A practitioner's guide to Continuing Detention Orders and Extended Supervision Orders

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Introduction

This document is not intended to be an exhaustive guide into post-sentence orders. Rather, it is intended to provide guidance into post-sentence orders and where in the Commonwealth Criminal Code the relevant provisions can be found.[1]

There is also a brief summary of some cases which may be of use if you have a client facing an application for a post-offence order.

Post-sentence orders

The Commonwealth Criminal Code (**the Code**) provides for two different orders to be made against people who have been found guilty of, and have been sentenced for, a terrorism offence. Those orders are Continuing Detention Orders and Extended Supervision Orders and they are provided for in div 105A of the Code. They are jointly referred to as post-sentence orders.

There are a few commonalities between the orders. Importantly, these include:

1. The object for both is to protect the community from serious terrorism offences
2. A court must be satisfied that a person poses an unacceptable risk before making such an order[2]
3. Each order can be made for a maximum of three years[3]
4. Interim orders can be made in both cases[4]
5. Successive orders can be made to commence straight after the cessation of the order.[5]

[1] The Commonwealth Criminal Code is found within schedule to the *Criminal Code Act 1995* (Cth).
[2] The Code s 105A.1.
[3] The Code sub-s 105A.7(5) (CDO) and sub-s 105A.7A(4)(d) (ESO).
[4] The Code s 105A.9 (CDO) and s 105A.9A (ESO).
[5] For CDOs see sub- s 105A.7(6) and for ESOs see sub-s 105A.7A(5).

Definition of terrorist offender

An order may be made in relation to a terrorist offender. An offender is a terrorist offender if they have been convicted of one of the following offences:[6]

- Intentionally delivers, places, discharges or detonates a device which is an explosive device against a public place intending to cause death, serious harm or destruction to the place[7]
- A serious Part 5.3 offence. Part 5.3 relates to terrorism generally. What makes a Part 5.3 offence serious is if the maximum penalty is 7 years or more[8]
- Offences which relate to foreign incursion and recruitment, except for if they relate to publishing recruitment advertisements.[9]

An order can only be made against someone who is 18 at the time their sentence ends.[10]

How an application is made

An application can be made by the AFP Minister (or their legal representative) within 12 months of the end of an offender's term of imprisonment.[11]

The application must be made to the Supreme Court of a State or Territory.[12]

The AFP Minister must make reasonable inquiries to ascertain any facts that would 'reasonably be regarded as supporting a finding' that an order should not be made (exculpatory facts).[13]

An application must include the following:

1. Any document that the applicant intends to rely on
2. Exculpatory facts
3. Information about the offender's age

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[6] The Code sub-s 105A.3(1)(a).
[7] This is shorthand and it is drawn from the offence provisions in s 72.3 of the Code.
[8] The Code sub-s 105A.2(1).
[9] The Code sub-s 119.7(2) or (3). Note that this covers offences under the Code in Part 5.5 and also under the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth).
[10] The Code sub-s 105A.3(1)(c).
[11] The Code sub-s 105A.5(2)(a).
[12] The Code sub-s 105A.5(1).
[13] The Code sub-s 105A.5(2A).

4. A request for an order of certain duration.[14] Remember that the period of an order cannot be more than three years
5. A report addressing the offender's risk.[15]

If the application is for an ESO then the following also needs to be included:

1. A copy of the proposed conditions
2. An explanation as to why each of the proposed conditions should be imposed on the offender
3. Exculpatory facts which relate to why a certain condition shouldn't be imposed
4. If the offender is already subject to an order which is equivalent under a State or Territory law, then a copy of that order.[16]

An application must be provided to the offender personally and to the offender's legal representative within two business days after the application is made.[17] Note that if the offender is in custody then it must be given to the offender as soon as reasonably practicable.[18]

Certain information is to be excluded from an application or material provided with the application. This includes:

1. National security information[19]
2. Information excluded on the basis of public interest immunity[20]
3. Terrorism material; advocating for engaging in or planning or preparing for terrorist acts or advocating for joining a terrorist organisation.[21]

[14] The Code sub-s 105A.5(3)(a)-(c).
[15] The Code sub-s 105A.5(3)(e). Such a report is obtained under s 105A.18D.
[16] The Code sub-s 105A.5(3)(d).
[17] The Code sub-s 105A.14A(2).
[18] The Code sub-s 105A.15(2).
[19] The Code s 105A.14B.
[20] The Code s 105A.14C.
[21] The Code s 105A.14D.

