONALDSON SC: Well, just - I think she said, I think it would be fair to summarise her report as saying, "This is not something you should throw out, but there are very serious problems with this that need to be the subject of further work".

MR ROY: That's right. And then -

MR DONALDSON SC: You might have been saying the same thing.

MR ROY: But then as you know, the ARC review into risk assessment tools is more of a reviewing the suitability of alternative tools as well that could be used as well in this context. So that's - that has a different objective in a team.

MR DONALDSON SC: Yes. So again that's the Australian Institute of Criminology are undertaking a review commissioned by, well, I think commissioned by you actually but directed by the PJCIS and as you know, I've got a final draft of that report. But I think that's quite a different piece of work and it seems to me to be very good work but a different piece of work to Dr Corner's report. Like, hers is a - I think it's a 150-page report. It's, she would say, the most thorough review that's ever been done of VERA.

So anyway, I've told you not only here, but before what I thought should have happened to that document. No doubt after today people are going to be asking to see it and you'll have to decide what you're going to do with it then, and I suspect you are going to have to explain the decision that you came up with at the time that you came up with it in relation to that. You don't need to be terrorised by me in relation to it. But again, I would have thought the answer to all of this is, and when I say 'all of this' very real concerns that well-meaning people have as to this whole risk assessment process including me. The key to it is research.

MR FEAKES: Yes.

MR DONALDSON SC: Because we cannot have a tool that is not an accurate tool being used to determine whether something is going to stay in prison or not. It's not appropriate.

MR FEAKES: We agree on the question of research.

MR DONALDSON SC: It sounds like your research budget is going to be - can I ask this relating out of this and I'm not trying to be flippant, because this - I think you started off Richard saying this is a very important piece of legislation. These are very important issues and risk management is at the absolute core of it. Absolute core of it.

MR FEAKES: Yes.

MR DONALDSON SC: Is it intended that there will be research commissioned by and undertaken by Home Affairs in relation to this?

MR ROY: That's right as Richard mentioned earlier, we have been funded over four years to establish a Centre of Excellence for research, risk assessment and training and the research -

MR DONALDSON SC: Sorry just in relation to extremist violence?

MR ROY: It's CVE broadly, which means some of the research will apply to intervention programs.

MR DONALDSON SC: When you talk about dangerous sexual offenders, for instance?

MR ROY: That's right. But the risk assessment component is a critical part of that and so we'll be looking to invest and not just in VERA, but in other tools that are being used across the CVE practitioner community more broadly.

MR DONALDSON SC: And with a view that that research will be published?

MR ROY: Where possible, yes. Yes.

MR DONALDSON SC: Alright. Did you have anything else you wanted to ask either Richard or Tim? There would have been more except that's going to be AGD now because they have sort of taken over a few of the functions that Home Affairs previously had. But thank for turning up today Richard and Tim.

MR ROY: Thank you.

MR DONALDSON SC: I'm sure it wasn't pleasant but you've been very helpful in providing what I asked for. Okay. Thanks very much.

MR FEAKES: Thank you.

SESSION 3: ATTORNEY-GENERAL'S DEPARTMENT

MR DONALDSON SC: All right. So I'm very grateful that Brooke, Phillip and Luke have come along today. As I mentioned a moment or two ago, but also earlier in the day I think there has been a very substantial administrative change within Commonwealth Government in relation to these matters and a change of government, which resulted in earlier material that was provided by the Attorney-General's Department, being not superseded, but there was a possibility of that wanting to be updated and I'm very grateful to the Attorney-General's Department for your very comprehensive response to that.

Are I understand now more clearly, thanks to the Home Affairs people that what the administrative arrangements are so pretty much in relation - well, I think you've pretty much got everything other than, really, these inter-government capability enhancement programs and then really the CVE centre.

MS HARTIGAN: Yes. We call the home affairs responsibility the enabling framework.

MR DONALDSON SC: Enabling. So now the entire responsibility or other than those matters is with AGD. Alright. And so when the AFP Minister is not the Attorney-General, that's just going to be the way it's going to be, isn't it, I suppose.

MS HARTIGAN: Yes, we will see what happens then, yes.

MR DONALDSON SC: Is - could there be an issue with that?

MS HARTIGAN: I don't think so. I mean, the AFP minister previously was the Minister for Home Affairs.

MR DONALDSON SC: Yes.

MS HARTIGAN: And I think we have managed the transition so I think like with everything in this regime it's very much a collaborative approach and we've certainly continued that since taking over the reins on the case work management side of things.

MR DONALDSON SC: Yes.

MS HARTIGAN: So I think it's just another thing that will be managed as part of that work.

MR MUFFETT: But should the AFP minister change from being the Attorney? It's likely the responsibilities then would shift out of the department to whoever the appropriate Minister's portfolio would be.

MR DONALDSON SC: Does that mean all the people who have come into the Attorney-General now from Home Affairs would then shift out to who the new AFP Minister is?

MS HARTIGAN: It really depends on the association of the MoG, which you mentioned earlier today.

MR DONALDSON SC: Yes.

MS HARTIGAN: So Machinery of Government changes typically occur when there's changes to the administrative arrangements order, but that's a process that we have just gone through with Home Affairs.

MR DONALDSON SC: Alright - because one thing that I was toying with was - having regard to issues that I've seen here particularly in relation, well not particularly but Dr Corner's report is an example. One thing I was toying with was recommending that the relevant Minister under the division be the Attorney-General and not the AFP Minister with a hope that the Attorney-General would perhaps have a concentration on some of these matters that an AFP Minister who wasn't necessarily a lawyer might not have.

MS HARTIGAN: If I could say something in response to that, I suppose one of the strengths of the scheme, I think is in its requirement for collaboration. So with Home Affairs, with ASIO, with the State and Territory counterparts I think I've certainly seen it as a helpful mechanism but, yes, I mean who knows what might happen in the future.

MR DONALDSON SC: Now, I jumped straight in. Were you wanting to say something, Brooke, or anybody to say something before?

