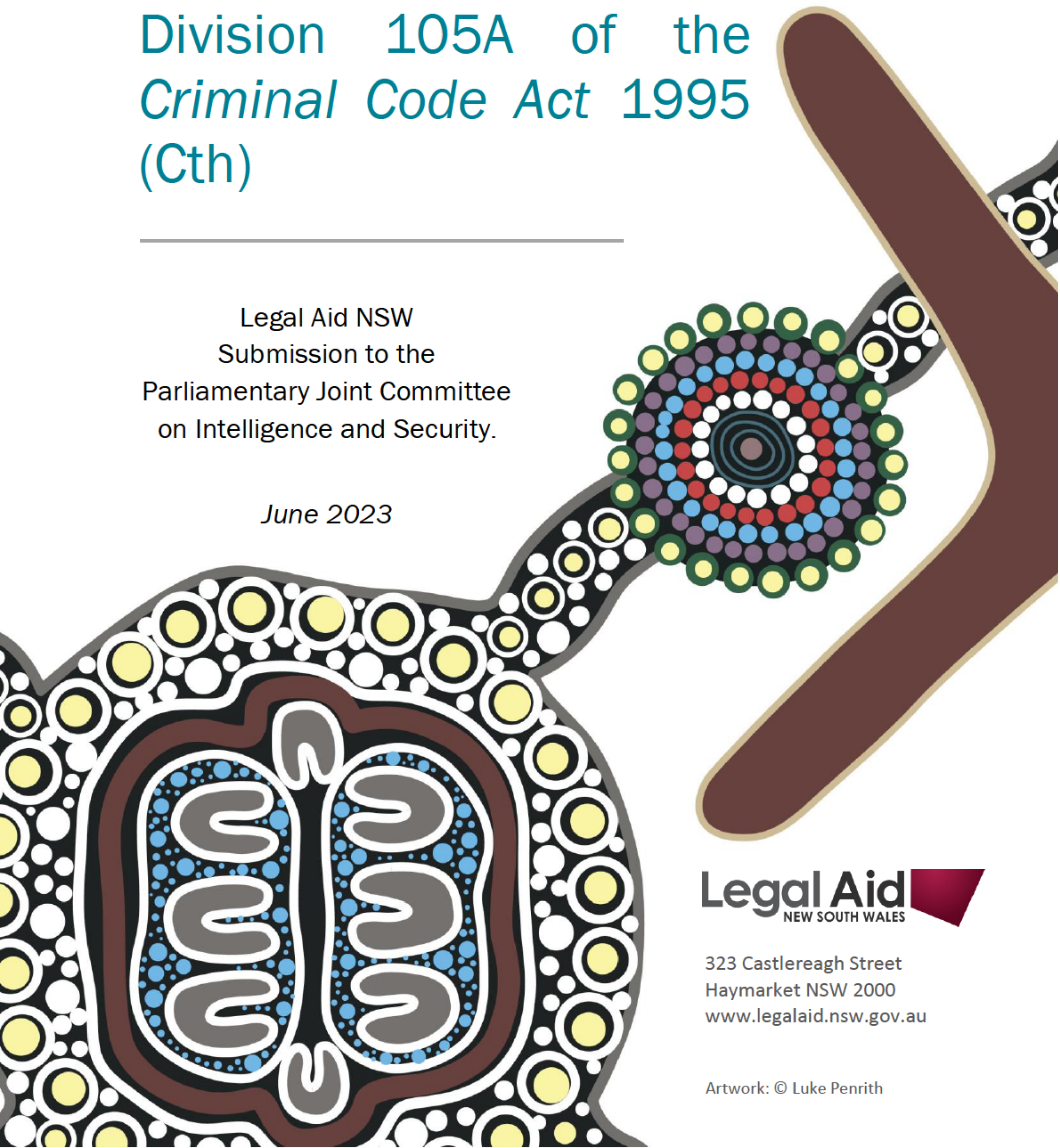
Review of Post-Sentence Terrorism Orders under Division 105A of the *Criminal Code Act* 1995 (Cth)

Legal Aid NSW
Submission to the
Parliamentary Joint Committee
on Intelligence and Security.

June 2023



Legal Aid NEW SOUTH WALES

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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act* 1979 (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Division and private practitioners. The Criminal Law Division services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

The **High Risk Offender Unit** is a specialist team within the Criminal Law Division. The Unit provides advice and representation to offenders subject to applications by the NSW Attorney General for post-sentence detention or supervision under the *Crimes (High Risk Offenders) Act 2006* (NSW), *Terrorism (High Risk Offenders) Act 2017* (NSW), as well as to Commonwealth offenders subject to applications by the Australian Federal Police (**AFP**) for post-sentence terrorism orders under Div. 105A *Criminal Code Act 1995* (Cth).

The HROU works closely with the **Commonwealth Crimes Unit**, a specialist unit within the Criminal Law Division which represents people charged with Commonwealth offences, including terrorism related offences and offenders convicted of terrorism related offences who are refused parole or are about to have their parole revoked.

Legal Aid NSW welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security review of Division 105A of the *Criminal Code Act 1995* (Cth). Should you require any further information, please contact:

Introduction

Legal Aid NSW has provided advice and representation in post-sentence order matters since the introduction of the *Crimes (High Risk Offenders) Act 2006* (NSW) (**CHRO Act**) in 2006. In 2019, in response to growth in the use and resource demand of state based post-sentence orders, Legal Aid NSW established the High Risk Offender Unit (**HROU**) as a separate business unit and specialist practice within the Criminal Law Division.

The HROU is a multidisciplinary team comprising a Solicitor in Charge, two Senior Managing Solicitors, four Senior Solicitors, a senior social worker, an Office Manager, paralegal and Legal Support Officer.

Solicitors in the HROU advise and appear in applications made by the State of NSW for post-sentence extended supervision orders (**ESO**) or continuing detention orders (**CDO**) under the CHRO Act and the *Terrorism (High Risk Offenders) Act 2017* (NSW) (**THRO Act**).