Preliminary hearing to determine whether to appoint an expert

If there is an application made for a CDO or an ESO then the Court must hold a preliminary hearing to determine whether to appoint one or more experts.[22] This must be done within 28 days of the application being given to the offender.[23]

The test for appointing one or more experts is whether the Court considers that it will 'materially assist' in deciding whether to make an order.[24] The parties can nominate one or more experts to the Court.[25]

Assessment and report by an expert

If the Court appoints an expert or experts then the offender must attend the assessment.[26]

An appointed expert must conduct an assessment of the risk that the offender poses of committing a serious Part 5.3 offence and provide a report to the Court and the parties.[27]

A report may include any of the following:

1. The risk of the offender committing a serious Part 5.3 offence
2. The reasons for such an assessment of risk
3. The pattern and progression of behaviour of the offender relating to Part 5.3 offences and an indication of the nature of any likely future behaviour
4. Efforts made to address the cause of such behaviour and any active participation in rehabilitation
5. The effect of rehabilitation on the offender
6. The background of the offender including developmental and social factors
7. Factors that might increase/decrease risks identified in relation to the offender committing a serious Part 5.3 offence

[22] The Code sub-s 105A.6(1).
[23] The Code s 105A.6. See also sub-s 105A.14A(2) for the requirement for the application to be given to the offender.
[24] The Code sub-s 105A.6(3).
[25] The Code sub-s 105A.6(3A).
[26] The Code sub-s 105A.6(5).
[27] The Code sub-s 105A.6(4).

8. Any other matters considered relevant.[28]

Anything said by an offender in an assessment is not admissible against them in criminal or civil proceedings save for proceedings connected to div 104 of the Code.[29] This is the division in relation to control orders.

Any of the parties can decide to also call their own expert.[30]

Matters to which a Court must have regard

When deciding whether to make an order, civil evidence and procedure rules apply.[31]

In deciding whether to make an order, the Court must have regard to the following:

1. The object of the division (protecting the community from serious Part 5.3 offences)
2. A report of an assessment by an expert or the results of any other assessment as to risk
3. Any report as to the management of the offender in the community
4. Treatment or rehabilitation programs undertaken by the offender
5. Level of compliance with any obligations while on parole for an offence listed under sub-s 105A.3(1)(a)[32] or an order for terrorist offenders under the Code
6. Priors for an offence against sub-s 105A.3(1)(a)[33]
7. Views of a sentencing court at the time a sentence was imposed for an offence under sub-s 105A.3(1)(a)
8. Whether the offender is subject to an equivalent order under a State/Territory law
9. Any other information as to risk of committing a serious Part 5.3 offence.[34]

The Court may have regard to any other matters it considers relevant.[35]

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[28] The Code sub-s 105A.6(7).
[29] The criminal offences under this division relate to breaching the conditions of a control order or not complying with the condition to wear an electronic monitoring device.
[30] The Code sub-s 105A.6(8).
[31] The Code sub-s 105A.6B(3). See also s 105A.13.
[32] See the section, 'Definition of terrorist offender' above.
[33] Ibid.
[34] The Code sub-s 105A.6B(1).
[35] The Code sub-s 105A.6B(2).

Review of post-sentence orders

The AFP Minister must apply for a review before the end of 12 months of a CDO or an ESO being made or, if they have been previously reviewed, within 12 months of the most recent review.[36]

If an application is not made then the order ceases to be in force at the end of the 12 month period.[37]

Following a review, the Court may affirm or revoke the order.[38]

Continuing Detention Orders

As the name suggests, these orders ensure that a person is detained in custody following the conclusion of their sentence. As they are not sentenced prisoners they are not meant to be treated as such and 'must be treated in a way that is appropriate to his or her status'.[39]

Making a CDO

A Court may make a written order if satisfied of three preconditions:

1. There is an application made in accordance with the requirements of the Code[40]
2. The Court is satisfied to a 'high degree of probability' that the offender poses an unacceptable risk when taking into account the matters to which the Court must have regard[41]
3. There are no less restrictive measures available to prevent the unacceptable risk.[42] A less restrictive measure can include the making of an ESO.