MS HARTIGAN: It was a brief opening statement.

MR DONALDSON SC: Yes, please.

MS HARTIGAN: And we have covered it before, but it might just set some context. Initially we wanted to thank you for giving us more time to provide our supplementary statement and thank you for providing an opportunity for us to come here today to speak to that. As you know I'm Brooke Hartigan. I'm the First Assistant Secretary of the Security and Counter-Terrorism Division and I'm joined today by Luke Muffett Assistant Secretary of the Security Law and Policy Branch, and Phillip Ng, the Assistant Secretary of the High-Risk Terrorist Offenders Branch, so the two different branches within my division.

Following the election in mid this year, as we've discussed and under the new Administrative Arrangements Order which commenced on 1 July 2022, the Attorney-General now has both policy and administrative responsibility for the Criminal Code Act 1995 including Division 105A, which is the subject of your review, and is also the Minister responsible for the Australian Federal Police. Accordingly, the Attorney-General's department has taken on new responsibilities for supporting the Attorney-General as decision-maker and applicant in the HRTO matters, and for advising government in relation to any legislative reforms recommended as part of this review.

The changes in the Administrative Arrangements Orders resulted in Machinery of Government changes as we have mentioned, with some functions and staff moving from the Department of Home Affairs to our department, and these changes took effect from 18 August 2022. Under the new arrangements the Attorney-General's Department is responsible for leading and coordinating on all HRTO casework, while the Department of Home Affairs retains responsibility for the enabling frameworks I mentioned earlier, in support of a Commonwealth HRTO regime and for CVE countering violent extremism.

In managing the HRTO casework, the department continues to ensure a collaborative approach. We work in very close partnership with the Australian Federal Police, who were here earlier this morning, and also with our

Commonwealth agency colleagues at the Department of Home Affairs, and state and territory colleagues in the law enforcement and corrective services space.

There are tried and tested governance arrangements in place to formalise collaborative decision-making on approaches in HRTO cases. There is also growing experience in our collaborative approach to monitoring offenders subject to Commonwealth post-sentence orders.

MR MOONEY: Sorry, what are the tried and tested?

MS HARTIGAN: They're the ones its RECG, the talk that Richard spoke about and also Sandra spoke about before, which also sit underneath a RIF, a regime implementation framework.

MR MOONEY: We have that, yes.

MS HARTIGAN: Yes. The RIF. That's right.

MR DONALDSON SC: Another one. Yes.

MS HARTIGAN: As all here today will know the Commonwealth's post-sentence order regime is in its early stages. Since the post-sentence order scheme was established in June 2017 six interim detention orders and two continuing detention orders have been made. Since the extended supervision order scheme was introduced in December 2021, five interim supervision orders and one extended supervision order have been made. All of these orders have been made in relation to three offenders who had some air time today, Mr Abdul Nasa Benbrika, Ms Hadashah Sa'adat Khan and Mr Blake Pender.

MR DONALDSON SC: Sorry to interrupt again, do you know off the top of your head, how many control orders have been made in that same time period?

MS HARTIGAN: I don't, I'm sorry. A matter for the AFP. As at today's date there is one HRTO offender subject to a CDO, Mr Abdul Benbrika. One offender is currently subject to and ESO, extended supervision order, Ms Hadashaa Sa'adat Khan and one offender Mr Blake Pender is subjected to an ISO, the interim supervision order. To provide some brief additional details since we submitted our supplement submission, on 8 November the Supreme Court of Victoria imposed an extended supervision order on Ms Sa'adat Khan for a period of 18 months. Ms Khan had been subject to successful interim supervision order since she was released from custody on 26 August 2022, at the end of her sentence.

Mr Pender was released from custody on 18 October 2022 to an interim - subject to an interim supervision order imposed by the Supreme Court of New South Wales. On 7 November 2022 Mr Pender was arrested and charged with allegedly

breaching the conditions of the ISO. He has been refused bail and will remain on remand until his next hearing on 23 November 2022. The extended supervision order hearing has been listed in the New South Wales Supreme Court for 5 December this year. The Attorney-General's Department along with other Commonwealth agencies represented here this morning and through the afternoon strongly supports your review of division 105A. We are committed to ensuring that the post sentence order framework is fit for purpose and applied in an open and transparent manner.

As you have noted, the Attorney-General's Department appeared at the public hearing in June this year. It was very helpful at that stage for us to hear your insights and comments at the hearing. We have since provided the supplementary submission to your review and we look forward to continuing to assist you and your office with this important work.

MR DONALDSON SC: Thank you very much, Brooke. Did Luke or Phillip want to say anything? And again, thank you for the response from the Attorney-General's Department. It addressed the issues that I had indicated and other things as well. So - and some of the information that I have for this review could only have come from your department and so I'm grateful for that, for that help. Okay. So I've got quite a lot for you, really.

MS HARTIGAN: We figured that when we saw we got the most air time on the agenda.

MR DONALDSON SC: Yes, it probably won't take all of that. Now - and that is largely because I am at a very advanced stage of the work on this review. It's not to say that this hearing is an afterthought. I've learned some things today that have been very helpful for me and I am sure I will hear more from you. But - so I think I'm at a very advanced stage with a lot of things already. Can I ask you a couple of things, though, about your review? I don't think it was you the last time at the hearing, but I did express some views about the thoroughness of the - is it the compatibility statement that was made with the HRTO bill?

MS HARTIGAN: Yes. Statements of compatibility.

MR DONALDSON SC: And I've got material back from you in response to that. I don't think it would be - and you refer in that to the New Zealand case. I don't think, well, is it your position that the only norm that needs to be satisfied at international law for the validity of a post-sentence detention regime is that there is regular review of any such order by an independent body?

MS HARTIGAN: No, not the only requirement in international law, no.

MR DONALDSON SC: And so, would you accept that a requirement of it is that any post-sentence order either of detention or of ongoing supervision have as a purpose the rehabilitation of the defendant and their reintegration into the community.

