



**Australian  
Human Rights  
Commission**

# Review into Division 105A of the Criminal Code (post sentence orders)

Submission to the Parliamentary Joint Committee on  
Intelligence and Security

23 June 2023

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Australian Human Rights Commission  
Review into Division 105A of the Criminal Code, 23 June 2023

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# 1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in relation to its review into the operation, effectiveness and implications of Division 105A of the Criminal Code. This is a statutory review which s 29(1)(bbaaa) of the *Intelligence Services Act 2001* (Cth) requires the PJCIS to conduct within 12 months of the completion of the latest review into Div 105A conducted by the Independent National Security Legislation Monitor (INSLM). The report of the review by the INSLM, Mr Grant Donaldson SC, was completed on 3 March 2023 and was tabled in Parliament on 30 March 2023 (INSLM Report).
2. Division 105A deals with the imposition of post-sentence orders (PSOs) on terrorist offenders. These orders may be either continuing detention orders (CDOs) or extended supervision orders (ESOs).
3. The Commission has made submissions to every major review of Div 105A since it was inserted into the Criminal Code in 2016. Most recently, the Commission made a detailed submission to the INSLM as part of his statutory review.<sup>1</sup> That submission drew on previous work of the Commission, including the following:
  - a submission to the PJCIS in relation to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth), which introduced Div 105A and CDOs<sup>2</sup>
  - a submission to the INSLM in relation to its 2017 statutory deadline reviews, which considered (in section 8.3) the interaction between the control order regime and Div 105A<sup>3</sup>
  - a submission to the PJCIS in relation to its comprehensive review of Commonwealth counter-terrorism powers, including Div 105A<sup>4</sup>
  - a submission to the PJCIS in relation to the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (Cth), which introduced ESOs.<sup>5</sup>
4. The PJCIS has indicated that while submissions should be prepared solely for the current review, they may refer to submissions made to the INSLM's review, or other reviews. The Commission gratefully adopts that approach. This submission deals with a number of important matters arising directly from the INSLM Report. It also refers

to the recent submissions to the INSLM and the previous submissions referred to above without reproducing those submissions in full again.

## 2 Summary

5. The INSLM Report tabled on 30 March 2023 contained shocking revelations about the inadequacy of the processes used to assess a person's future risk, for the purposes of determining whether to impose a continuing detention order on them.
6. The CDO regime was legislated in 2016 without a valid means of assessing relevant risks, but with assurances provided to the PJCIS that a sufficiently robust risk assessment process would be developed. Unfortunately, that has not come to pass.
7. In May 2020, the Department of Home Affairs (Home Affairs) was provided with a report by Dr Emily Corner and Dr Helen Taylor (Corner Report) that cast serious doubt on the reliability, validity and equity of VERA-2R – the leading tool used for risk assessments under Div 105A of the Criminal Code. The Corner Report concluded that VERA-2R lacks a strong theoretical and empirical foundation, has poor inter-rater reliability and questionable predictive validity.
8. Despite the strength and seriousness of these findings, VERA-2R was relied on by experts in two subsequent CDO proceedings. Further, the Corner Report remained secret until the fact of its existence and a summary of its findings were disclosed by the INSLM during his inquiry. A copy of the report was later released pursuant to FOI, with some redactions.
9. The INSLM concluded that the CDO regime could no longer be justified and his primary recommendation was that it be repealed. The Commission agrees with that recommendation. Section 4 of this submission deals with that primary recommendation and the reasons for it in more detail.
10. In section 5 of this submission, the Commission endorses a number of other recommendations made by the INSLM dealing with amendments that should be made to the remaining regime for extended supervision orders. These recommendations provide for a sharper focus on rehabilitation and reintegration; the proper disclosure of information that tends to suggest that an ESO should not be made; and ensuring

that evidence about future risk is only considered by a Court if it is admissible.

11. The Commission reiterates its previous recommendation to both the PJCIS and the INSLM that the threshold for making an ESO should require a Court to be satisfied to a 'high degree of probability' that the offender poses an unacceptable risk of committing a relevant act. This would bring the Commonwealth regime into line with the regimes in every equivalent State and Territory. The Commission also reiterates a number of specific recommendations about the kinds of conditions that may be included in an ESO.
12. Finally, in section 6 of this submission, the Commission makes recommendations to increase the oversight of the ESO regime. The Commission agrees that there should be an ESO Authority in the form recommended by the INSLM. Among other things, the ESO Authority would provide oversight of 'specified authorities' who are given the power to monitor compliance with the terms of ESOs and to vary the conditions attaching to ESOs.
13. The Commission also considers that there should be an independent risk management body responsible for developing and validating new risk assessment tools and processes, and accrediting people in the use of those tools and processes.
14. The findings in the INSLM report require a substantial re-evaluation and amendment of the way in which Div 105A of the Criminal Code has operated to date.

### **3 Recommendations**

15. The Commission makes the following recommendations.

#### **Recommendation 1**

The Commission recommends that the continuing detention order regime in Div 105A of the Criminal Code be repealed, while retaining the extended supervision order regime.

#### **Recommendation 2**

The Commission recommends that the objects of Div 105A of the Criminal Code be amended to include the rehabilitation and reintegration of the subjects of a post-sentence order back into the community.

### **Recommendation 3**

The Commission endorses and repeats the 5 recommendations made by the INSLM at [390] of the INSLM Report dealing with the disclosure of information that tends to suggest that a post-sentence order should not be made.

### **Recommendation 4**

The Commission recommends that Div 105A of the Criminal Code be amended to clarify that:

- reports of relevant experts can only be admitted into evidence if admissible by the applicable laws of evidence
- the court is not required to have regard to any witness's opinion evidence that is not admissible.

### **Recommendation 5**

The Commission recommends that s 105A.7A(1)(c) of the Criminal Code be amended to provide that the Court must be satisfied that the conditions to be imposed by an ESO are also reasonably necessary, and reasonably appropriate and adapted, for the purpose of aiding the offender's rehabilitation and reintegration into the community.