The onus of satisfying the Court as to unacceptable risk and that there are no less restrictive measures available lies with the AFP Minister.[43]

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[36] The Code sub-s 105A.10(1A)-(1B).
[37] The Code sub-s 105A.10(4).
[38] The Code sub-s 105A.12(4)-(5AA).
[39] The Code s 105A.4(1).
[40] The Code sub-s 105A.7(1)(a).
[41] See the section, 'Matters to which a court must have regard' above.
[42] The Code sub-s 105A.7(1)(c).
[43] The Code sub-s 105A.7(3).

The housing of offenders on CDOs

Those the subject of a CDO must not be accommodated or detained in the same area of the prison as prisoners who are serving sentences, unless:

1. It is necessary or their rehabilitation or treatment
2. It is necessary for the security or good order of the prison
3. It is necessary for the safety and protection of the community
4. The offender elects to be accommodated with sentenced prisoners.[44]

Interim detention order

If an application has been made for a CDO then the AFP Minister can apply for an interim detention order (**IDO**).[45]

The Court can make a written order if satisfied that the person in custody or detention will be released before the application for the CDO has been determined and there are reasonable grounds for considering that the CDO will be made.[46]

The IDO cannot be made for a period of more than 28 days and the total period that a person can be on an IDO before a decision is made in relation to the CDO is three months, unless there are exceptional circumstances.[47]

If the order is made then it ensures that the person is committed to detention in a prison while in force.[48]

[44] The Code sub-s 105A.4(2).
[45] The Code sub-s 105A.9(1).
[46] The Code sub-s 105A.9(2).
[47] The Code sub-s 105A.9(5)-(6).
[48] The Code sub-s 105A.9(3).

Extended Supervision Orders

The provisions relating to ESOs commenced on 9 December 2021.[49] These orders allow for an offender to be supervised in the community following the end of their sentence.

Making an ESO

A Court may make a written order if satisfied of three preconditions:

1. There is an application made in accordance with the requirements of the Code[50]
2. The Court is satisfied on the 'balance of probabilities' that the offender poses an unacceptable risk when taking into account the matters to which the Court must have regard[51]
3. The Court is satisfied that each of the conditions on their own and all of the conditions operating together are reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the community from the unacceptable risk.[52]

When deciding whether the conditions are reasonably necessary and reasonably appropriate and adapted, the Court must take into account the object of the Division.[53]

The onus of satisfying the Court, as to unacceptable risk and that the conditions are reasonably necessary and reasonably appropriate and adapted, lies with the AFP Minister.[54]

The making of an ESO automatically revokes a CDO that was in force.[55]

Conditions of an ESO

The Court can make any condition which it considers to be reasonably appropriate and reasonably necessary to protect the community from an unacceptable risk of a serious Part 5.3 offence.[56]

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[49] *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth).
[50] The Code sub-s 105A.7A(1)(a).
[51] See the section, 'Matters to which a court must have regard' above.
[52] The Code sub-s 105A.7A(1)(c).
[53] The Code sub-s 105A.7A(2).
[54] The Code sub-s 105A.7A(3).
[55] The Code sub-s 105.7A(6).
[56] The Code sub-s 105A.7B.

However, there are general conditions listed under the Code:

1. That the offender not be present at a particular place
2. That the offender reside at a specified premise, including that they remain there at a particular time of day
3. That the offender not leave Australia or a particular State/Territory
4. That they surrender their passport
5. That they not change their name or use another name
6. That they not apply for a travel document or any license to use heavy machinery, a heavy vehicle or a weapon
7. That they not communicate with specific people
8. That they not access/use specified forms of technology (including the internet)
9. That they not possess or use specified articles or substances
10. That they not do certain activities
11. That they not engage in particular types of work
12. That they not engage in training or education without prior permission
13. That they engage in rehabilitation or undertake psychological/psychiatric assessment
14. That they attend and participate in interviews and assessments
15. That they provide specified information to a specified authority within a particular time
16. That they comply with the reasonable direction given in relation to a condition.[57]

Together with the broad conditions above, there are also conditions relating to monitoring and enforcement that the Court may impose. For example, that the offender:

1. Carry a specified mobile phone[58]
2. Allow any police office to enter specified premises to search the offender or the residence[59]

[57] The Code sub-s 105A.7B(3).
[58] The Code sub-s 105A.7B(5)(e)(i).
[59] The Code sub-s 105A.7B(5)(i).