MS HARTIGAN: Certainly. I think we made it either in one of our supplementary or earlier submission that we see rehabilitation and reintegration into society as very much part of the protective nature of the regime.

MR DONALDSON SC: Yes. But I think you don't necessarily support it being identified as a separate object.

MS HARTIGAN: I'm not sure we have a position. I mean, certainly because our - our position thus far has been we see it as an integral part of the protection mechanism. And, indeed, in the cases that we have been involved in, we have been at pains to ensure that in the ESO conditions for example that there are plenty of therapeutic conditions and certainly see it as part of our role in taking this forward. Whether it needs to be articulated in the objects -

MR DONALDSON SC: Can I interrupt you there?

MS HARTIGAN: Yes please.

MR DONALDSON SC: But a new Minister responsible for this part of the Act may say, "I don't care about rehabilitation of this mob. We are not doing anything about that" and there would be nothing in the Act that would preclude that policy decision in.

MR NG: The court would still have to consider, in the list of the matters the court has to consider, the offender's participation in the rehabilitation program.

MR DONALDSON SC: Yes, and if it's not offered then it's pretty hard to participate isn't it? That factor, if it is offered to you, you don't participate, that's a factor held against you but it doesn't require those services to be provided. I understand your position and I'm not going to have a go at you. But all I'm saying is that if that is so that you don't have a position on it because it's almost a given, then it doesn't seem to me there would be any great issue with expressing it as either an object of the division or a requirement.

MS HARTIGAN: We have been listening to your discussions over the course of today and sort of where you're going with how it would be articulated, so whether it would be a prioritised object. So, while the protection of the community might be the paramount one, whether this one is a primary consideration or whether you have them together, curious to know whether you think this is just, where you put an "and" into the object so it's protective and rehabilitative in nature.

MR DONALDSON SC: Well, I probably would and I say that because although I agree with you, that rehabilitation and - well, the rehabilitation aspect of it is embedded, if you like, in the protective purpose. I'm not sure everyone has that view. In fact, I'm pretty sure some people don't. So, it would be just so there's no doubt about that and just so that its focus is not lost by diffusion it would probably be an "And". And that's why it would - that's why some issue of prioritisation of it may arise.

But I've got a pretty well-developed view on that and I just wanted to put to you that if rehabilitation and reintegration are as uncontroversial as everybody seems to think it is, it seems to me that it would be a good thing for it to be there. Because, as you know, in the Pender decision, I think Justice Walton took the view that because there was no express reference to it in the legislation, it was not a matter to which his Honour had to have regard there. Now, his Honour might be wrong in having that view, but I think because that view can be held, it needs to be tidied up. So I think you're going to get that -

MS HARTIGAN: Okay. Good to know.

MR DONALDSON SC: - recommendation.

MS HARTIGAN: Thank you.

MR DONALDSON SC: That's one thing. And with the international, I think I've dealt with the international obligation as well. I must say I think that that's pretty - and I've got a lot of this from your very helpful information but I think that my understanding of the international law obligation in this respect now is pretty well developed. And I think from the UN Human Rights Committee report, I think that says a lot of what needs to be said, and I think it says it more clearly than the committee's reports in relation to Fardon and Tillman, myself, and I don't think that you've put anything to me that's inconsistent with the UNHCR: view from General Comment Number 35. Alright. So that has been very helpful.

Now can I ask you something that's harder than that. Under my Act, I have to have regard to the proportionality of this regime to the risk caused by, effectively caused by terrorism, and by whether the regime remains necessary, so whether it's proportionate to any threat of terrorism or threat to national security and whether it remains necessary. One thing that has intrigued me when I've had to ponder that question is what happens in jurisdictions that have same history and culture of ours that deal with it?

The United Kingdom, which has a far greater experience of extremist violence than we do, doesn't have continuing detention orders. New Zealand, after the shocking massacre in Christchurch where there was an extensive royal

commission into ensuring that that doesn't happen again, there was no recommendation about continuing detention orders. I don't think they exist in Canada. So, it seems to me that we're a bit of an outlier in relation to this.

I have my own views as to why that might be so, that don't matter one way or the other. But we do seem to be an outlier and that we are an outlier, it seems to me to be relevant to questions of proportion at least, if not necessity. Would you disagree with that?

MS HARTIGAN: I would say that the experience that our partners, like-minded countries, have is very relevant context for us, particularity those that have experienced, sadly, you know, terrorist events. But I don't think they should dictate what we can do in our legislation. So this regime -

MR DONALDSON SC: No, I'm not saying. I'm not saying anyone dictates anything.

MS HARTIGAN: Well, I just think that it's important context that, you know, we can come up with a regime that is slightly different to others. And certainly, we welcome shared experience from them and we would welcome sharing ours with them as well.

MR DONALDSON SC: It's not really slightly different. It seems to me that there is a very real difference between supervision of a person post their sentence and detention. It seems to me they are fundamentally different.

MS HARTIGAN: Yes.

MR DONALDSON SC: And if that's right, and that's just a view I have, I'm afraid you're not going to be able to convince me otherwise. And if that's so, then I don't think that the way that we've responded to this issue is just a little bit difference to others. I think it's fundamentally different. And when I look at what Britain has been through with terrorist offending since 2001, and that there have never been continuing detention orders in the UK, it just seems stark. The UK, of course, has - interestingly, the United Kingdom has the experience where a person who had been released, shortly - for a terrorist offence, shortly after their release committed that atrocity on, whichever bridge was.

MS HARTIGAN: The Streatham one.

MR DONALDSON SC: I can't remember his name, but they have, you know, an actual experience of that.

MR DONALDSON SC: When that happened there were no calls for detention centres. Anyway, it seems to me that is something that's relevant to proportion. I

understand you to be saying, Brooke, and I'm trying not to be unfair to you, that - yes, well, I can't tell you you're wrong but it certainly shouldn't dictate the result, and I think I agree with that. How about recidivism? Do you reckon that's relevant to questions of proportion and necessity?