### **Recommendation 6**

The Commission recommends that the threshold for making an extended supervision order in s 105A.7A(1)(b) of the Criminal Code be amended to require that the Court be 'satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing, providing support for or facilitating a terrorist act'.

### **Recommendation 7**

The Commission recommends that any condition imposed by an extended supervision order or interim supervision order that requires a person to participate in treatment, rehabilitative or intervention programs or activities, psychological or psychiatric assessment or counselling, interviews or other assessments, be subject to a further condition that a person is only required to participate if they agree, at the time of the relevant activity, to so participate.

### **Recommendation 8**

The Commission recommends that the conditions requiring a person to consent to certain monitoring and enforcement activity in ss 104.5A(1)(c)(i), (2)(a) and (5); 105A.7B(5)(g)–(j); and 105A.7E(1)(c)(i), (2)(a) and (5) of the Criminal Code be repealed on the basis that they are not necessary, given the existing range of monitoring warrants.

### **Recommendation 9**

The Commission endorses and repeats the recommendation made by the INSLM at [461] of the INSLM Report dealing with the establishment of an ESO Authority.

### **Recommendation 10**

The Commission recommends that an independent risk management body be established to:

- (a) accredit people in the assessment of risk for the purpose of becoming 'relevant experts' as defined in s 105A.2 of the Criminal Code
- (b) develop best-practice risk-assessment and risk-management processes, guidelines and standards
- (c) validate new risk assessment tools and processes
- (d) evaluate the operation of risk assessment tools
- (e) undertake and commission research on risk assessment methods; and
- (f) provide education and training for risk assessors.

### **Recommendation 11**

The Commission recommends that 'relevant experts' be required to be accredited by the independent risk management body in order to be appointed under ss 105A.6 or 105A.18D of the Criminal Code.

## 4 Repeal of continuing detention order regime

### (a) *Need for risk assessment tool*

16. When the continuing detention order regime was first proposed in 2016, the Commission warned that for any system of preventative detention to be justifiable, it must be possible to make robust predictions about risk.<sup>6</sup>
17. The PJCIS concluded at that time, on the basis of the evidence before it, that there was no tool available that could validly predict the risk of future terrorist offending.<sup>7</sup> The Attorney-General's Department agreed that such a tool was necessary; said that it could take months, or even years, for such a tool to be developed; but nevertheless asked for the legislation to be passed in anticipation that such a tool would eventually be developed.<sup>8</sup>
18. Because of the 'enormously significant matters' still to be developed,<sup>9</sup> including a valid risk assessment tool, the PJCIS recommended that the Attorney-General provide it with a 'clear development and implementation plan' by the time of the second reading debate for the Bill in the Senate.<sup>10</sup> In the implementation plan provided to the PJCIS, the Attorney-General's Department agreed that '[a] risk assessment tool will be required to support the expert's judgement'. It proposed a scoping exercise in April 2017, a period of tool development between May and December 2017, and ongoing validation of the tool from January 2018.<sup>11</sup>
19. In 2017, the High Risk Terrorist Offenders Implementation Working Group identified the Violent Extremism Risk Assessment Version 2 Revised (VERA-2R) as 'the best available violent extremism risk assessment tool to assist experts'.<sup>12</sup> Since that time, VERA-2R has been consistently identified as the tool to be used for Div 105A assessments.
20. A joint-agency submission to the PJCIS in September 2020 noted that the Australian Government has 'identified the VERA-2R as the most appropriate tool currently available' to assess risk of people engaging in terrorism related conduct.<sup>13</sup> It was relied on in the application in November 2020 for a CDO against Mr Abdul Nacer Benbrika,<sup>14</sup> and in the application in October 2021 for a CDO against Mr Blake Pender.<sup>15</sup>
21. However, as recorded in the INSLM Report, in May 2020, prior to each of the events in the previous paragraph, Home Affairs had been



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provided with the Corner Report that cast serious doubt on the reliability, validity and equity of VERA-2R.<sup>16</sup>

22. The INSLM concluded that the Corner Report should have been provided to Mr Benbrika and produced to the Court in relation to the application for a CDO against him, and should have been provided in all other applications where VERA-2R was relied on for the purpose of risk assessment.<sup>17</sup> He said that there was 'no excuse' for not disclosing the existence of the report, and that it was 'shocking' that orders have been sought, and made, without parties knowing that the Corner Report exists.<sup>18</sup>
23. The Commission does not know whether Home Affairs made the PJCIS aware of the Corner Report at the time of its *Review of APF powers in relation to terrorism* (between September and December 2020) or its *Review of the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020* (in November 2020). In the Commission's view, the Corner Report should have been disclosed to the PJCIS and discussion of the Corner Report should, at the least, have occurred in confidential sessions of the PJCIS in relation to each of those inquiries.

(b) *Inadequacy of VERA-2R*

24. The Corner Report examined the theoretical and empirical underpinnings for VERA-2R and then performed a series of experiments to test both its predictive validity and inter-rater reliability.<sup>19</sup> The authors of the Corner Report described it as the first piece of research to be performed on VERA-2R.<sup>20</sup> Almost all of the previous literature on VERA-2R had been written by the primary author of the tool, raising potential concerns about bias arising from authorship effects in reporting of results.<sup>21</sup>
25. In terms of its theoretical and empirical underpinnings, the Corner Report found that the evidence base cited in the VERA-2R user manual and supporting documentation was of poor quality, and was primarily composed of theoretical assertions, secondary citations of literature reviews, and media articles.<sup>22</sup> Only 23.3% of citations were drawn from empirical findings in the works referred to.<sup>23</sup> The evidence base relied on for the instrument was 'less concerned with scientifically validated information, as opposed to the opinion of the authors'.<sup>24</sup> As a result it could not properly be called a Structured Professional Judgment (SPJ) tool.<sup>25</sup> At best, it was SPJ 'lite'.<sup>26</sup>