Legal Aid NSW is also funded by the Commonwealth Attorney General's Department to advise and appear in post-conviction order proceedings under Division 104 and 105A of the *Criminal Code* (Cth) (**Criminal Code**). This includes applications for ESO, CDO and Control Orders (**CO**).

In 2021 solicitors from the HROU appeared on behalf of the first respondent to an application in NSW under Division 105A, Mr Blake Pender – an Aboriginal man from the South Coast of NSW.

The extensive experience and expertise of HRO Unit solicitors appearing in both state and more recently Commonwealth high risk offender proceedings informs this submission. We also draw on our June 2022 submission to the Independent Security Legislation Monitor's Review into Division 105A (**INSLM Review**), and evidence given (including by members of the Legal Aid NSW Criminal Law Division) to that review at the public hearings held in Canberra, in June and November 2022.

We acknowledge the comprehensive report of the INSLM, Mr Grant Donaldson SC, dated 3 March 2023 (**INSLM Report**), and the recommendations contained therein. In addressing the Committee's request for submissions on the operation, effectiveness, and implications of Division 105A, we have responded in two parts:

- **Part 1** responding to the INSLM's specific findings and recommendations.
- **Part 2** referring briefly to issues raised in our June 2022 submission to the INSLM Review (a copy of which is **attached**) which were either not addressed, or not specifically recommended by the INSLM, for consideration by the Committee.

Part 1: Response to INSLM Recommendations

INSLM Recommendation: Abolition of Continuing Detention Orders

That Div 105A be amended to **abolish** Continuing Detention Orders

Legal Aid NSW **supports** this recommendation.

We acknowledge that terrorism and violent extremism present unique challenges for Governments, law enforcement and courts. We also acknowledge that a number of post-sentence supervision and detention schemes, including Div.105A, have been held constitutionally valid.[1] However, laws in the anti-terrorism sphere are often enacted in response to particular events and in times of actual or perceived crisis. With the evolution in social, political and expert understanding about terrorism, and the benefit of experience and hindsight, this legislative measure can no longer be regarded as fit for purpose.

Following detailed consideration of submissions, evidence, and the response in comparable jurisdictions, the INSLM has concluded that CDOs under Div. 105A are no longer either proportionate or necessary, noting several factors including:

- The **number of convictions for offences against Part 5.3 are very small**. This is demonstrable by comparison with the much broader scale of terrorism in the United Kingdom.[2]
- The **rates of recidivism for this cohort of offenders is "uniquely low"**.[3] Evidence demonstrates that while political offenders do reoffend, their rates of recidivism are low when compared to an apolitical population and that, when they do reoffend, it tends to be for minor or personally motivated crimes or parole violations.[4]
- Despite the 'global nature' of terrorism and greater number and severity of terrorist events, **neither the UK or New Zealand has enacted a CDO regime, nor has the United States or Canada.**[5] **Australia is described as an "outlier"** among these ally nations in having a CDO mechanism as a response to the risk of terrorism.[6]

We note Australia's international human rights obligations under Article 9 of the *International Covenant on Civil and Political Rights* (**ICCPR**) which deals with preventative detention, and

[1] *Fardon v Attorney General (Qld)* (2004) 223 CLR 575; [2004] HCA 46. See also the decisions of the New South Wales Court of Appeal *Kamm v State of New South Wales (No 4)* (2017) 95 NSWLR 179; [2017] NSWCA 189 upholding the constitutional valididy of the CHRO Act (NSW) and the decision, currently restricted, [2020] NSWCA 248 in which a challenge to the constitutional validity of the THRO Act (NSW) was dismissed.
[2] INSLM Report [303]
[3] INSLM Report [314]
[4] O Hodwitz (2021) 'The Terrorism Recidivism Study', 15(4) Perspectives on Terrorism p.27-38: https://www.jstor.org/stable/27044233
[5] INSLM Report [309].
[6] INSLM Report [311].

the 2010 UN Human Rights committee findings that the detention of Robert Fardon[7] and Kenneth Tillman[8] under similar State-based regimes was arbitrary and in violation of Article 9(1). As the INSLM Report notes, the consequences of these findings and observations by the UN were considered by the Parliamentary Joint Committee on Human Rights (**PJCHR**) following introduction of amendments to the Criminal Code which included Div. 105A. The PJCHR distinguished Div. 105A from those state post-sentence regimes, consistent with the UN Human Rights Committee General comment No 35,[9] on the basis that offenders are:

1. generally required to be **kept separately** from sentenced prisoners, and
2. that the court is required to consider the availability of **less restrictive measures**, incorporating 'some aspects of the test of proportionality under international human rights law'.[10]

Notwithstanding these two features being identified by the Government and PJCHR as important safeguards to ensure that detention is not arbitrary:[11]

- It is apparent from evidence given to the INSLM Review that the conditions of detention of offenders under Div 105A are not consistent across States and Territories.[12] The INSLM also expressed "very considerable doubts" that, without rigorous monitoring by the Commonwealth, detention in prisons operated by certain States could even comply with the obligations of the Commonwealth under s.105A.4.13. As we note below at p.15, our experience in New South Wales reflects this concern; and
- S.105A.7(1)(c) was ultimately narrowed[14] to ensure that ESOs and control orders are the only measures that may be considered when deciding whether or not there is a less restrictive alternative.[15] Such limitation on alternatives that may be considered by the court is inconsistent with the principle of least restrictive measures and Australia's human rights obligations, which require post-sentence detention to be a "last resort".[16]

Having regard to these issues, the availability of a wide range of other powers including surveillance, criminal investigation, and arrest, and separate concerns about the state of risk assessment in the terrorism sphere, we agree with the INSLM that CDOs are not a proportionate response to the threat of terrorism and that they **should be abolished**.