MS HARTIGAN: I think it's again, relevant context, but as we've discussed in the two that did occur in UK, were recidivists. So low rates, I agree with you. But again the regime that we've implemented here is very much specific to the offender. So, it's the risk that an offender presents.

MR DONALDSON SC: Yes, I agree but part of the explanation for that is you don't have an actuarial tool to deal with risk assessment.

MS HARTIGAN: No.

MR DONALDSON SC: So, it has to be. And the other thing that's concerning about, when you look at this regime with very low recidivism rates - and there's no reason to think, I don't think, that any of the numbers from Holland, Belgium, Spain, United Kingdom, all through Europe actually, Germany is the same, no reason to think that those recidivism rates would be different here.

MS HARTIGAN: Yes.

MR DONALDSON SC: So you assume those sort of numbers. But you have a regime of putting people in detention to deal with it, where you're never actually going to know whether that's an appropriate order or not because you won't have recidivists if you're putting them in continuing detention, under the sorts of conditions that these people are likely to be under.

MS HARTIGAN: Yes, but I guess what we could say is that the CDO regime itself is meant to be a measure of last resort. Certainly, it's for the most extreme cases and it's not continuing in the sense that it doesn't have a finite time, you know, it's three years maximum with review, both statutory, and also can be initiated by the offender themselves. I mean, we realise it's a serious - you know, a serious thing, but it's also - we have the mindset that it's for the most extreme circumstances.

MR DONALDSON SC: And so, again, I keep looking at this every time I turn my mind in detail to these matters . When you make the application - this gets to - an unacceptable risk if the person's released, that they will commit a serious Part 5.3 offence. So you've got to prove that, and an ESO won't deal with it.

MS HARTIGAN: Yes.

MR DONALDSON SC: That's basically what subsection (2) means.

MS HARTIGAN: Yes.

MR DONALDSON SC: And so I struggle with the way that's done that way because essentially an AFP officer has to say, "I can't dream up any ESO conditions that deal with this." So, in effect, the question is a CDO is the only way of dealing with this risk. That's really the question, and I may well be recommending that, well, that's actually a better question to ask than asking in the way you ask it.

MS HARTIGAN: In the legislation, yes.

MR DONALDSON SC: But that I think is a detailed thing rather than anything of substance. But what comes from that is, if you look at the tasks that are put to the relevant expert - a relevant expert I think it's too much to ask of a relevant expert even if they're an expert, by that I mean a recognised field of expertise.

MS HARTIGAN: Yes.

MR DONALDSON SC: It's too much to ask of them is there a risk of a serious Part 5 offence because that's not what the tool does. The tool is developed to risk of violent extremism; so that is, in effect, committing a violent act which causes harm due to an extremist ideology, religiously or politically motivated. So that's what risk assessment is all about. And that's not what the legislation asks a relevant expert to do. It might be the job for the court but that's not what the risk assessment does.

And so, the question of working out, then the question is: well, who's going to be the best person to decide whether an ESO is going to be able to deal with that threat of violent extremism? And the way it's been done at the moment is I think that's an AFP officer gives that view. Although, I think the risk assessors also seem to deal with that even though the legislation doesn't provide for that. I don't have any particular problem with it, I've got to say.

MS HARTIGAN: There's a full suite of information. The AFP information that we get from corrections, where the offender has been held for the term of their sentence, information from the expert panel. And then the conditions, whether it's a CDO or an ESO and then whether, if it's an ESO what conditions will be applied, is hashed out in the governance arrangements that we spoke about before.

So it's a case, you know, we look at all the evidence before us and then make a decision about what's the most appropriate thing to put forward to the Attorney who we have to convince in the first instance, and also, what conditions are most appropriate? Are they weighted enough on the therapy side? Are each of the law enforcement conditions required and why? So there's a process where that's sort of

nutted out, presented to the Attorney and if the Attorney agrees then it's presented to the court.

MR DONALDSON SC: But what happens if a court decides, "I'm not satisfied, having heard your submissions, that a CDO is the only way to deal with that risk"?

MS HARTIGAN: Well, they have the discretion not to make it.

MR DONALDSON SC: Yes, I know but you have then got to go back and have a whole hearing about an ESO, don't you, and your risk assessor, who has said, "Well there's no way that this risk - the only way this risk can be dealt with is by a CDO", they can't turn around and say, "Okay, well, I'm wrong on that so here are the conditions of an ESO that satisfy." That's not going to happen, is it?

MS HARTIGAN: Well, yes, exactly. It's open but it's not pursued. So if the court decides there's no CDO, there's no CDO.

MR DONALDSON SC: Yes, but that wasn't the question I was asking. I know that. The court then says -

MS HARTIGAN: You're asking whether or not we can go back and -

MR DONALDSON SC: Yes. The court then says, "well, I'm not satisfied a CDO can do it, I'm not necessarily convinced that this person is to be released, I want to hear about an ESO". You then have to go back and say, "Here are the terms of an ESO that would satisfactory the risk" which would require you, would it not, to get a new risk assessment done?

MR NG: That's correct.

MR DONALDSON SC: Okay. So that's how you would do it.

MR NG: We would seek a new risk assessment at that point if the court had refused the making of a CDO because they weren't satisfied that the high level, the high probability of that risk occurring was - the threshold was met. You would have to go back and seek that. And then at that point, I think perhaps in answer to your question, the relevant expert would then be looking at questions of whether those - both the risk and whether the ESO conditions are, for example, reasonable, is the test reasonably appropriate and adapted to the risk that is posed by that offender. So I think it doesn't pre-judge that conclusion, the fact that the CDO -

MR DONALDSON SC: Both Phillip and Brooke, you both sort of said whether an ESO is appropriate and then the terms of an ESO. But it's only the terms of an ESO. It's what is going to be effective to deal with the risk. But I'm grateful, Phillip, because I've never been able to get an answer on this from anyone before.