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26. In order to test the validity and inter-rater reliability of the tool, the authors of the Corner Report conducted a comprehensive search of legal and non-legal Australian databases to source known cases (N=153) that involved relevant acts.<sup>27</sup> This was supplemented with some European and Canadian cases, and closed source cases provided by Home Affairs.<sup>28</sup> The research team drew up 60 case vignettes that differentiated between political and non-political, violent and non-violent, and lone and group based actors, as well as those at risk of radicalisation and a neutral control group.<sup>29</sup> 30 participants comprising non-experts, experts and those trained in the use of VERA-2R or another tool Radar, each completed on average 4 assessments using one of these two tools.<sup>30</sup>
27. The Corner Report had this to say about predictive validity:
- The accurate identification of risk of future offending is critical for offender management and public safety. Identification accuracy is most often measured by assessing the predictive validity of the instrument. Employing an instrument with no proven predictive validity has serious implications, particularly in the terrorism domain, where the consequences for the inaccurate identification of offenders are potentially deadly. Inaccurate instruments may identify individuals who are subsequently subjected to intervention procedures or deprived of their liberty, despite not being of any risk. The other consequence of a lack of predictive validity is that an instrument may fail to capture those individuals who do move to carry out an act of mass violence, which has serious societal and security consequences.<sup>31</sup>
28. Predictive validity was measured in five ways:
- Sensitivity: the proportion of those who engaged in the relevant act who were judged to be high risk
  - Specificity: the proportion of those who did not engage in the act who were judged to be low risk
  - Positive predictive value: the proportion of those judged to be high risk who went on to engage in the act
  - Negative predictive value: the proportion of those judged to be low risk who did not go on to engage in the act
  - Area under the curve (AUC): the probability that a randomly selected violent extremist received a higher risk score than a randomly selected non-violent, non-extremist.<sup>32</sup>

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29. The results of those tests are recorded at pages 136–137 of the report. The report noted that the AUC was a particularly useful method of assessment because it was resistant to changes in the base rate, and was a more accurate representation of the predictive value of both instruments.<sup>33</sup> The report said this about the AUC results:

The outputs for the AUC calculations are in Figure 4 below. The results show that the VERA-2R lacks both sensitivity and specificity ... . AUC values closer to 1 indicate that the instrument is able to readily distinguish between outcomes. The AUC value for violent extremism is 0.603. Accordingly, this indicates poor predictive validity (values of 0.5 to 0.6 indicate that the instrument is worthless as it is unable to predict outcomes). This outcome is not [statistically] significant ... however, the strength of the value does indicate a pattern of predictive value. ... Much like the outcomes for the other performance indicators, the VERA-2R's predictive validity for violent outcomes is extremely low. With a value of 0.510 ... the VERA-2R's ability to predict violence borders on worthless.<sup>34</sup>

30. The inter-rater reliability of the factors within the VERA-2R was assessed across 13 cases using the Krippendorff's alpha test.<sup>35</sup> If an instrument has been designed and implemented correctly, then similar outcomes will be expected across assessors when examining the same case.<sup>36</sup> In an instrument with poor inter-rater reliability, the interpretation of a factor that is deemed to indicate high-risk by one assessor may be interpreted to be of low-risk by another. These different decisions would lead to different outcomes for the case under scrutiny.<sup>37</sup> The findings of the Corner Report in relation to the inter-rater reliability of VERA-2R were as follows:

The average  $\alpha$  value for all assessed cases was 0.242. This indicates that inter-rater reliability of the VERA-2R is extremely low (values below 0.67 are considered worthless, values between 0.68 and 0.8 are considered poor, and values above 0.8 are considered good). The results also demonstrate, that if we were to conduct IRR testing across a population sample of cases, there is an 88.2% probability that the  $\alpha$  would be below 0.500 (indicating no inter-rater reliability).<sup>38</sup>

31. The Corner Report concluded that VERA-2R lacks a strong theoretical and empirical foundation, has poor inter-rater reliability and questionable predictive validity.<sup>39</sup>
32. In May 2023, the Australian Institute of Criminology published a review of violent extremism risk assessment tools to determine their suitability for use in Div 104 control order and Div 105A post-sentence

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order proceedings.<sup>40</sup> The INSLM had regard to a draft of that report in preparing his own report.<sup>41</sup>

33. The primary recommendation of the AIC was that 'VERA-2R remains the most suitable risk assessment tool for use with Division 104 control orders and Division 105A post-sentence orders and should continue to be used, in conjunction with other suitable tools as appropriate'.<sup>42</sup> However, this recommendation was qualified by the warning that VERA-2R 'must be subjected to further scrutiny and, in particular, validation'.<sup>43</sup> The AIC did not have the benefit of the Corner Report's analysis of VERA-2R's predictive validity when preparing its own report.<sup>44</sup>
34. A more detailed analysis of the AIC Report casts further doubt on the strength of its primary recommendation. The AIC Report emphasised that 'when making decisions that have considerable ethical implications for the judicial process, there should be an expectation that the tools used to inform those decisions be robust and highly effective'.<sup>45</sup> However, the report concedes in relation to each of the four tools under review that 'there is little evidence that these tools are accurate'.<sup>46</sup> In relation to VERA-2R in particular, the report notes that:

Published studies on the VERA and its subsequent versions provide limited evidence regarding the validity or reliability of the tool. In addition, there is little evidence in terms of the appropriateness of the indicators with samples [of] who became radicalised or engaged in violent extremism in Australia. The applicability for Australian violent extremists of the risk indicators emerging from the VERA-2R is therefore unclear. Research into this tool is particularly difficult as the content is not widely or publicly available and, as a result, independent research into its validity is not possible.<sup>47</sup>
35. Ultimately, it appears that the AIC Report's primary recommendation is based on the anecdotal opinion of some participants in its study that VERA-2R was, in comparison to others, the 'best available' tool.<sup>48</sup> However, that is little comfort if the best available tool is not suited for the task to which it is put.
36. As noted by the INSLM, VERA-2R was not developed to perform the task required by Div 105A, that is, to assess the risk of an offender committing a serious Part 5.3 offence. Nor was it developed for use in making a decision about whether a person should be detained in custody after the expiration of their sentence.<sup>49</sup> On the basis of the

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Corner Report, it is now clear that that ‘best available’ tool is not appropriate for use in relation to these tasks.