3. Facilitate access to any technology for the purpose of the police accessing such data.[60]

The Court may also make conditions which are exemption conditions. That is a condition which allows an offender to apply to a specified authority for a temporary exemption from a condition of the ESO.[61]

Interim supervision orders

If an application has been made for an ESO then the AFP Miniter can apply for an interim supervision order (**ISO**).[62]

The Court can make a written order if an application is made for an ISO or an application is made for an IDO.[63] It must be satisfied that the term of imprisonment or detention will end before the application for a CDO or ESO is determined and there are reasonable grounds for considering that an ESO will be made.[64] The Court must also be satisfied that there are reasonable grounds for considering that each of the conditions to be imposed are reasonably necessary or reasonably appropriate and adapted for the purpose of protecting the community from the unacceptable risk of the terrorist offender committing a serious Part 5.3 offence.[65]

The Court must take into account the object of the Division when considering whether the conditions are reasonably necessary and reasonably appropriate for an ISO.[66]

If the order is made then the offender will have conditions placed upon them. If breached that will constitute an offence.[67]

The ISO cannot be made for a period of more than 28 days and the total period that a person can be on an ISO before a decision is made in relation to the CDO or ESO is three months, unless there are exceptional circumstances.[68]

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[60] The Code sub-s 105A.7B(5)(j).
[61] The Code sub-s 105A.7C.
[62] The Code sub-s 105A.9A(1).
[63] The Code sub-s 105A.9A(4)(a).
[64] The Code sub-s 105A.9A(4)(b)-(c).
[65] The Code sub-s 105A.9A(4)(d).
[66] The Code sub-s 105A.9A(5).
[67] The Code sub-s 105A.9A(6).
[68] The Code sub-s 105A.9A(7)(c)-(8).

Lawyer entitled to copy of ESO or interim supervision order

The offender's lawyer is entitled to an ESO or ISO made as soon as practicable after they have requested it.[69]

Varying the ESO or interim supervision order

The AFP Minister must bring an application to vary if satisfied that a condition is no longer reasonably necessary or reasonably appropriate and adapted.[70]

Either the AFP Minister or the offender may apply for a variation of conditions.[71]

A variation application may be brought by consent or otherwise.[72] If the application is not brought by consent then the Court must be satisfied of certain further factors.[73]

Offence to contravene an ESO or interim supervision order

There are offence provisions which relate to the breach of conditions on an order or by interfering with a monitoring device.[74]

[69] The Code sub-s 105A.7F.
[70] The Code sub-s 105A.9B(1A).
[71] The Code sub-s 105A.9B(1).
[72] The Code sub-s 105A.9C-105A.9D.
[73] The Code sub-s 105A.9C(1)-(2).
[74] The Code ss 105A.18A and 105A.18B.

Cases

This summary is not intended to cover each decision that has dealt with post-sentence orders but rather to indicate how the law has been applied in practice.

Nigro (unacceptable risk)

This case is the authority in relation to the interpretation of unacceptable risk. It was cited in approval in both the first review in the *Benbrika* matter[75] and in the judgment making the ESO in the matter of *Sa'adat Khan.*[76]

Importantly, in *Nigro* the Court acknowledged that 'some level of risk is acceptable in a democratic society that values the rights of an individual to freedom and privacy'.[77]

The Court then goes on to explain that when assessing whether a risk is unacceptable, it is the gravity of the consequences of the potential future offence which matters:

> *It is the gravity of the consequences of the offence which the offender is at risk of committing which will ordinarily be the critical factor in the assessment of whether that risk is 'unacceptable'. That gravity will depend upon the offender's likely conduct, which in turn depends upon an evaluation of the particular circumstances which pertain to that offender and not upon generalisations about the general character of the offence or sentences which are attracted by the relevant offence.*[78]

Benbrika (CDO)

Abdul Nacer Benbrika was found guilty, following a trial, of intentionally being a member of a terrorist organisation contrary to s 102.3(1) of the Code and s 102.2(1) of the Code. He was sentenced to a total effective sentence of 15 years' imprisonment, with a non-parole period of 12 years. His sentence expired on 5 November 2020.