So if the court doesn't accept that the CDO is the only means of dealing with the risk, there would then have to be a separate process by which you would be contending that an ESO on particular terms did.

MR NG: Sorry, Brooke and I were discussing. That's right. I mean, the extra report, as Brooke has mentioned, would only be one component of it. Obviously at that point we are falling back on our pretty established architecture, and under the sort of the interagency conditions we have to kind of consider what would be appropriate in terms of ESO conditions for that particular offender, and what kind of application, whether we think the application should be made and the recommendation made to the Attorney.

MR DONALDSON SC: Yes. Alright. I understand. That's a pretty lengthy process.

MR NG: Well, there is certainly, as you have seen from the cases, a large volume of evidence that has to be gathered together, and as is fitting for this exceptional regime, to be able to be able to put that before the court to satisfy the -

MR DONALDSON SC: I suppose what you would say in response to any issues about time is if you are unsuccessful in getting a CDO a person is then going to be released on an ISO, because there's going to be a supervision order because he's not going to be detained. So there will be a supervision order. So the moment the CDO is rejected there will be an interim supervision order until the hearing of the full ESO, won't there?

MR MUFFETT: Depending on timing as well. If this is all -

MR DONALDSON SC: Well it never has been. It's not going to be.

MR MUFFETT: Yes.

MR DONALDSON SC: I'm not having a go at you, but all I'm saying is these things by their nature, you know, happen late in the piece.

Anyway, that's fine. I perfectly understand what you're saying to me. And maybe the issue in relation to time is not a real issue because there'll always be an ISO, an interim supervision order, at that time. So if there's some delay getting before the court in relation to an ESO you're not going to have anybody in detention while that's happening. Logically, that's right, isn't it?

MR NG: Yes, that's right. I think it will just depend on how much - certainly how much time was there and when the application was made, but that's right.

MR DONALDSON SC: Okay. Alright. So that's, yes, that's very helpful to understand. Can you tell me something now about the 105A.4 process. So this is the detention regime. So, again, I think the principle behind this is a person in detention should not be held - or needs to be held in circumstances that are consistent with their status as being a person who's not imprisoned. A specific example of that is in subsection (2). That is, they must be kept in conditions that are separate from the general prison population and I think that responds to an international law norm. And I noted from your very helpful response that some of the provisos in subsection (1) you think could be excluded. I think it was (a). (1)(a).

MS HARTIGAN: Sorry, can you say that again, Grant, that we excluded something, did we?

MR DONALDSON SC: Yes, I thought that in your submission to me - because the way 105A subsection (4) works is that a person can be held in detention in a jail but must be held in circumstances consistent with their status, or appropriate to their status, as a person who is not serving a sentence of imprisonment, subject to requirements. So these are, if you like, provisos or carve-outs. So in these circumstances a person can be treated in a manner that is not appropriate to their status if to do so is necessary for A, B, C, D.

MS HARTIGAN: Yes.

MR DONALDSON SC: And I understood your submission to be, but I might be confusing you with somebody else, that subsection (a) in (1) was no longer required. I think that's right.

MS HARTIGAN: We're just checking that. Sorry, Grant.

MR NG: Sorry, just have a look at page 8 of our supplementary submission. Is that the part you are referring to?

MS HARTIGAN: The supplementary one?

MR DONALDSON SC: It's alright. I've got it.

MS HARTIGAN: Mine has got scribbles all over it.

MR NG: I think you might be referring to page 8.

MR DONALDSON SC: I think I am confusing you. So you're not saying that. Alright. Well, because the difficulty with these provisos is that they are pretty easy ways to avoid the requirement of (1), aren't they? So -

MS HARTIGAN: That's not their intention, but I see what you're saying, yes.

MR DONALDSON SC: So the effect of this is a person can be detained in a prison, but the manner in which they are detained has to be appropriate to their status as a person who is not serving a term of imprisonment, except if that's necessary for the management of the prison. Well, prison authority turns around and says, "Well, we need to keep them in these means that are inconsistent with their status for the management of the prison". It seems to me to be a pretty easy way to get out of that.

Anyway, I have again sort of considered these matters, because they've been the subject of submissions by others, but they give rise to a greater concern that I have, and that is this provision, which imposes an obligation - so it says a terrorist offender must be treated in a particular way. That's not the subject of an order by the court, is it? So the court doesn't order that a person be kept in particular conditions of incarceration or detention.

MS HARTIGAN: Yes, to our knowledge, you're right.

MR DONALDSON SC: So - and I noticed in the Benbrika matter, for instance, there was a detailed affidavit put before the court from Corrections Victoria, which set out the conditions in which Mr Benbrika would be kept. But nothing was made of that in the decision because it's not a matter for the judge, I don't think. So what happens if somebody is kept in conditions that are not appropriate or consistent with their status?

The only thing that could be done about that is for the person to bring on some sort of application for administrative or judicial review of their conditions, isn't it, which would be difficult for a person in detention. In fact, also some complexities as to where you would bring that, I would have thought. I don't know if it's - I just haven't looked as whether it's an ADJR matter although, having regard to the administrative arrangement between the Commonwealth and the state -

MS HARTIGAN: That's right.

MR DONALDSON SC: - corrections facility it may, in fact, be a matter under state jurisdiction anyway. So those concerns have given - and because it's really not reviewable in a real sense.

MS HARTIGAN: Yes.

MR DONALDSON SC: And because I should say to you, I think reasonable people could form different views on whether certain conditions of detention are consistent with a person's status or not. I think that there needs to be some sort of

oversight of this obligation and I'm likely to be recommending that. And if you have anything you want to say about that tell me.

MS HARTIGAN: I don't think anything specific to your point other than to note that yes, there's a negotiation between the Commonwealth and the states about the housing arrangements of these offenders. So there is detail in that about, you know, where they will be housed.

MR DONALDSON SC: That's only housing really, isn't it?

MS HARTIGAN: It also deals with what they have access to, et cetera. But I see your point about an oversight arrangement for that.