37. In the absence of a valid SPJ tool, an assessment of the risk of a person committing a serious Part 5.3 offence would have to be made on the basis of an unstructured ‘clinical’ judgement. The Corner Report refers to research demonstrating that clinical judgement alone is no better than chance at predicting the risk of violence.<sup>50</sup> This is consistent with evidence referred to by the Sentence Advisory Councils in both Victoria and New South Wales.<sup>51</sup> The AIC Report refers to research that unstructured ‘clinical’ judgement ‘is prone to significant error due to subjective bias that results in the incorrect assessment of factors and a lack of consistency and appropriateness in weighing the importance of certain factors’.<sup>52</sup>
38. During his inquiry, the INSLM sought, but was not provided with, answers about what expertise was considered valid to inform a ‘clinical’ judgement about the likelihood of a person committing a Part 5.3 offence.<sup>53</sup> What seems clear is that clinical judgement alone cannot be a sufficient basis for the making of a CDO. That is, without a valid risk assessment tool, there is no justification for keeping people detained after the end of their sentence based on the opinion of someone claiming expertise because those opinions are not reliable indicators of future risk.

(c) *Recommendation by the INSLM*

39. The INSLM recommended that Div 105A be amended by repealing the parts of it that relate to CDOs. The Commission agrees with this recommendation. The key factors relied on by the INSLM in reaching the view that the CDO regime is not proportionate to the threat of terrorism and is not necessary were:
  - the inability to make accurate assessments about the risk that someone might commit a serious Part 5.3 offence in the future
  - the broad nature of the conduct that is captured by Part 5.3 of the Criminal Code, including some conduct that does carry a high degree of probability of harm to persons or property<sup>54</sup>
  - the very low numbers of people who have committed a serious Part 5.3 offence in Australia since 2001, particularly in comparison with other serious crimes<sup>55</sup>

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- the very low recidivist rate for terrorist offenders, particularly in comparison with most (if not all) other offence types<sup>56</sup>
  - the fact that no other comparable country has an equivalent regime of post-sentence detention<sup>57</sup>
  - the availability of other methods to deal with terrorist offenders, including ESOs and, in the INLSM's view, control orders and preventative detention orders.<sup>58</sup>
40. It might be suggested that it would be sufficient for the Government to adopt a temporary policy position of not seeking CDOs, in the hope or expectation that a valid risk assessment tool might be developed in the future. In the Commission's view, it was a mistake to legislate a CDO regime without first demonstrating that valid risk assessments could be undertaken. Little progress towards that goal has been achieved in the seven years since the commencement of Div 105A in 2016.
41. However, there is a more fundamental objection to leaving the CDO regime on the books. The problem with having the ability to seek orders of this nature is the political temptation to do so in an individual case when a particular offender is due for release, despite a prevailing policy against it or the lack of a valid tool. Further, retaining the regime sends a message to the judiciary that relevant assessments of risk *are* possible, despite evidence to the contrary.
42. As noted in the INSLM Report,<sup>59</sup> in the first instance proceeding involving Mr Benbrika, Dr Michael Davis gave evidence that was substantially consistent with the later findings in the Corner Report. Dr Davis' evidence was to the effect that there was 'no valid way of assessing extremist risk' and that the VERA-2R tool is 'not appropriate for use in the assessment of risk of violent extremist offending'.<sup>60</sup> Justice Tinney rejected that evidence because to accept it would be to conclude that there could never be evidence of a kind that Div 105A countenanced.<sup>61</sup> That is, the Court found that if the legislation says that the Court must have regard to any expert report about the risk of an offender committing a serious Part 5.3 offence, then it must be possible for such a risk assessment to be undertaken. This finding clearly demonstrates why it was an error to legislate for the regime prior to developing a valid risk assessment tool.

(d) *Experience of managing offenders in the community*

43. Repeal of the CDO regime is unlikely to have any material impact on the way in which terrorist offenders are managed in practice following the expiration of their sentences. Overwhelmingly, the practice of authorities in Australia has been to manage terrorist offenders in the community following the end of their sentences, with an initial period of up to two years during which they are required to comply with a range of conditions.
44. Since the CDO regime was enacted in 2016, there have been at least 14 people who met the definition of a 'terrorist offender' for the purposes of Div 105A,<sup>62</sup> but were released from detention without a CDO being sought.
45. In the case of 12 of those people, a control order was obtained for an initial 12 month period following their release.<sup>63</sup> In some of those cases, a second control order was obtained for a further 12 month period. Most of these people complied with the terms of the control orders without incident. The Commission understands that in two cases, offenders meeting the definition of 'terrorist offenders' have been given short additional sentences for breach of the terms of their control orders.<sup>64</sup>
46. In a 13<sup>th</sup> case, an ESO was made under the *Terrorism (High Risk Offenders) Act 2017* (NSW) for a period of 12 months.<sup>65</sup> In a 14<sup>th</sup> case, after amendments to Div 105A to permit the making of ESOs, the first ESO was made in November 2022 for a period of 18 months.<sup>66</sup> It appears that a 15<sup>th</sup> offender, Mr Robert Musa Cerantonio, was due for release on 9 May 2023. The Commission cannot find a record of any post-sentence order being made in relation to him.
47. There have only ever been two CDOs made, and only one of those remains in force. On 24 December 2020, Tinney J in the Supreme Court of Victoria ordered that Mr Abdul Nacer Benbrika be subject to a CDO for a period of three years.<sup>67</sup> Mr Benbrika's CDO is due to expire in December 2023.
48. On 15 December 2021, Walton J in the Supreme Court of New South Wales ordered that Mr Blake Nicholas Pender be subject to a CDO for a period of one year commencing on 13 September 2021.<sup>68</sup> While in custody, he was convicted of an assault charge and sentenced to an additional 6 months imprisonment, expiring on 18 October 2022.<sup>69</sup> On 7 October 2022, shortly before his release, an Interim Supervision