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[7] *Fardon v Australia* (1629/2007) (18 March 2010), considering the Queensland Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld).
[8] *Tillman v Australia* (1635/2007) (18 March 2010).
[9] UN Human Rights committee, General comment No 35 on Article 9, l berty and security of person (2014), [21].
[10] INSLM Report [219].
[11] Revised Explanatory Memorandum, Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016, at [104]; PJCHR October Report, [1.80]; Explanatory Memorandum, Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020, Statement of Compatibility with Human Rights at [53].
[12] INSLM Report [502] – [513].
[13] INSLM Report [502].
[14] Government amendment sheet PZ101, *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill* 2020, item 36, at https://parlinfo.aph.gov.au/parlInfo/download/legislation/amend/r6593_amend_596687d1-4879-4e9a-b5f3-48d327209130/upload_pdf/PZ101.pdf;fileType=application%2Fpdf.
[15] Supplementary Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill* 2020 (Cth), Amendments to be Moved on Behalf of the Government, at 7 [19].
[16] UN Human Rights committee, General comment No 35 on Article 9, liberty and security of person (2014) [21].

INSLM Recommendations: Rehabilitation and reintegration as express objects of Div.105A and consequential amendments

That the **objects** of Div 105A be amended to include, as an express object of the Division, rehabilitation, and reintegration of the subjects back into the community.

Consequential amendments to s 105A.6B(1) to be amended to provide that, in making a decision about an ESO under s 105A.7A(1), the court **must have regard to the objects** of Div 105A, including rehabilitation and reintegration.

Consequential amendments to s 105A.7A, including that (1)(c) be amended to provide that, when a court considers whether proposed **conditions** of an ESO are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk', the court also consider **whether they provide adequately for rehabilitation and reintegration** of the defendant into the community.

Legal Aid NSW **supports** these recommendations, which are consistent with our Recommendation 6 to the INSLM Review.[17]

Australia has international human rights obligations not to engage in arbitrary detention. While preventative detention itself is not necessarily arbitrary, it *will be* if it is not justified by "compelling reasons", used as a "last resort", and if the detention is not "aimed at the detainee's rehabilitation and reintegration into society".[18] Therefore, for a preventative detention regime to avoid arbitrariness, the state needs to provide assistance that enables detainees to be released as soon as possible without being a danger to the community, with conditions aimed at rehabilitation and reintegration. Failure by the state to invest in and provide rehabilitative programs and services – both in custody and in the community – may compound risk or unfairly deny an offender opportunity to reintegrate.

An ESO constitutes a significant fetter on the civil rights and freedoms of an individual, beyond the expiry of their sentence. Such an order carries with it the threat of arrest and detention if breached, even for otherwise non-criminal conduct. For this reason, in our submission, there is no reason why international human rights norms and principles about non-punitive detention should not extend to the control and supervision of ESOs.[19]

We endorse the view expressed by the INSLM that, quite apart from our obligations under international law, "logic, common sense and decency" also require a defendant's

[17] Legal Aid NSW submission, p.14-15.
[18] UN Human Rights committee, General comment No 35 on Article 9, I berty and security of person (2014) [21].
[19] See for e.g. the observations of Button J in proceedings under the CHRO Act in NSW in *State of NSW v Biber* [2021] NSWSC 47. His Honour observed at [36] that while the proceedings were not strictly criminal, and that the plaintiff was not seeking incarceration by a CDO, the ESO sought by the State "*is a significant diminution of the liberty of the defendant over a very lengthy period. And breaches of the conditions of an ESO can and do lead to further incarceration.*"

rehabilitation and reintegration back into society to be an express object of any post-sentence order.[20] This view is reinforced by UN Security Council Resolution 2396 (2017) which the INSLM noted specifically incorporates rehabilitation and reintegration measures as a response to terrorism offenders.[21]

In addition to consideration of international obligations, our experience with the THRO Act in New South Wales is that a very high proportion of terrorism related offenders (and high risk offenders more broadly) suffer from social disadvantage and vulnerability. We refer the Committee to our 2022 Submission at p.14-16 headed 'Rehabilitation of offenders', and in particular the data we provided indicating the disproportionate impact of post-sentence terrorism schemes have on Indigenous offenders, and those with cognitive impairment or mental illness.

Incorporating rehabilitation and reintegration as central objects to Div 105A, and the determination about what conditions are necessary and appropriate to achieve those aims, will go some way towards addressing these concerns. We reiterate our observations to the INSLM Review that to achieve rehabilitative aims, post-sentence orders *must* be accompanied by appropriate funding for State and Commonwealth based support services.

INSLM Recommendations: Inquiries and Disclosure, and consequences of non-disclosure of the *Corner* report

That Div 105A.5 be amended to reflect mandatory inquiries and positive disclosure obligations, including:

- an expanded class of those to whom the AFP Minister must make inquiries of, and consequential requirements that the AFP Minister or legal representative must file an affidavit detailing those inquiries and compliance with all disclosure obligations;
- new provisions providing explicit disclosure obligations in relation to information which differs from evidence relied upon by the Minister (including exculpatory material or contrary opinion), and consequential requirements for an affidavit of compliance with this disclosure obligation.

Legal Aid NSW **supports** strengthening of statutory obligations on the AFP Minister to make all relevant inquiries and to provide timely disclosure to the defendant.

We note that these recommendations arise as a direct consequence of the concerning circumstances in which the report of Dr Emily Corner (on the validity and reliability of a central risk assessment tool, the VERA 2R) was commissioned, and then suppressed,[22] by the

[20] INSLM Report [233].
[21] INSLM Report [208].
[22] Adopting the language of the INSLM, in the cover letter to the Final Report dated 3 March 2023 at p.2.