MR DONALDSON SC: Yes. Because my concern is not so much with the physical accommodation because you can see pictures of that, it's more that - and Mark gave the example this morning, a person who is the subject of a CDO has been found by a court to be a person who is an unacceptable risk of committing a terrorist offence. And in many prisons that means they will be on the higher security rating, which means they will have very limited access to many things. So it's just determining whether those sorts of things might be appropriate with the status that I think needs oversight and review.

So I'll likely be recommending that with a view to not wishing to create a massive bureaucracy that deals with that issue. But, again, in that respect I must say I've been heartened by the Victoria post sentence authority which actually administers the ESO scheme in Victoria, which is a - you know, it seems to me - I don't know if you are of the same view Mark, but we have spent quite a bit of time with them and it seems to me to be an extremely well-run small organisation. It doesn't deal with prison. It deals with ESO conditions, really. But I had hoped that this could all be done without - without a massive independent bureaucracy.

MR MOONEY: Well, in fact, it has just sitting at the top of it, some part time officials or appointments, who are independent. But the secretariat, they draw on staff from the Attorney-Generals and justice. So it's only at the very top of the organisation that you have separate appointments and it's supported by the public service. But it brings expertise, independence, and an ability to report on relevant matters.

MS HARTIGAN: We were curious on that, in terms of what its role would be. Would it be more the implementation, administration side of things or oversight or both?

MR DONALDSON SC: For the ESO?

MS HARTIGAN: The oversight. Yes. Because it was sort of going towards what the AFP Sandra Booth mentioned this morning, if they were coming in as another party in terms of the pulling the brief of evidence together, doing the application and then administering or monitoring the ESO conditions it might add a bit of confusion to the mix. But if it's an oversight arrangement -

MR DONALDSON SC: Yes. No, I have in mind for that - and the AFP was really helpful today, because they gave me an understanding of how things are going to work. Because, of course, we don't have ESOs yet so it's really hard to really look at how they are practically operating. But my concern in relation to ESOs is really that, and I'm aware of Mr Benbrika's environment.

There's nothing like that this Western Australia. Unless it was built by the Commonwealth inside a state prison you would never have anything like that and I now have a fair understanding of how ESO conditions for dangerous sexual offenders are administered in Victoria and they are fundamentally different to the way they are administered in Western Australia I can assure you.

MS HARTIGAN: Yes.

MR DONALDSON SC: And what we cannot have happen with a Commonwealth scheme is for there to be different terms of detention or supervision in different states. And so I don't envisage there being a body, for instance, that actually administers ESOs. That is, that it be the specified authority, say. But that it be a body that oversees how the ESOs are administered to determine whether there's uniformity between the states is really what I have in mind. It will have to report, yes. Well, it reports.

MS HARTIGAN: So consistency in the approach, not necessarily the conditions themselves, as they are tailored to the offender.

MR DONALDSON SC: Well, the court orders the conditions. So they're not going to be ordering conditions, but they will be reviewing how the ESOs are administered and they could include, you know, alternative - so there are delegated powers to the designated authorities in relation to certain matters. If, for instance, there was never a power exercised in relation to a specific matter ever in Western Australia, but every time in Victoria that might be interesting. It's really to ensure uniformity of how these people are treated under a Commonwealth scheme throughout the Commonwealth.

MS HARTIGAN: Yes. You mean in terms of breach? So if there was a breach how it's dealt with in one jurisdiction.

MR DONALDSON SC: Something like a breach might be difficult, because it depends very much on the circumstances of the breach but again to give you an

example, we received great assistance from the New South Wales body that is responsible for administration of throw ESOs and the manner in which those supervision orders are - well, the nature of those orders and the way in which they are administered in New South Wales is, to my mind, extraordinarily resource-intensive. I'm not saying bad, I'm just saying the resources are extraordinary and the prescription of behaviour of defendants in that system is quite extraordinary as well. So they use, what do they call it? Not a diary system.

MR MOONEY: Scheduling.

MR DONALDSON SC: A scheduling system. So that effectively schedules hour by hour what a person is going to be permitted to do. Well, you know, that is the way ESOs are going to be dealt with -

MS HARTIGAN: Well - so we have one ESO in relation to Ms Khan, the way the conditions are, to propose them to the attorney and to the court is through that governance arrangement. So the national consistency if you like stems from that arrangement. So we obviously want the approach to be similar, but the conditions themselves may be nuances to the offender. They may be quite different.

MR DONALDSON SC: Of course.

MS HARTIGAN: Yes.

MR DONALDSON SC: But the approach of New South Wales in administering those is very different to the administering things elsewhere.

MS HARTIGAN: That's where the AFP role comes in as the lead monitor of the conditions.

MR DONALDSON SC: Again, the AFP was very helpful today in explaining that, which I didn't appreciate as well as I had previously.

MS HARTIGAN: Yes.

MR DONALDSON SC: And so that has given me a great deal of comfort in relation to ESOs.

MS HARTIGAN: Yes.

MR DONALDSON SC: I should say in relation to ESOs, of course, I'm a very practical person and this is a very practical role. So it's looking at how things practically operate that are of interest and ESOs haven't practically operated much yet.

MS HARTIGAN: No.

MR DONALDSON SC: So it may be that those issues are issues for later.

MS HARTIGAN: We would agree.

MR DONALDSON SC: And the AFP gave me a good timeframe for that.

MS HARTIGAN: 24-36 months, we heard, yes.

MR DONALDSON SC: Yes. Exactly. Anyway, that's a matter that I had been thinking about and I have received some very interesting and helpful feedback on that today. Legal aid, I've got to ask you about that as well. So funding - I think you were all here when we had the Law Council people here. Is that an issue?