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[75] *Minister for Home Affairs v Benbrika (First Review)* [2022] VSC 169.
[76] *Attorney-General v Hadashah Sa'Adat Khan* [2022] VSC 507.
[77] Nigro v Secretary to the Department of Justice [2013] VSCA 213; 41 VR 359 - Redlich, Osborn and Priest JJA [113].
[78] Ibid [130].

Original CDO proceeding

The Minister for Home Affairs applied for a CDO. Tinney J made the CDO on 24 December 2020, for a period of 3 years.

A matter that would become significant in later proceedings against Mr Benbrika was that, in determining the matter Justice Tinney was required to consider competing expert evidence regarding Mr Benbrika's risk of committing a serious offence if he was released into the community. The Minister for Home Affairs' two expert witnesses at the time both relied upon an assessment tool or instrument known as the violent extremism risk assessment (the VERA-2R). The Minister for Home Affairs was highly critical of Mr Benbrika's expert for expressing doubts about the validity of VERA-2R. On the basis of the evidence before him, Justice Tinney accepted the validity of VERA-2R and the assessments made using it.

This decision was appealed, pursuant to s105A.17 of the Code, which confers an appeal as of right to proceed by way of rehearing.

High Court judgment – constitutional validity

Prior to the hearing of the matter in the Court of Appeal, in February 2021, the High Court handed down its judgment regarding a challenge on behalf to the constitutional validity of the provisions which appear at Division 105A of the Code.[79] On the application of Mr Benbrika, the Supreme Court had reserved the following question in the proceeding for the consideration of the Court of Appeal of the Supreme Court of Victoria:

> *Is all or any part of Division 105A of the Criminal Code (Cth) and, if so, which part, invalid because the power to make a continuing detention order under section 105A.7 of the Code is not within the judicial power of the Commonwealth and has been conferred, inter alia, on the Supreme Court of Victoria contrary to Chapter III of the Commonwealth Constitution?*

On the application of the Attorney-General of the Commonwealth, the question reserved had been removed into the High Court pursuant to *Judiciary Act* 1903 (Cth), s40.

The High Court held (Kiefel CJ, Bell, Keane, Edelman and Steward JJ, Gageler and Gordon JJ dissenting), that Div 105A of the Criminal Code (Cth) validly conferred the judicial power of the Commonwealth on the Supreme Court of a State or Territory. The majority decision

[79] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68

was that Division 105A was rightly characterised as directed to ensuring the safety and protection of the community from the risk of harm posed by the threat of terrorism.[80]

Court of Appeal judgment

In November 2021, the Court of Appeal confirmed that when determining whether an offender poses an unacceptable risk of committing a serious Part 5.3 offence the Court does not need to specify which particular Part 5.3 offence the offender is said to pose an unacceptable risk of committing.[81]

The Court also noted that it is the effect of the whole of the evidence which is important when determining whether an offender poses an unacceptable risk of committing a serious Part 5.3 offence.[82] A piecemeal approach should not be taken.[83]

The fact that there were less restrictive means available to the Court, such as making a control order or taking into account the cancellation of a visa, does not mean that the primary judge needed to be satisfied that the unacceptable risk could be mitigated by less than a CDO.[84]

The Court generally found that there was no *House v The King* type error.[85]

First review

There have subsequently been two reviews of Mr Benbrika's CDO.

In the first review, the CDO was affirmed by Hollingworth J.[86] The underlying validity of VERA-2R was not disputed in that review because its validity had already been upheld by Justice Tinney and the Court of Appeal. Instead, the challenge was to the manner in which VERA-2R had been applied by the Minister for Home Affairs' experts in assessing Mr Benbrika's risk of offending.