Department of Home Affairs. We observe that, following its receipt by the Department of Home Affairs in May 2020, the report was:

- not provided to Mr Benbrika or his lawyers in Victorian s.105A proceedings in December 2020 (despite direct challenge to the validity of the tool in that litigation), with no claim for public interest immunity or other restriction on disclosure/publication/production sought;
- not disclosed to Mr Pender or Legal Aid NSW in proceedings brought in 2021/22 seeking Commonwealth post-sentence orders[23] with no claim for public interest immunity or other restriction on disclosure/publication/production sought;[24]
- (apparently) not provided to experts who hold existing licences to administer VERA 2R as an additional warning about its use, noting also that the Department of Home Affairs is the sole licensee of this tool in Australia;[25]
- (apparently) not provided to the New South Wales Government Ministers and authorities responsible for assessment, management and initiation of proceedings against individuals under THRO Act (impacting approximately 21 cases over a 2 year period), and therefore not provided as disclosure[26] to any of those defendants or their lawyers;
- not voluntarily provided to the INSLM by any Commonwealth authority in evidence or submissions, despite central consideration of risk assessment tools in several submissions and discussion at the June 2022 Public Hearings.

That this report necessitated the INSLM exercising compulsory notice to produce powers under the Act is of particular concern to Legal Aid NSW, in circumstances where it has since been found:

- Not to contain operationally sensitive material, as claimed by the Department of Home Affairs upon production;[27]
- Not to contain 'terrorism material' as defined in s 105A.14D;
- To be relevant, and a document which should have been provided in **all applications** where relevant experts make a risk assessment using the VERA 2R tool. The INSLM noted assertions that it was not relevant are "plainly and obviously wrong" and that there is "no excuse" for the failure to disclose. [28]

Following the November 2022 hearings, Legal Aid NSW requested disclosure of Dr Corner's report from the Australian Government Solicitor in Mr Pender's Commonwealth proceedings which were then still underway. The report was disclosed as requested, but subject to non-

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[23] Noting in Mr Pender's case, concurrent proceedings were taken by the Commonwealth, seeking a CDO in the Supreme Court and a Control Order in the Federal Court (in the event of failure on the CDO application).
[24] The applicant in CDO and ESO proceedings is obligated to disclose a "statement of any facts that the applicant is aware of that would reasonably be regarded as supporting a finding that the order or orders …..should not be made, except any information, material or facts that are likely to be protected by public interest immunity…"- *Criminal Code 1995* (Cth) s 105A.5(3)(aa)(ii).
[25] INSLM Public Hearing Transcript 21.11.22, p-176.15
[26] Until at least February 2023, the New South Wales Crown Solicitor's office was advising Legal Aid NSW that they did not hold a copy of the report.
[27] INSLM Public Hearing Transcript 21.11.22, p-176.28-29; INSLM Report at [278] where Mr Donaldson SC observes it "contains nothing that could properly be described as operationally sensitive information."
[28] INSLM Report [272].

disclosure undertakings. In recent THRO Act proceedings, the report has only been made available to defendants through the issue of a subpoena (and payment of conduct money) to the Department of Home Affairs.[29] The report has only very recently been publicly released, in redacted form, as a result of access applications under *Freedom of Information Act* 1982.

Dr Corner's findings that the lack of evidence underpinning both instruments have potentially serious implications for their validity and reliability, and that the instruments are not able to predict their specified risk with anything other than chance,[30] lend considerable weight to the existing body of cautionary evidence about risk prediction in terrorism.[31] It bolsters concern about risk prediction where the consequence may be indefinite detention.

The fact that it was withheld by the Commonwealth has the capacity to seriously undermine public confidence in the Government, and what is being done in the name of public safety. It is noted that the Commonwealth continued to publicly endorse the use of VERA-2R as a tool based on 'significant academic research' both to the PCJIS review in 2021[32] and to the INSLM Review in 2022,[33] in circumstances where it was then in possession of the Corner Report. The language adopted by the INSLM[34] in relation to this failure to disclose reflects the seriousness of such concerns.

Given the extraordinary power imbalance between state and individual, and revelations through the INSLM Review, Legal Aid NSW **supports** more robust legislative obligations around inquiry and disclosure including to relevant State-based bodies, which align more closely with prosecutorial obligations.

We also urge the PJCIS to **recommend a public inquiry into the circumstances surrounding the failure to disclose the Corner report**, including examination of who within any Commonwealth Government department or agency was aware of the report and when, and who (if anyone) the report was provided to before 21 November 2022 (including any person in a New South Wales Government department or agency). Such an inquiry would demonstrate transparency and accountability and could restore confidence among legal professionals and the public.

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[29] For example in the matter of *State of New South Wales v Hardy* (2022); *State of New South Wales v XX* (2023).

[30] INSLM Report [281].

[31] For example, the VERA-2R website describes the predictive validity of the tool as "problematic due to the low base rate of terrorists and violent extremists"- Strengths and Limitations', *Custodial Institutions Agency- Ministry of Justice and Security* (Web Page) < Strenghts and limitations | Instrument | Vera-2r>. Forensic psychologist, Dr Michael Davis, gave evidence in *Benbrika* that: "[t]here is currently no validated way of assessing the risk of recidivism for terrorism offences. This is because the base-rate of recidivism is far too low to enable such assessments to occur without an overwhelming number of false positives. Moreover, none of the extant tools have been validated in terms of their predictive validity"-*Minister for Home Affairs v Benbrika* [2020] VSC 888 [245].

[32] Parliament of the Commonwealth of Australia, *Review of police powers in relation to terrorism, the control order regime and the continuing detention order regime*, Parliamentary Joint Committee on Intelligence and Security, October 2021, para 5.55

[33] Joint Agency Submission: Attorney General's Department and Department of Home Affairs (January 2022) [159].

[34] Including that it is "shocking" that orders have been sought and made with parties unaware of Dr Corner's report, and that the failure "compels" legislative change.

INSLM Recommendations: Experts, witnesses and the rules of evidence

That the definition of 'relevant expert' in s.105A.2 be repealed and replaced in a form that reflects a person with expertise in and who are **qualified to express an opinion as to the risk, and means of ameliorating the risk**, of a defendant committing terrorist acts.