MR NG: So - yes. We did hear the testimony from earlier and I think some of the references to funding referred to our earlier submissions to you on it. I guess a couple of things to clarify. There was reference made to the expensive Commonwealth criminal cases fund, the ECCCF that continues to fund costs not just for post-sentence order matters but more generally. I think there was a comment made earlier regarding that it - and one that I was hoping to clarify briefly which was that I think it looked like the total amount of funding was going to decrease in the forward estimates. The point I just wanted to clarify there was that the amount, as reflected in those budget figures going forward is the base amount for the fund, which as you know, funds more than, radically more than just PSO applications. And that the Commonwealth is moving towards a more sustainable model for these PSO things including the potential to continue to fund the ECCF for that.

So that's just one small clarification for why that figure looks a bit different. But just to take a step back for the moment. Other than through the ECCCF of course as you would be aware, there's the safeguards in the legislation itself that refers to where the terrorist offender is unable to engage legal representation, I think it's in 105A(15)(a).

MR MOONEY: I think the experience to date, certainly what we heard from Benbrika's legal team was in practice that the Commonwealth sort of is a lender of last resort, if you like. So that they had to go through the rigmarole of applying for legal aid and getting an amount, which was obviously manifestly insufficient and the approval for funding came but it came, you know at the eleventh hour which caused a lot of, you know, delay and so they were just saying the way in which it operated practically in that case made it very difficult for them to prepare a case.

And, of course, in both Benbrika and Pender there was a need for an interim detention order just because of the timing. So that was one of the points they made

to us, which was that a lot of time was wasted having to go through lots and lots of hoops when it was pretty well understood that there was no way that they were going to get sufficient funding for a matter as complex as Benbrika from Legal Aid and that the subsequent, just the way the process worked had an adverse effect on them preparing their case.

MR DONALDSON SC: Yes. Because it works this way, doesn't it? They have got to go to legal aid. Legal aid has to process it. It's late in the piece. Legal aid goes through its processes and offers, you know, five grand. By then you are weeks away from the hearing and nobody can do anything until they know whether there's going to be a grant of aid, because they don't flow whether they are going to be engaged or not.

Now, this is a perennial problem, but with these matters it's a particular problem was unlike criminal matters where you get legal aid generally months or years before a hearing, here you have a very compressed time frame. And so if they don't get funding within a short period of time, the process is going to blow out past the sentence. So is there a way of dealing with that, because at the end of the day the Commonwealth is going to have to pay for this, at least in the near term and they are going to have to pay for these people to be adequately represented. So is there a way of doing that that enables that to happen?

MR NG: So, as I understand it, and that is entirely a legitimate concern to raise, that there is an ongoing process between the Commonwealth and the state and territory legal aid commissions in order to kind of anticipate the case load and to give reasonable estimates as to when, particularly in matters where we know that they're coming up, let's leave aside the short sentence matters, that's right, that there is adequate funding set aside.

MR DONALDSON SC: What if you cut out legal aid commissions, because that just - look surely, they should just come straight to you, and I don't care how you appropriate the funds, but the moment you introduce a state legal aid commission, that introduces a layer of delay that seems to me just to be unnecessary, because they're not going to fund it. State legal aid commissions don't have capacity out of their own funds unless it's some Commonwealth fund which fund these sorts of things, or if they have a capacity they are not going to because they will say it's a Commonwealth matter. You, Commonwealth, fund it. Why don't we have a system where they come directly to the Attorney-General's Department and the Attorney-General's Department undertakes to fund them to a reasonable amount in accordance with the regulations, and if there's any dispute it gets determined, you know, on a taxation by the court. So they know on day one.

MS HARTIGAN: I hear the bespoke arrangement that we would have to go off and consider.

MR DONALDSON SC: Correct.

MR NG: And I'm conscious statutory legal aid are receiving a lot of Commonwealth funding in the first place, so we just have to look at the interaction there.

MR DONALDSON SC: You will have an argument with state legal aid authorities, I can tell you. But I don't want to get into argument about that because I once used to know about all these things. But all I'm saying is state legal aid authorities are going to say, "We're not dishing that out, that sort of money out, for this when it's really a Commonwealth responsibility." Anyway, I'm likely to be saying something about that because it's very undesirable that we have people sitting in detention because of those sorts of things.

MR MOONEY: Yes, you know, Mr Benbrika and also Mr Pender had to agree to an interim detention order just because of the timing of their cases.

MS HARTIGAN: Yes.

MR DONALDSON SC: That was pretty easy for you. Anything else?

MS HARTIGAN: We wanted to clarify one thing if we could, in respect of if a court makes a decision not to issue a CDO. So, there is a provision in 105A.7(2) which basically says if the court is not satisfied to make the CDO they must seek material from the AFP Minister in respect of what conditions would have been, had there been an ESO requested, and then consider whether any ESO should be made.

MR DONALDSON SC: Yes, that says afterward. See, that's a bit intriguing. You're not saying that they do that at the time before a decision over a CDO is made?

MS HARTIGAN: I think they could but it would require a very comprehensive application.

MR DONALDSON SC: But if it says if the court is not satisfied about a CDO so they have to make that decision.

MS HARTIGAN: Yes.

MR NG: Yes.

MR DONALDSON SC: Then the court must - so that's always seemed to me that what happens is it's a two-stage process.

MS HARTIGAN: Yes.

MR DONALDSON SC: But they don't seem to deal with it that way. You've obviously seen the cases. It sort of gets all thrown in the mix in relation to the 1(b) question.

MS HARTIGAN: Yes.

MR DONALDSON SC: Is an ESO a ready alternative, as it were? But this is a two-stage process, and maybe the answer to my concerns about a two-stage process is that if you get through the first stage and a CDO is not ordered, then they're out on an interim supervision order straightaway, basically, and then you're coming back to argue about an ESO later on, because you couldn't suppose an ESO - sorry, an interim supervision order at that stage because you've missed out on a detention order.

MR MUFFETT: Yes, you would have missed out on a detention order: either you haven't met the risk threshold to the high degree of probability.

MR DONALDSON SC: In which event you walk. Or no, you don't necessarily.

MR MUFFETT: Yes, so it has a lower standard of proof there.