Second review

In the second review, Hollingworth J agreed with the Minister's concession that Mr Benbrika no longer needed to be on a CDO but could be effectively managed in the community on an ESO. The publication of the reasons for this second review are pending, but Her Honour

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[80] *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 and *Fardon v Attorney-General* (Qld) (2004) 223 CLR 575
[81] *Benbrika v Minister for Home Affairs* [2021] VSCA 303 [73]-[80].
[82] Ibid [100].
[83] Ibid [99].
[84] Ibid [109]-[116].
[85] Ibid [121].
[86] *Minister for Home Affairs v Benbrika (First Review)* [2022] VSC 169.

gave short reasons concerning the precise terms of the order made, and a serious non-disclosure of exculpatory material in the earlier proceedings.

The non-disclosure of the Corner report

Central to the second review proceedings was a serious non-disclosure of exculpatory material that the Minister was obliged to provide to the respondent pursuant to:

> s105A.5(2A) – The AFP Minister must ensure that reasonable inquiries are made to ascertain any facts known to any Commonwealth law enforcement officer or intelligence or security officer that would reasonably be regarded as supporting a finding that the order should not be made; and
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> s105A.5(3)(aa) – The application must include:
> (i) a copy of any material in the possession of the applicant; and
> (ii) a statement of any facts that the applicant is aware of;
> that would reasonably be regarded as supporting a finding that the order should not be made.

The High Court had noted that an important statutory safeguard to the powers contained in Div 105A are these legislative requirements to disclose exculpatory material.[87]

The non-disclosure concerned a report produced in June 2020 by Dr Emily Corner and Dr Helen Taylor from the ANU produced a 150 page report headed, 'Testing the reliability, validity and equity of terrorism risk assessment instruments.' The Corner Report was commissioned by the Department of Home Affairs.

In her short reasons, Hollingworth J made the following findings and observations regarding the Corner report and its non-disclosure:

- The stated purpose of the Corner Report was to undertake a holistic and impartial analysis of both VERA2R and another assessment instrument called RADAR, to demonstrate the extent to which they accurately classified offenders or over-estimated or under-estimated the risk they pose. The authors also set out to provide the most comprehensive overview of the state of the empirical knowledge of the causes of radicalisation and terrorism to date.
- The Corner Report's findings were that the theoretical and empirical evidence base cited in both instruments user manuals and supporting documentation was of poor quality, was predominantly composed of theoretical assertions, secondary citations of

[87] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, at 87 [12].

literature reviews and media articles. Neither instrument followed a true, structured professional judgment approach as claimed by the authors, rather they were both “SPJ-lite”.

- Of the 1500 variables found in the empirical evidence to be statistically associated with movements towards radicalisation and violent extremism, VERA-2R covered only 14.2 per cent of those variables.
- VERA-2R offered poor predictive validity. Without a strong theoretical and empirical basis, it was not possible to anticipate that VERA-2R was able to predict the specified risk with 'anything other than chance'.
- The Corner report was clearly a document that should have been disclosed in the CDO proceedings.
- The Minister for Home Affairs did not disclose either the contents or existence of the Corner report to Mr Benbrika or the court, even though the validity of VERA-2R was a fundamental issue in dispute in the earlier proceedings. In the second review, the Attorney-General quite properly conceded that the non-disclosure of the Corner report was a serious breach of that disclosure obligation imposed by the Code.
- During 2022, the then Independent National Security Legislation Monitor, Grant Donaldson SC, conducted a review into the operation, effectiveness and implications of the part of the Code that deals with CDOs and ESOs. In the course of his review, Mr Donaldson became aware from Dr Corner's webpage that she had completed a research project for Home Affairs concerning the testing or risk assessment tools, and used his statutory powers to require Home Affairs to produce the Corner report to him.
- The Corner report was first publicly referred to in an Independent Monitor hearing on 21 November 2022. Mr Donaldson was highly critical of the minister's failure to produce the Corner report in the Benbrika proceedings. Mr Donaldson's strong and targeted criticisms still did not prompt either Home Affairs or the Attorney-General's department to produce the Corner report to Mr Benbrika or to inform him or this court of its existence. Mr Benbrika's lawyers first learnt of the Corner report from media coverage of the Independent Monitor's public hearings. A redacted copy of the Corner report was only provided to Mr Benbrika's lawyers on 6 December 2022 after they specifically requested a copy from the Attorney-General's department.

- In the days leading up to the trial, further disclosure material continued to be produced by the Attorney-General, including three further expert reports that were critical of VERA-2R, and which had never been produced in the earlier proceedings.
- After the close of evidence, yet another expert report that was critical of VERA-2R was disclosed for the first time by the Attorney General.