Order (ISO) was imposed on him,<sup>70</sup> pending the determination of an application for an ESO. While in the community, he was charged with using his mobile phone contrary to the terms of the ISO and was remanded in custody.<sup>71</sup> In December 2022, an ESO was made in relation to Mr Pender for a period of three years.<sup>72</sup> He is reportedly due for release into the community, subject to the terms of the ESO, on 9 September 2023.<sup>73</sup>

49. None of the former terrorist offenders released into the community have gone on to commit a serious Part 5.3 offence. This is consistent with the evidence referred to by the INSLM of the low recidivism rates internationally among convicted terrorism offenders.<sup>74</sup> It appears that in Australia the system of supervision, initially pursuant to control orders and now pursuant to ESOs, has been sufficient to address the risk of harm posed by former offenders on their release.

#### **Recommendation 1**

The Commission recommends that the continuing detention order regime in Div 105A of the Criminal Code be repealed, while retaining the extended supervision order regime.

## **5 Retention of extended supervision order regime**

50. While the INSLM noted that continued detention of a person in a prison after the end of their sentence should not be decided by questionable predictions of their future risk, he recommended that the extended supervision order regime continue.<sup>75</sup>
51. The use of a tool like VERA-2R to assist in this process would be closer to the purpose for which it was originally designed.<sup>76</sup> The application of conditions to a convicted offender on release is less problematic and is similar to other established processes in the criminal justice system including bail conditions.
52. The following sections of this submission identify changes to the regime in Div 105A if CSOs are abolished and ESOs are retained.
53. The Commission has previously provided detailed submissions to both the INSLM and the PJCIS about amendments to the regime in Div 105A. Given that the current review by the PJCIS is in response to the INSLM Report, the Commission focuses in particular on recommendations



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made by the INSLM, while also highlighting some important recommendations by the Commission that have not yet been implemented. Because the Commission's views on these issues have already been canvassed at length previously, this submission seeks to deal with them in a condensed, summary way.

54. If CDOs are abolished, then there would be no need to deal with Recommendations 1–6 and 9–15 made by the Commission to the INSLM.

(a) *Objects*

55. The Commission agrees with the recommendation of the INSLM, that the objects of Div 105A be amended to include the rehabilitation and reintegration of the subjects of a post-sentence order back into the community. This issue is dealt with in Chapter 6 of the INSLM Report.

**Recommendation 2**

The Commission recommends that the objects of Div 105A of the Criminal Code be amended to include the rehabilitation and reintegration of the subjects of a post-sentence order back into the community.

(b) *Disclosure of relevant information*

56. The non-disclosure of the Corner Report in each of the two CDO proceedings to date raises questions about the adequacy of the existing provisions in Div 105A that deal with the disclosure of information to a defendant that could support a finding that a post-sentence order should not be made.
57. Disclosure of such information will remain relevant in ESO proceedings.
58. The Commission agrees with the five recommendations made at [390] of the INSLM Report which are designed to make the disclosure regime more robust. In summary, adoption of these recommendations would:
- require the AFP Minister to conduct broader searches for relevant information
  - require sworn evidence to be provided to the Court about the nature of searches conducted

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- require this evidence to be updated shortly before the hearing
- require particular attention to be given to expert reports, scientific evidence or research that differs from the evidence to be relied upon by the Minister.

**Recommendation 3**

The Commission endorses and repeats the 5 recommendations made by the INSLM at [390] of the INSLM Report dealing with the disclosure of information that tends to suggest that a post-sentence order should not be made.

(c) *Admissibility of expert evidence*

59. In Chapters 4 and 7 of the INSLM Report, the INSLM expressed concern about two matters:
- first, whether the field of ‘risk assessment for violent extremist offending’ could properly be characterised as a relevant field of expertise for the purposes of admission of expert evidence<sup>77</sup>
  - secondly, whether the Criminal Code *required* a judge hearing an application for a post-sentence order to have regard to expert evidence even if it would not otherwise be admissible.<sup>78</sup>
60. In a supplementary submission to the INSLM’s inquiry, the Attorney-General’s Department accepted that experts must be qualified as experts under the ordinary rules of evidence. It said that the statutory requirement that the Court must have regard to an expert report was subject to the qualification that the court must apply the rules of evidence and procedure for civil matters in a PSO proceeding, including rules about the admissibility of evidence.<sup>79</sup>
61. The INSLM made two recommendations at [409] and [410] of the INSLM Report designed to make it clear that:
- reports of relevant experts can only be admitted into evidence if admissible by the applicable laws of evidence
  - the court is not required to have regard to any witness’s opinion evidence that is not admissible.
62. The Commission considers that these clarifications are useful and are consistent with the intention of the regime as described in the submission of the Attorney-General’s Department.

#### **Recommendation 4**

The Commission recommends that Div 105A of the Criminal Code be amended to clarify that:

- reports of relevant experts can only be admitted into evidence if admissible by the applicable laws of evidence
- the court is not required to have regard to any witness's opinion evidence that is not admissible.

(d) *Making an extended supervision order*

63. Given the proposed change to the objects of Div 105A to include rehabilitation and reintegration into the community (see Recommendation 2), the INSLM also recommended that the conditions imposed by an ESO also be directed towards these objects, as well as to the safety of the community. The Commission supports this recommendation.

#### **Recommendation 5**

The Commission recommends that s 105A.7A(1)(c) of the Criminal Code be amended to provide that the Court must be satisfied that the conditions to be imposed by an ESO are also reasonably necessary, and reasonably appropriate and adapted, for the purpose of aiding the offender's rehabilitation and reintegration into the community.