MR DONALDSON SC: Yes.

MR MUFFETT: Or you fail to satisfy the court that there's no less restrictive measure. So they might be sort of inclined to say that: well, actually there may be conditions that could be imposed that would be appropriate and that's when - failing on either of those two limbs is when the court would then sort of put to the AP Minister, knowing it wouldn't have been included in the initial application which was for a CDO, what would be the conditions of an ESO you would be proposing. And then they would consider that in making their - well, or potentially making an ESO order.

MR DONALDSON SC: Well, in fact, you've just reminded me: it has to be a two-stage process because the standard of proof that you apply at the second process is different to the standard of the first. So there has to be two processes. It just seems some of the decisions don't seem to necessarily reflect that because I think ESO conditions are thrown up in the course of it. Now, it may be that it's defendants who do that. I don't know why.

MS HARTIGAN: Impose the ESO conditions?

MR DONALDSON SC: Well, no, suggest an ESO on certain conditions could deal with that because if they persuaded the court of that then they wouldn't make a CDO.

MR MUFFETT: You fail on the least restrictive grounds, so that would drop them down. But I mean, in terms of all the evidence put forward to justify the high degree of probability about the future risk.

MR DONALDSON SC: No, all the (b) evidence is the same.

MR MUFFETT: And then the court would go, you haven't hit that bar.

MR DONALDSON SC: It would be in the ESO terms. The second hearing they are just looking at ESO terms in reality.

MR MUFFETT: Yes.

MR DONALDSON SC: Because it's not going to be - it's not likely to be determined on the first question as to risk assessment.

MR MUFFETT: You wouldn't think so.

MR DONALDSON SC: I agree. Okay. Anything else for you Mark? Anything else you wanted to say?

MS HARTIGAN: I don't think so.

MR DONALDSON SC: Alright. That's been very -

MR MOONEY: I just wanted to ask in relation - you might have heard Grant talking to Home Affairs about the obligation to disclose exculpatory material and whether or not he's considering making a recommendation that that be amended to take in - to borrow from the Commonwealth prosecution policy, what would - do you have a view on that? Do you think it's necessary? Because now AGD have responsibility for dealing with that and putting material before the court, do you think that would be helpful or -

MS HARTIGAN: I can see why maybe some clarification is required in relation to the exculpatory information request. My view is that there's a little nervousness about how wide the net might be cast and what that means in making an application going forward, like how much literature would you have to provide in an application to assure yourself that you have met the legislative requirement, whatever that looks like going forward.

MR DONALDSON SC: There would be no doubt with Dr Corner's report.

MS HARTIGAN: Yes but if there were additional one answers how do we assure ourselves? I mean, VERA-2R is not a mandated tool and what I've seen in judgments thus far is, you know, experts may use it and others. So is it a case of providing information on all of those things at the same time and what does that look like as this evolves in terms of volume. That would be my only query.

MR DONALDSON SC: Well, again and the Home Affairs people I don't think are here but they know my view on this. In relation to that matter Dr Corner's report was as to the VERA-2R tool. It was the most extensive review that had been done. It was given to Home Affairs in May 2020. There was a hearing in November 2020 where Dr Benbrika's sole attack was, "The VERA-2R tool is not a valid tool to be used for this purpose" and he led expert evidence on it. Now, that should have been handed over on any view of the world. Well, you're making applications for ESOs and CDOs now based upon VERA-2R. So have you got Dr Corner's report?

MS HARTIGAN: We do now, yes.

MR DONALDSON SC: Okay. Alright. So is there anything else you wanted to mention to us? It's been very helpful. And again, I'm grateful, I know the department invests a lot of resources in responding to these matters for this office and I'm very grateful for that. Anything else, Mark?

MR MOONEY: No.

SESSION 3: QUESTION AND ANSWER

MR DONALDSON SC: Thank you very much. So that is the end of the session today. We truncated the last two sessions, really, into less time, which was very, very helpful but again all of the issues I was interested in have been dealt with. I see that there are some people here who are not with the agencies. Were there any questions that anybody who is here wished to ask and I'm able to deal with?

MR DONALDSON SC: Mark Nolan is there. Yes.

PROFESSOR MARK NOLAN: Thank you. My only question is around human rights obligations. We've talked a fair bit about ICCPR obligations around co-mingling and other matters. What's in my mind is how relevant is the whole OPCAT and CAT expectations and norms around the co-mingling question or the question of CDO conditions generally? It would seem to me that the national preventive mechanism responsibility lies with the Commonwealth Ombudsman.

So there already is someone who is charged with considering those norms under CAT, OPCAT requirements before the subcommittee on the prevention of torture

reaches the country for regular investigations of places of detention, which could be bespoke facilities for CDO servers, they could be prisons. So I am just wondering to what extent the OPCAT, CAT human rights norms are as relevant in this context as where we always tend to start which is thinking about ICPPR.

MR DONALDSON SC: Yes. Mark, it seemed to me that the concerns that exist here, particularly in relation to the requirement for uniformity between the states as to how people are treated may best be dealt with by a bespoke oversight body, particularly having seen the way the Victorians do it, which I think has an independent body which I think deals with these issues pretty well. I haven't - we haven't actually dealt with the Commonwealth Ombudsman yet -

MR MOONEY: No -

MR DONALDSON SC: - to determine whether they would be enthusiastic about taking these responsibilities on. But I must say, in addition, in relation to the issues as to incarceration and whether they were consistent with status and the like, they are questions that I think are more suited to a body that has specialist skills in relation to that, that would have people from a penology background and the like, because they are, I think, pretty delicate questions of expertise.

So that was really - that was really my view as to why a bespoke body might be a best body to deal with those sorts things. But it's a good - I'm sure if we asked the Ombudsman whether they wanted that, they would give us a fairly short answer but we'll see. But it's a good point. Thanks for that. Otherwise, thank you everybody for coming along and that is the end of today's session. Thank you.

THE HEARING ADJOURNED AT 3.01 PM