Her Honour indicated that after written reasons were published all of these non-disclosures would be referred to the new independent monitor for their consideration.

Having received the Corner report, in December 2022 Mr Benbrika's lawyers commenced a proceeding seeking a review of the CDO arising out of the non-disclosure of the Corner report. The Attorney-General then commenced his own proceeding seeking an order that this court make a less restrictive ESO in place of the current CDO, and Mr Benbrika's review proceeding and the Attorney-General's ESO proceeding continued alongside each other, relying on the same materials and being heard together.

In those proceedings, Mr Benbrika accepted that it was open to the Court to find the unacceptable risk test met for the purposes of an ESO. However, there were several matters in dispute between the parties concerning the duration and conditions of the ESO to be imposed.

Competing expert evidence

In considering those issues in dispute, Her Honour had before her the risk assessments of two expert witnesses – Dr Chelsey Dewson, called on behalf of the Minister, and Dr Anne Speckhard, called on behalf of Mr Benbrika.

Dr Anne Speckhard, a professor of psychiatry, and the founder and director of the International Centre for the Study of Violent Extremism in the United States, assessed Mr Benbrika, together with an Islamic scholar from that same international centre. Those sessions included testing Mr Benbrika with challenging hypothetical scenarios to see how he applied his ideological beliefs. Mr Benbrika engaged fully in those sessions and responded very positively to the Islamic scholar's mentorship.

The Attorney-General's expert psychologist, Dr Chelsea Dewson, continued to use the VERA-2R that she had used on previous occasions, to assist her in coming to her professional judgment on risk assessment.

The legislation does not require that a relevant expert use a formal risk assessment tool in order to carry out a risk assessment. However, Hollingworth J noted that if an expert does

choose to use such an instrument, the instrument should be empirically-based and have some underlying validity.

At the time of the original CDO proceeding in late 2020, Dr Dewson assessed Mr Benbrika's overall risk of committing a relevant offence as high. By the time of the first review proceeding in late 2021 she had reduced that to moderate-high. In second review proceedings Dr Dewson has reduced her overall risk assessment to moderate-low.

Dr Speckhard assessed Mr Benbrika's current risk of committing a relevant offence as low. Her Honour noted that Dr Speckhard is an internationally recognised expert in the field of terrorist studies, who had frequently been consulted by governments and security and police forces around the world, including the US Departments of Justice, Defence and Homeland Security, the UK Home Office and even the Australian Federal Police. She had been working in the terrorist extremist field for around 40 years.

In coming to her risk assessment, Dr Speckhard relied on her extensive experience, which includes working with more than 800 terrorist offenders from around the world. She had vastly more experience than the Attorney-General's expert, Dr Dewson, who had worked in the extremism field for less than ten years and had assessed fewer than 20 terrorist offenders.

Dr Speckhard also spent more time talking with Mr Benbrika, and met with him more recently, than Dr Dewson.

ESO conditions

Hollingworth J received detailed written and oral submissions regarding the conditions to be imposed. There were several conditions where Her Honour's reasoning will potentially have application to future ESO applications:

- Compliance with curfew condition: Not reasonably necessary to empower the AFP to enter and search a residential home which is occupied by persons other than Mr Benbrika. Instead, wording was used requiring him to present himself at the front door of the specified premises during the curfew period when required.
- Residential visitor condition: Not reasonable to restrict the persons who may enter Mr Benbrika's home to a list of specified individuals, particularly given the combined effect of all the other conditions imposed. The proposed condition would prevent other members of his family from having visitors, and potentially criminalise a situation where one of their friends dropped by unannounced – conduct which has no connection whatsoever with the risk of offending. It would have prevented visits from

professional persons such as lawyers, health-care visitors, delivery persons and tradespeople. The suggestion that written permission could be sought from the AFP Superintendent was unreasonable and impractical.

- Condition which empowering the AFP superintendent to give written notice of other prohibited persons or classes of prohibited persons with whom Mr Benbrika must not associate: A carve out to this condition was added so that a variation to the ESO must be sought if the AFP superintendent sought to prohibit association with certain members of his family.