That s.105A.7A(1) be amended with consequential amendments to make plan any reports or evidence of relevant experts can only be admitted **if admissible by the applicable laws of evidence.**

That Div. 105A be amended to remove the requirement for a court to have regard to any witness's **opinion evidence that is not admissible** in accordance with the applicable rules of evidence.

Legal Aid NSW **supports** these recommendations.

A court should not be required to have regard to evidence of an expert, or any other opinion evidence, which would not be admissible if the rules of evidence were applied. The test for relevance is a very low bar: the threshold test is whether there is a logical connection between the evidence and a fact in issue. Where the effect of the evidence is so ambiguous that it could not rationally affect the assessment of the fact in issue, the evidence is irrelevant, and the court should not be required to 'have regard' to it.[35]

A requirement that a court must 'have regard' to particular evidence has the capacity to add to the already significant cost of this litigation and prolong court time required for determination of issues. This is because legislation cannot prescribe the weight or significance to be attributed to such evidence – including that it be given no weight at all. Where, for example, opinion is offered without foundation or qualification which would otherwise be required for admissibility, this is highly likely to result in disputes about its relevance, probative value, weight, and use that can be made of it. It may necessitate sourcing and briefing of defence witnesses to provide a counter-opinion.

We share the INSLM's concerns, which are consistent with those expressed by the Australian Human Rights Commission (**AHRC**) and echoed in our submissions to the INSLM Review,

[35] See for e.g. the recent terrorism trial of *R v Fleming* [2023] NSWSC 560, and observations of Wilson J about evidence led by the Crown from Professor Smith on right wing extremism as an area of "specialised knowledge". In refusing to admit that evidence, her Honour found "it must firstly be observed that the study in Australia of terrorist groups, or of individuals who subscribe to the ideologies and aims of such groups, is in its infancy" and further that the "specialised knowledge" upon which Professor Smith's opinions were said to be based appeared "to be more akin to that which might be possessed by a well-read individual who is informed with respect to contemporary world politics. However, being widely read upon recent right wing terrorist events does not necessarily equate to expertise in the context of s 79."

that the current definition of 'relevant expert' is "broad, vague and does not guarantee sufficient training or independence."[36]

In addition, however, we urge the PJCIS to consider the recommendations made by the AHRC (Recommendation 7[37]) and Legal Aid NSW (Recommendation 10[38]) to the INSLM regarding establishment of an independent risk management body (distinct from the proposed ESO Oversight Authority)**.**

Currently, there are no minimum requirements for training or accreditation. While the amendment proposed by the INSLM goes some way to ensuring an expert is qualified (having regard to applicable laws of evidence and the common law), our experience in both NSW and Commonwealth proceedings raises broader questions about impartiality, quality and consistency of experts available in this field and particularly in litigation.

As the AHRC noted, this issue was considered by the New South Wales Sentencing Council in 2012, with recommendations that risk assessments should be undertaken *independently* of the corrections system to avoid apprehension of bias, and that there be an independent accreditation process.[39] The Sentencing Council noted that such a body would facilitate best practice in relation to risk prediction, including by developing standards and guidelines, providing rigor to the process, and increasing the pool of available experts – an issue of particular concern to us, given the currently very small group of experts available to engaged in court proceedings.

Having regard to concerns about the state and use of risk-prediction tools as a means of assessing future risk of terrorism, and the findings of the Corner Report, we suggest that establishment of an independent risk management authority is a pressing and essential step towards developing nationally consistent approach towards appropriate terrorism offender assessment and management.

Lastly, we note that the INSLM does not support our Recommendation 11,[40] (in relevantly similar terms to the AHRC Recommendation 9), that the power of the Minister to order mandatory risk assessments of offenders under s.105A.18D be removed. **We reiterate our concerns** at p.20-21 of our 2022 submission and endorse the AHRC submissions that such a power of is contrary to established principles of non-compellability and inconsistent with the quasi-criminal nature of these proceedings. **We urge the Committee to recommend that this power be removed.** If the power is to remain, we submit that the requirement that the Court consider an offender's level of participation pursuant to s 105A.6B should be removed.

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[36] LANSW submission, p.19; AHRC Submission at [154]: https://www.inslm.gov.au/sites/default/files/2022-03/11-australian-human-rights-commission.pdf
[37] AHRC Submission [154]-[157]
[38] LANSW submission, p.19-21.
[39] New South Wales Sentencing Council, 'High Risk Violent Offenders. Sentencing and post-custody management options.' (May 2012), at 5.34 – 5.37
[40] LANSW submission, p.20-21.

INSLM Recommendation: Discretion to impose conditions

> That s.105A.7E (requiring the court to impose certain conditions) be repealed

Legal Aid NSW **supports** this recommendation.

We endorse the observations of Justice Fullerton in *State of New South Wales v Bugmy* [2017] NSWSC 855, an application under the CHRO Act. Her Honour said (at [89] with citations omitted):

> "The conditions must not be unjustifiably onerous or simply punitive. Neither may they simply be an expression of state paternalism or imposed to meet what might be thought to be the public interest, in some generalised sense, or because they might be convenient or resource efficient means of the department exercising supervision under an extended supervision order."

We agree that the court should only be empowered and required to impose conditions that are, on the evidence, reasonably necessary and reasonably appropriate and adapted for the purposes of protecting the community from unacceptable risk and to aid the defendant's rehabilitation and reintegration.

INSLM Recommendation: Establishment of an Independent Oversight Authority

> That within the next 3 years the AGD publish a report responding to provisional recommendations that an **ESO Authority be created** (and recommendations as to that independent statutory body's constitution, remit and reporting functions).
>
> If no such body is created, and CDOs are retained, there should be a **standalone body** – independent from the relevant Minister – established to discharge the oversight functions in s.105A.4

An Independent Oversight Authority

Legal Aid NSW **supports** the establishment of an independent oversight authority (**an ESO Authority**) and urges the Committee to undertake, as a priority, further targeted consultation with relevant stakeholders (including Legal Aid NSW) on an appropriate model. We make this suggestion, noting that detail about the composition, remit, and power of this Authority should be informed by the outcome of other recommendations.