64. The Commission remains concerned about the standard of proof required for the making of an ESO. This issue was dealt with in detail in section 10.1 of the Commission's submission to the INSLM.<sup>80</sup>
65. The 'balance of probabilities' standard in the Criminal Code is contrary to the recommendation of the third INSLM, Dr James Renwick CSC SC, prior to the ESO regime being legislated. It is also lower than the threshold for making an ESO in every equivalent State and Territory jurisdiction in Australia. All of those jurisdictions require satisfaction to a 'high degree of probability'.
66. The Commission considers that the balance of probabilities standard for ESOs does not give sufficient weight to the significant restrictions on liberty imposed by the ESO regime. This is a quasi-criminal regime that, as presently drafted, can impose restrictions on all areas of a person's life, based on an assessment of their risk of engaging in future criminal activity. Those restrictions may be imposed for up to three

years at a time. It is appropriate that a standard higher than the usual civil standard be applied for the imposition of such extensive restrictions. The Commission reiterates the recommendation it made to the INSLM on this issue (Recommendation 16).

### **Recommendation 6**

The Commission recommends that the threshold for making an extended supervision order in s 105A.7A(1)(b) of the Criminal Code be amended to require that the Court be 'satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing, providing support for or facilitating a terrorist act'.

67. The Commission also reiterates its comments about two types of conditions that may be imposed pursuant to an ESO.
68. First, the Commission maintains that it is not appropriate, and in fact may be counter-productive, to provide for compulsory engagement in de-radicalisation programs and other activities. This issue is dealt with in detail in section 10.2(b) of the Commission's submission to the INSLM.<sup>81</sup> As set out in that submission, research in this area establishes that:

in order for individuals to be disengaged, they must first be willing to hear alternate ideas and accept the support on offer. Forced participation is unlikely to achieve either the desired results or positive outcomes and, in many cases, may harden the radical views of those forced to participate.<sup>82</sup>

### **Recommendation 7**

The Commission recommends that any condition imposed by an extended supervision order or interim supervision order that requires a person to participate in treatment, rehabilitative or intervention programs or activities, psychological or psychiatric assessment or counselling, interviews or other assessments, be subject to a further condition that a person is only required to participate if they agree, at the time of the relevant activity, to so participate.

69. Secondly, the Commission maintains that it is not appropriate for conditions to be imposed on an ESO that permit specified authorities to have warrantless entry into people's homes. This issue is dealt with in detail in section 10.2(c) of the Commission's submission to the INSLM.<sup>83</sup> Authorities already have extensive powers to obtain warrants where they are necessary, and the warrant system brings with it a

system of checks and balances on the exercise of executive power so that intrusive powers of this nature are not misused.

70. The Commission has previously provided the PJCIS with an example of the misuse of a different statutory power permitting warrantless entry into a person's home.<sup>84</sup>

### **Recommendation 8**

The Commission recommends that the conditions requiring a person to consent to certain monitoring and enforcement activity in ss 104.5A(1)(c)(i), (2)(a) and (5); 105A.7B(5)(g)–(j); and 105A.7E(1)(c)(i), (2)(a) and (5) of the Criminal Code be repealed on the basis that they are not necessary, given the existing range of monitoring warrants.

## **6 Establishment of oversight bodies**

### *(a) Establishment of an ESO Authority*

71. The INSLM Report recommended that the Attorney-General's Department prepare a report about the establishment of an independent statutory body, called an ESO Authority, that would:
- provide oversight of offenders' compliance with ESO conditions
  - provide oversight of the services provided to assist offenders in complying with ESO conditions
  - provide oversight of the services provided to assist offenders with rehabilitation and reintegration into their communities
  - report to the court on each review of an ESO about the exercise by 'specified authorities' of their delegated powers including their decisions about the variation of conditions
  - assist the court in determining whether the conditions imposed by an ESO remain reasonably necessary and reasonably appropriate and adapted for the purposes of the offender's rehabilitation and reintegration into the community.<sup>85</sup>
72. The Commission agrees that oversight of specified authorities is appropriate. Some of the reasons for this are set out in more detail in section 10.5 of the Commission's submission to the INSLM which described the practice at both Commonwealth and State and Territory levels of prosecuting people for relatively minor breaches of control

order and ESO conditions.<sup>86</sup> Similar concerns were expressed by the INSLM based on evidence given to his inquiry.<sup>87</sup>

73. If an ESO Authority were established with oversight of the conduct of 'specified authorities', it may obviate the need for some of the specific recommendations made by the Commission about the way in which specified authorities operate (see Recommendations 17, 20, 23, 24 and 25 of the Commission's submission to the INSLM).

### **Recommendation 9**

The Commission endorses and repeats the recommendation made by the INSLM at [461] of the INSLM Report dealing with the establishment of an ESO Authority.

#### *(b) Establishment of a risk management body*

74. Experience with Div 105A has shown the importance of accurate risk assessment, of the need for transparency in how risk assessment is conducted, and the need for risk assessors to be independent of government.
75. At present, the definition of 'relevant expert' is broad, vague and does not guarantee sufficient training or independence. There are no minimum requirements for training or accreditation.
76. In Scotland, a Risk Management Authority (RMA) was established in 2005 pursuant to s 3 of the *Criminal Justice (Scotland) Act 2003* (UK) (CJS Act). The purpose of the RMA is to make Scotland safer by setting the standard for risk practice to reduce reoffending and the harm that it causes. It is particularly focused on the risk posed by violent and sexual offenders.
77. The RMA has the following functions under the CJS Act:
- promote effective risk management practice
  - compile and review research and development
  - provide advice and recommendations to Scottish Ministers
  - set standards and issue guidelines on the assessment and management of risk
  - publish the form of risk management plans
  - approve risk management plans and review their implementation

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- administer schemes of accreditation
  - provide education and training.
78. Section 11 of the CJS Act provides that Scottish Ministers may make a scheme of accreditation in relation to:
- any manner of assessing and minimising risk
  - persons having functions in relation to the assessment and minimisation of risk.
79. The RMA is to administer any such scheme of accreditation.
80. The RMA publishes a resource on its website called the Risk Assessment Tools Evaluation Directory.<sup>88</sup> This publication provides background information on 74 risk instruments and highlights the strengths and limitations that the assessor should take into account when applying each tool as part of a holistic risk assessment process.

### **Recommendation 10**

The Commission recommends that an independent risk management body be established to:

- (a) accredit people in the assessment of risk for the purpose of becoming 'relevant experts' as defined in s 105A.2 of the Criminal Code
- (b) develop best-practice risk-assessment and risk-management processes, guidelines and standards
- (c) validate new risk assessment tools and processes
- (d) evaluate the operation of risk assessment tools
- (e) undertake and commission research on risk assessment methods; and
- (f) provide education and training for risk assessors.

### **Recommendation 11**

The Commission recommends that 'relevant experts' be required to be accredited by the independent risk management body in order to be appointed under ss 105A.6 or 105A.18D of the Criminal Code.

## Endnotes

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- <sup>1</sup> Australian Human Rights Commission, *Review into Division 105A of the Criminal Code (post sentence orders)*, submission to the INSLM, 4 February 2022, at <https://www.inslm.gov.au/sites/default/files/2022-03/11-australian-human-rights-commission.pdf>.
- <sup>2</sup> Australian Human Rights Commission, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)*, submission to the PJCIS, 12 October 2016, at <https://www.aph.gov.au/DocumentStore.ashx?id=32397a66-a179-4a07-a5fb-ab60b776676f&subId=414693>.
- <sup>3</sup> Australian Human Rights Commission, *Independent National Security Legislation Monitor (INSLM) Statutory Deadline Review*, submission to the Acting INSLM, 15 May 2017, at <https://www.inslm.gov.au/sites/default/files/11-australian-human-rights-commission.pdf>.
- <sup>4</sup> Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJCIS, 10 September 2020, at <https://www.aph.gov.au/DocumentStore.ashx?id=b2a784cc-435f-4cbd-b5c7-6831eeb05e81&subId=691580>.
- <sup>5</sup> Australian Human Rights Commission, *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020*, submission to the PJCIS, 20 October 2020, at <https://www.aph.gov.au/DocumentStore.ashx?id=dccdea26-8e64-433f-8cdd-51430e028cf3&subId=695306>.
- <sup>6</sup> Australian Human Rights Commission, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (Cth)*, submission to the PJCIS, 12 October 2016 at [61].
- <sup>7</sup> PJCIS, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, November 2016, [3.95] and see generally [3.70]–[3.109], at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/HRTOBill/Report-PDF](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/HRTOBill/Report-PDF).
- <sup>8</sup> PJCIS, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, November 2016, [3.91]–[3.93].
- <sup>9</sup> PJCIS, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016*, November 2016, [4.83].
- <sup>10</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016* (November 2016) at [4.87] and [4.90].  
At [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/HRTOBill/Report-PDF](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/HRTOBill/Report-PDF).
- <sup>11</sup> Attorney-General's Department, *Post-Sentence Preventative Detention of High Risk Terrorist Offenders: Implementation Plan*, November 2016, pp 4 and 7, at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/HRTOBill/Implementation\\_Plan](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/HRTOBill/Implementation_Plan).
- <sup>12</sup> Attorney-General's Department, *Post-Sentence Preventative Detention of High Risk Terrorist Offenders: Report to Parliamentary Joint Committee on Intelligence and Security*, June 2017, p 4, at [https://www.aph.gov.au/-/media/02\\_Parliamentary\\_Business/24\\_Committees/244\\_Joint\\_Committees/PJCIS/45th\\_Parl\\_H](https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/PJCIS/45th_Parl_H)



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[RTO Bill/HRT0 Report June 2017.pdf?la=en&hash=788CFDF0020D3F05C8017A36AF0A64F64558A16A](#).

- 13 Department of Home Affairs, Attorney-General's Department and Australian Federal Police, *Joint-agency supplementary submission – Review of AFP Powers – Division 105A*, submission to the PJCS, 4 September 2020, pp 6 and 13–14.
- 14 *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [109] and [176].
- 15 *Minister for Home Affairs v Pender* [2021] NSWSC 1644.
- 16 Dr Emily Corner and Dr Helen Taylor, Centre for Social Research and Methods, The Australian National University, *Testing the Reliability, Validity, and Equity of Terrorism Risk Assessment Instruments*, at <https://www.homeaffairs.gov.au/foi/files/2023/fa-230400097-document-released-part-1.PDF> and <https://www.homeaffairs.gov.au/foi/files/2023/fa-230400097-document-released-part-2.PDF>.
- 17 INSLM Report at [273].
- 18 INSLM Report at [290].
- 19 Corner Report, pp 2–3.
- 20 Corner Report, p 2.
- 21 Corner Report, pp 33, 43–44 and 58. See also INSLM Report at [283].
- 22 Corner Report, p 3.
- 23 Corner Report, p 51.
- 24 Corner Report, p 82.
- 25 Corner Report, p 157.
- 26 Corner Report, pp 82 and 158.
- 27 Corner Report, p 112.
- 28 Corner Report, pp 113–114.
- 29 Corner Report, p 109–111.
- 30 Corner Report, p 130.
- 31 Corner Report, p 119.
- 32 Corner Report, pp 135 and 184.
- 33 Corner Report, pp 137 and 154.
- 34 Corner Report, p 137.
- 35 Corner Report, p 139.
- 36 Corner Report, p 123.
- 37 Corner Report, p 153.
- 38 Corner Report, p 139.
- 39 Corner Report, p 3.
- 40 Australian Institute of Criminology, *Review of violent extremism risk assessment tools in Division 104 control orders and Division 105A post-sentence orders*, May 2023, at <https://www.aic.gov.au/publications/special/special-14> (AIC Report).
- 41 INSLM Report at [284]–[287].
- 42 AIC Report, Recommendation 1, p ix.
- 43 AIC Report, Recommendation 1, p ix.
- 44 AIC Report, References, pp 51–58.
- 45 AIC Report, p 45.
- 46 AIC Report, p 45.
- 47 AIC Report, pp 26–27.