We make the following general observations for the Committee's consideration:

- An independent statutory authority to manage the ESO scheme and develop nationally consistent framework for supervision of offenders would facilitate monitoring and implementation of the INSLM's recommendation that rehabilitation and reintegration be incorporated as express objects of Div. 105A orders. This is an important step towards ensuring uniform treatment of offenders across states and territories, transparency and accountability of the various agencies exercising delegated power.
- We refer the Committee to our 2022 submission p.16-19 'ESO Conditions and Monitoring', and our observations about the often punitive and counterproductive 'zero tolerance' approach towards ESO monitoring and enforcement. We remain concerned about the undermining of Closing the Gap targets and offender rehabilitation goals that this causes, and the lack of appropriate supports for offenders in community. An independent oversight authority would go a long way towards addressing these concerns.
- We note that, unlike COs which are monitored by the AFP (a Commonwealth agency), CDOs and ESOs are dependent on state service delivery to offenders both when in custody or in the community, and multi-agency delivery of support services other than the NDIS. For this reason, when any ESO authority is convened, it should be multi-disciplinary and include a forensic psychiatrist or forensic psychologists, as well as a professional who is familiar with the availability of social services more broadly, such as a social worker.

We note that New South Wales does not have an independent oversight authority, and that Victoria provides the best available example of a post sentence authority in Australia. It has a dual purpose, independently monitoring services provided to offenders by government agencies and also monitoring the effectiveness of the scheme. It is responsible for independent and rigorous monitoring of multi-agency service delivery that is focused on treatment and rehabilitation through evidence-based means. One of its goals is to enhance strategic relationships and ensure that the information provided to it is purposeful, constructive, and transparent. It aims to balance the human rights of offenders with those of the victims and the broader community.

In its role as a monitor of the scheme, it independently monitors service delivery to offenders and reports on performance. The Board consists of senior lawyers, forensic psychologists or psychiatrists and community representatives.

In our view, it is important that any Commonwealth authority is similarly independent and staffed by suitably qualified professionals, who are recognised as having expertise in their respective fields, together with representatives of the broader community.

Compliance with s.105A.4 (if CDOs are retained)

If CDOs are to be retained, we submit that an **independent standalone body should be promptly appointed to monitor and report on the treatment of offenders detained under a detention order** in accordance with s.105A.4.

Our experience in New South Wales is that terrorism related offenders, including those detained under CDOs (or who are in custody charged with breaching an ESO), are housed in conditions in prison that are indistinguishable from punitive detention. This occurs despite the Commissioner of Corrective Services being legally obligated to "as far as practicable"

keep post-sentence inmates, such as those subject to a Commonwealth CDO, separate from other classes of inmates.[41]

Many terrorism offenders, or other inmates identified and classified as an Extreme High Risk Restricted (**EHRR**)/ National Security Identified (**NSI**) are held at Goulburn High Risk Management Correctional Centre (**HRMCC**) (colloquially known as 'Supermax'). There is almost no publicly available information about the policies and procedures applied to management of these inmates – the Custodial Operations Policies and Procedures document which applies to offenders with such classification '*3.5 HS, EHS, EHRR, NSI, AA and Cat 5 (Under review)*' has been under review for some time, and is entirely redacted.[42] Information which *is* available, through reports published by the New South Wales Inspector of Custodial Services, reflects some of the concerns identified by the INSLM Report about the conditions of custody for violent extremist identified or terrorism related offenders. For example:

- Inmates in 'supermax' prisons, generally, are often subject to restrictive regimes, including long periods confined in their cells (sometimes up to 23 hours a day), restrictions on how many people they associate with and on undertaking programs and activities.[43]
- HRMCC was inspected by the ICS in 2016 as part of a thematic inspection on the management of radicalised inmates in the NSW Correctional system. Generally, they found HRMCC to be a functional and well-equipped high security facility. However, they reported being "*…concerned to find HRMCC inmates, who were already subject to the most restrictive custodial regime in the highest security facility in NSW, in segregated custody. We struggled to understand how this was a necessary or useful approach for managing this cohort.*"[44]
- The rehabilitation of inmates who were either ready to disengage or capable of disengaging from extremism was being hindered by the high security environment of the HRMCC. The behaviour management regime that applied to all inmates was "*not designed to manage violent extremists and we were concerned this could exacerbate radical tendencies and generate a group identity based on shared grievances, driving hostility toward HRMCC staff*".[45]
- Further inspection was carried out by the ICS in 2021. The ICS noted "Despite many improvements in HRMCC … since our previous inspection, including greater access to exercise, phone calls and visits, inmates still had no access to programs, work or education."

[41] *Crimes (Administration of Sentence) Regulation 2014* (NSW) reg 33.
[42] https://correctiveservices.dcj.nsw.gov.au/documents/copp/hs-ehs-ehrr-nsi-aa-cat5-redacted.pdf
[43] Ibid [51].
[44] Inspector of Custodial Services Report, 'Goulburn Correctional Centre and the High Risk Management Correctional Centre." (June 2022) at [8]: https://www.parliament.nsw.gov.au/tp/files/82137/Inspection%20of%20Gou burn%20CC%20and%20HRMCC%202021_FINAL.pdf
[45] Ibid [52].

- While HRMCC is not specifically designated (at least publicly) as the location in which Div 105A offenders would be held in New South Wales in future, this facility was purpose built to house inmates requiring the highest level of security, including remand and sentenced inmates identified as violent extremists, as well as other inmates who are being held at the HRMCC because they pose an extreme risk to other inmates or staff or the good order of a correctional centre. There is no other prison like it in the state.
- The ICS noted in a 2016 inspection that EHRR and NSI inmates held in the HRMCC were restricted from speaking or complaining to Official Visitors about their treatment and the conditions of their incarceration. Consequently, the ICS recommended that CSNSW consider removing the restriction on engagement between these inmates and Official Visitors. On further inspection in 2021, the ICS noted that the situation has not changed.[46] This lack of oversight and accountability for the conditions of custody further amplifies concerns expressed by the INSLM about recent refusal by state governments (including New South Wales) to allow inspection of prisons by the UN Subcommittee on Prevention of Torture and other Cruel, Inhumane or Degrading Treatment or Punishment.[47]

It is unclear how (or if) New South Wales prisons (HRMCC or otherwise) will comply, and transparently demonstrate compliance, with the requirements of s.105A.4 in the absence of an independent oversight authority.