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- <sup>48</sup> AIC Report, p 28.
- <sup>49</sup> INSLM Report at [267].
- <sup>50</sup> Corner Report p 21. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 623 [124]–[125] (Kirby J).
- <sup>51</sup> Sentencing Advisory Council (Victoria), *High Risk Offenders: Post-Sentence Supervision and Detention* (2007), [2.2.11]–[2.2.12], at [https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/High\\_Risk\\_Offenders\\_Final\\_Report.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/High_Risk_Offenders_Final_Report.pdf); NSW Sentencing Council, *High-Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012), [2.72]–[2.73], at [http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing\\_Serious\\_Violent\\_Offenders/online%20final%20report%20hrvo.pdf](http://www.sentencingcouncil.justice.nsw.gov.au/Documents/Sentencing_Serious_Violent_Offenders/online%20final%20report%20hrvo.pdf).
- <sup>52</sup> AIC Report, p 37.
- <sup>53</sup> INSLM Report at [263].
- <sup>54</sup> INSLM Report at [327]–[332].
- <sup>55</sup> INSLM Report at [303]–[304].
- <sup>56</sup> INSLM Report at [312]–[317].
- <sup>57</sup> INSLM Report at [307]–[311].
- <sup>58</sup> INSLM Report at [337]–[339].
- <sup>59</sup> INSLM Report at [244]–[245].
- <sup>60</sup> *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [440] and [445].
- <sup>61</sup> *Minister for Home Affairs v Benbrika* [2020] VSC 888 at [445].
- <sup>62</sup> Criminal Code, s 105A.3.
- <sup>63</sup> See Australian Human Rights Commission, *Review into Division 105A of the Criminal Code (post sentence orders)*, submission to the INSLM, 4 February 2022, Appendix A (rows 7, 9, 10, 12–16, 18, 20, 22 and 23) at <https://www.inslm.gov.au/sites/default/files/2022-03/11-australian-human-rights-commission.pdf>.
- <sup>64</sup> Australian Human Rights Commission, *Review into Division 105A of the Criminal Code (post sentence orders)*, submission to the INSLM, 4 February 2022 at [249] in relation to Ms Alo-Bridget Namoa. INSLM *Annual Report 2021-22*, pp 34–35 in relation to Ms Alo-Bridget Namoa and Mr Radwan Dakkak.
- <sup>65</sup> *State of New South Wales v Elmir (Final)* [2019] NSWSC 1867 at [200].
- <sup>66</sup> *Attorney-General v Hadashah Sa'adat Khan (No 2)* [2022] VSC 687 at [51].
- <sup>67</sup> *Minister for Home Affairs v Benbrika* [2020] VSC 888.
- <sup>68</sup> *Minister for Home Affairs v Pender* [2021] NSWSC 1644.
- <sup>69</sup> *Attorney General of the Commonwealth of Australia v Pender (Final)* [2022] NSWSC 1773 at [116].
- <sup>70</sup> *Attorney General of the Commonwealth of Australia v Pender (Final)* [2022] NSWSC 1773 at [123].
- <sup>71</sup> *Attorney General of the Commonwealth of Australia v Pender (Final)* [2022] NSWSC 1773 at [126].
- <sup>72</sup> *Attorney General of the Commonwealth of Australia v Pender (Final)* [2022] NSWSC 1773 at [210].
- <sup>73</sup> Ellen Whinnett, "'Tinnie terrorist' chief to walk free from jail' *The Australian*, 14 April 2023.
- <sup>74</sup> INSLM Report at [312]–[314].
- <sup>75</sup> INSLM Report at [335] and [345].
- <sup>76</sup> AIC Report, p 20.
- <sup>77</sup> INSLM Report at [246]–[259].
- <sup>78</sup> INSLM Report at [140]–[144], referring to ss 105A.6B(1)(b) and (c) of the Criminal Code.

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- <sup>79</sup> Attorney-General's Department, *Supplementary Submission to the Independent National Security Legislation Monitor's Review into Division 105A of the Criminal Code*, October 2022, at [107], referring to Criminal Code, s 105A.6B(3) and s 105A.13.
- <sup>80</sup> Australian Human Rights Commission, *Review into Division 105A of the Criminal Code (post sentence orders)*, submission to the INSLM, 4 February 2022 at [186]–[196].
- <sup>81</sup> Australian Human Rights Commission, *Review into Division 105A of the Criminal Code (post sentence orders)*, submission to the INSLM, 4 February 2022 at [211]–[219].
- <sup>82</sup> Kristen Bell, 'Looking Outward: Enhancing Australia's Deradicalisation and Disengagement Programs' (2015) 11(2) *Security Challenges* 1 at 17, citing Tinka Veldhuis, *Designing Rehabilitation and Reintegration Programmes for Violent Extremist Offenders: A Realist Approach*, ICCT Research Paper (The Hague: International Centre for Counter Terrorism, 2012).
- <sup>83</sup> Australian Human Rights Commission, *Review into Division 105A of the Criminal Code (post sentence orders)*, submission to the INSLM, 4 February 2022 at [220]–[228].
- <sup>84</sup> Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the PJCIS, 10 September 2020 at [91] and Case study 1.
- <sup>85</sup> INSLM Report at [455].
- <sup>86</sup> Australian Human Rights Commission, *Review into Division 105A of the Criminal Code (post sentence orders)*, submission to the INSLM, 4 February 2022 at [246]–[262].
- <sup>87</sup> INSLM Report at [453].
- <sup>88</sup> Risk Management Authority, *Risk Assessment Tools Evaluation Directory*, at <https://www.rma.scot/research/rated/>.