INSLM Recommendations: Funding of Div 105A applications

> That provisions relating to payment of costs in post sentence order proceedings be amended such that the Commonwealth is to bear the reasonable costs of an offenders legal representation, including expert witnesses, and consequential provisions for conferral and agreement as to quantum, and orders for quantum.

Legal Aid **NSW** suggests that the question of funding arrangements be considered as a discrete issue, **subject to further detailed consultation** including with relevant representative bodies as well as state and territory legal aid bodies and National Legal Aid.

Legal aid is available in New South Wales to defendants responding to an application under Div 105A subject to our Means Test policy.[48] This is an eligibility requirement approved by the Legal Aid NSW Board under the *Legal Aid Commission Act 1979*, which ensures appropriate use of limited public funds. We note that the INSLM's recommendation does not remove the requirement for adherence to this eligibility policy, and any such change would require approval by our Board.

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[46] Ibid [71].
[47] INSLM Report [502].
[48] Crime policy control orders (nsw.gov.au) An applicant for Aid who wishes to appeal against an order, or seek variation or revocation of an existing order must also satisfy the merit test.

Where Legal Aid NSW grants aid, it can recover the money it has spent on these matters via the Expensive Complex Criminal Cases Fund (**ECCCF**), which is currently the subject of a request for a Performance Audit.[49]

Except in exceptional circumstances or in case of conflict of interest, Legal Aid NSW guidelines provide that where legal aid is granted, post-sentence orders are to be retained in-house by our specialist HROU (where possible). We understand, however, that we are the only legal aid commission which provides such service.

One consequence of the recommendations of the INSLM may be that defendants will simply not seek representation (at least in New South Wales) through Legal Aid. Private practitioners and counsel may also decline to undertake legal aid work, because the quantum of "reasonable costs" is likely to be substantially lower if sought at Legal Aid NSW scale fees,[50] as opposed to ordinary commercial rates.

The overarching issue from our perspective is the timing of applications, because under the Act a preliminary hearing must be listed within 28 days of filing. The requirement to determine eligibility for legal aid, or for a defendant to seek a court's decision on costs may be an impediment to effective legal representation. The time taken to process, determine and administer a grant of legal aid can mean valuable time to respond to an application is lost.

Whether a defendant receives Legal aid or is required to fund proceedings privately, there should be a careful **assessment of the quantum of funds for the defendant** and an agreed mechanism to determine what is fair and reasonable. It has been noted previously that there is an issue of equality of arms between the Commonwealth and defendants. Our experience is that these proceedings are often brought by the State or Commonwealth with substantially greater legal resources (for example, several solicitors, and multiple senior and junior counsel) than those available to legally aided defendants. Defendants should not be left to fund their defence, at short notice and at a much lower levels of resourcing given the extraordinary nature of these orders.

We otherwise refer the Committee to our 2022 Submission at p.23-25 'Funding Issues', and **maintain our Recommendation 16 that consideration be given to expanding ECCCF funding** to facilitate training and professional development, and provide extended legal assistance support services.

[49] Expensive Commonwealth Criminal Cases Fund | Australian National Audit Office (ANAO)
[50] Crime Supreme Court (nsw.gov.au)

Part 2: Additional issues and recommendations by Legal Aid NSW

Standard of proof and narrowing of 'object of risk' for CDOs if retained.

We refer the Committee to our 2022 submission at p.16 and **renew Recommendations 7 and 8** which echoed the position of both the Law Council of Australia and the AHRC.[51]

The INSLM has observed that, if CDOs are retained, such an order should only be available where the relevant risk involves the commission of a terrorist act, or preparing or planning for one (this formulation having been taken from the test for preventive detention under Div. 105.)[52] We **maintain our submission** (consistent with our Recommendation 7, and the minority reasoning in *Benbrika*[53]) that this narrowing of scope is appropriate if CDOs are not abolished.

The INSLM did not recommend any change to the test for the making of an ESO, in accordance with our Recommendation 8. The INSLM observed at [429]: "all courts dealing with applications for ESOs will appreciate the seriousness of the issues, their nature and consequences of findings by applying the *Briginshaw* understanding. The standard will be high."

Accepting that the standard is high, **we maintain our submission** that the threshold for the making of an ESO should be satisfaction to "a high degree of probability". This language is well understood and has been adopted widely in other post-sentence order schemes, and it better reflects the extraordinary level of restriction and control imposed on an individual under an ESO (as opposed to a control order).

Overlap between Div 105A and Control Order Regime

We refer the Committee to our 2022 submission at p.10-12 and **renew our alternative recommendation** that control orders not be available while an Order under Div 105A is in force or is pending. This is also consistent with the third INSLM's recommendation in 2017.[54] **Further,** such proceedings should not be available as a "fallback" if an offender has been the subject of failed proceedings based on substantially similar information in corresponding State regime (e.g. under THRO Act).

The present state of legislation leaves open the real possibility that the Minister may pursue a CDO, then an ESO, and a Control Order against a single individual (each as a successive "fall back" position), with concurrent or a substantial duplication of proceedings in the Supreme Court and Federal Court. We draw the Committee's attention to our experience in

[51] AHRC Submission, 10.1
[52] INSLM Report [489].
[53] At [64].
[54] 'Commonwealth of Australia, Independent National Security Legislation Monitor, Control Orders and Preventative Detention Orders.'

Pender, and concerns about the procedural fairness implications and significant resource consequences of this at p.10-11.

While there may currently be policy agreement between Commonwealth and/or State and Territory authorities about the precedence of available post-sentence orders, there is no legislative safeguard to prevent harassment by multiple prosecutions about the same issue. We are of the view that, in prosecuting applications against eligible individuals, the Minister/authority should be required to proceed with the least restrictive form of supervision/control. Any policy agreements between state and Commonwealth authorities about application proceedings should also be published.

Procedural issues for further consideration

A number of recommendations made by Legal Aid in our 2022 Submission are not specifically addressed in the INSLM Report, but continue to pose practical challenges impact on procedural fairness and resourcing.

In relation to the **timing of applications**, the INSLM notes at [106]-[107] "*experience with Div 105A has already shown that applications that are made 'late', and do not allow sufficient time for all necessary work to be done before determining an application, risk injustice to a defendant…If my recommendation for the abolition of [CDOs] is accepted, a great deal of this injustice will cease because a person could not be detained in custody beyond their sentence*." While we support abolition of CDOs, we remain of the view that late filing of ESO applications compromises effective legal defence, and that some steps should be taken to legislate a "window period" within which Div 105A applications must be filed.

The INSLM hearing provided some public insights into the burden of responding to a Div 105A application. At [466], the INSLM set out the volume of material provided to Mr Benbrika's lawyers. Based on our experience with *Pender* and in THRO Act applications, we observe that the scale and complexity of post-sentence terrorism matters is extraordinary, even compared to complex criminal practice. To give some context:

- These matters are generally the **size and complexity** of something in the nature of a large scale commonwealth prosecution or homicide matter – the product usually of months if not years of police investigation and work compiling a brief of evidence before proceedings are even commenced.
- In a criminal prosecution for a serious offence, there is generally a **long period of preparation** time (of months to years) in which to get across the brief material, and before a decision must be made about a plea, negotiations, or to be ready for trial. Where high risk offender matters are filed within only a few weeks or months of sentence expiry, the defendant does not have this time.
- At the point at which high risk offender proceedings are commenced, **the State is at a distinct advantage**: it has **greater relative resources**, a **sophisticated and readily accessible client**, and has had **time** to develop familiarity with the available documentary material and evidence.

The long 'lead time' before a sentence or trial in large, complex criminal matters is crucial not only to enable sufficient time to become familiar with the brief, take instructions, explore the availability of exculpatory or contextual material, obtain relevant expert opinions, and distil the issues in dispute: it also provides opportunity to develop rapport with the client, which is particularly important when a matter requires robust advice about prospects of success and appropriate concessions.

Where Div 105A proceedings are filed with weeks or a few months before sentence expiry, our **capacity to discharge our obligations to the client and court** are significantly undermined. In almost all cases, eligible offenders will have been identified by authorities years before they are due for release: filing of applications seeking extraordinary post sentence orders in those circumstances should be confined to a "window period" of 6-12 months prior to the relevant non-parole or sentence expiry date unless the offender was not identified as a possible eligible offender within that timeframe.

We urge the Committee to consider our Recommendations 1 and 2 (requiring notification to offenders under consideration and filing at least 6 months' in advance of sentence expiry).

Specified Authority supervising offenders on orders

In New South Wales, post-sentence terrorism offenders are monitored and supervised by a team of Community Corrections officers (**CCO**) and police. The equivalent of the 'Specified Authority' is the 'Enforcement Officer' (**EO**). An EO is usually a very experienced CCO. Conditions under THRO Act are framed in such a way that the delegated power vested in an EO is also extended to *their* delegate, which in practice includes members of the ESOIT (ESO Police). Although the EO and police work together as a team, in our experience there is an inherent tension in their roles and responsibilities, with some offenders subject to inconsistent directions.

We note and endorse the INSLM's concerns about the appropriateness of a law enforcement officer being the specified authority and *"the person actually liaising with a subject day to day to oversee compliance with conditions…"* In our experience in New South Wales, the involvement of law enforcement officers in offender management and compliance is one of the principal drivers of high breach and re-incarceration rates. This is largely a consequence of a structural deficit in the CHRO and THRO Acts: they do not provide for an independent review authority (such as the State Parole Authority (**SPA**), and so decisions about whether to proceed with charge and prosecution rests exclusively with police, whose remit is enforcement, not rehabilitation and reintegration.

EOs are generally experienced in making judgments in the context of parole about whether breach conduct can be dealt with by a warning or further directions, or it warrants formal breach action with recommendations about consequences or (as a last resort) revocation of parole. This hierarchy of actions is available, and utilised, because the State Parole Authority exists to make the final determination. In contrast, in our experience, ESOIT police take a highly risk averse, 'zero tolerance' approach, to breach. Where there is any evidence of a breach (for example, and offender admits in AOD counselling that they have consumed drugs,

or returns a positive drug swipe) this leads to a decision to arrest, charge and refuse bail. This is in stark contrast to the more balanced approach on parole, where discretion to warn is commonly exercised or recommended to SPA.[55]

As it stands, the final decision about whether to breach or not effectively rests with police who (understandably) may not be willing to bear responsibility for making that determination (even where an offender is demonstrating good compliance and progress in all other respects). In the absence of a **legislated hierarchy of sanctions and for breach** (before criminal prosecution), **an independent authority** (such as a State Parole Authority or post sentence auhority), and a **defence of reasonable excuse**, this pattern of immediate breach and return to custody by law enforcement is highly likely to be perpetuated in the Commonwealth scheme, and it will undermine rehabilitative efforts.

We refer to the Committee to our 2022 submission p.17-19 and ask the Committee to accept our Recommendation 9.

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[55] Using the example provided, while prior use of drugs is obviously a concern, an offender making voluntary disclosures of use in a counselling context may be regarded as positive as it demonstrates honesty, acceptance of responsibility, and ongoing engagement with protective and therapeutic services. In that scenario, an immediate return to custody may be regarded as counterproductive to rehabilitation, because of the disruption to treatment and existing social support services.