- Attendance at mental health treatment appointments: The condition imposed requires that Mr Benbrika must not fail to attend three or more psychological or psychiatric treatment appointments in a row without a reasonable excuse, as opposed to a requirement that he attend all mental health treatment appointments unless he has a reasonable excuse. Missing an occasional appointment was not necessarily a barrier to making therapeutic progress, and the primary management of mental health treatment should be left as far as possible to experienced mental health practitioners.

- Information sharing regime for treating mental health practitioners: Information regarding mental health treatment required to be shared with persons and agencies involved in supervising the ESO was limited to the following:

    (1) Information regarding the dates and duration of sessions he had attended and the general themes and topics of those sessions;

    (2) Information regarding his level of engagement with treatment;

    (3) Information regarding any deterioration in his mental state that may impede his ability to interact in supervision, participate in offence-specific treatment or comply with the conditions of the ESO; and

    (4) Should the treating psychological or psychiatrist have concerns for his safety or the safety of others, information in relation to those concerns.

- Condition requiring notification to the AFP superintendent in writing three calendar days prior to his attendance at any place of public religious worship, service or celebration, or in any private prayer group: Condition not imposed, considered an unjustifiable limitation on the right of Mr Benbrika to freely practice his religion and to attend community events such as weddings and funerals, and would have prevented Mr Benbrika from spontaneously praying with his own family in his own home or from

engaging in spontaneous prayer with friends outside his home. Proposed condition not reasonable given the combined effect of all of the other ESO conditions.

- Non-association condition: Proposed condition prohibiting contact with persons on bail or community release to persons who have been charged with, or committed of, terrorist related offences.
- Condition added permitting the discussion of certain otherwise "prohibited matters" in the course of mental health treatment or disengagement program: A condition was added clarifying there would be no breach of other conditions based on things Mr Benbrika says or does, or does not say or do, in the course of his mental health treatment or disengagement program. This would enable him to discuss what would otherwise be prohibited matters in the course of that treatment or programs. Discussing and challenging potentially extremist views is an important part of both the therapeutic and disengagement processes.
- Condition added concerning Mr Benbrika's current "library": To provide a procedure by which the AFP superintendent can go through all of Mr Benbrika's books and other documents to determine which ones can and cannot be retained by him in order to comply with the ESO conditions.
- Condition added to provide a process for the review by the court of decisions made by the AFP superintendent in relation to significant matters under the ESO conditions: To provide an appropriate mechanism for judicial oversight of some of the more substantial powers, to ensure that the AFP superintendent is not effectively re-writing the ESO conditions through the approval, direction and notice powers.

Duration

As to duration, the Attorney-General argued that it should be for the three years. Mr Benbrika argued that it should be for no more than one year. Hollingworth J determined that the order would be for one year, for the following reasons:

- Mr Benbrika had not lived in the community since his initial arrest almost 20 years ago. Much of the experts' assessment of how Mr Benbrika would likely get on in the community had necessarily been based on predictions and judgment of things that may or may not come to pass.
- Given the Code requirement for annual reviews of post-sentence orders, there would need to be another court proceeding in 12 months' time in any event, and it was preferable that the judge hearing the matter at the conclusion of the ESO start with a

clean slate as to what, if any, ESO conditions are reasonable at that time, based on the expert evidence and evidence as to how Mr Benbrika has got on in the community since his release.

Sa'adat Khan (ESO)

This case may be useful for the purpose of what the Court will consider when making an ESO and on an annual review for an ESO.

Hadashah Sa'adat Khan pleaded guilty to providing support to a terrorist organisation contrary to s 102.7(1) of the Code. She was sentenced to a total of 2 years and 6 months' imprisonment with a non-parole period of one year and eleven months. Her sentence expired on 26 August 2022.

An ISO was at first put in place.[88] An extended supervision order was then made for a period of 18 months.[89] When making the ESO John Dixon J noted the following in relation to unacceptable risk:

> *The concept of unacceptable risk of committing a serious Part 5.3 offence is a flexible concept calibrated to the nature and degree of the risk and adaptive to the circumstances of each particular case. The critical assessment is the combination of the degree of likelihood of offending and the seriousness of the consequences if the risk eventuates. The gravity of the consequences will ordinarily be the critical factor in the assessment.*[90]

A review was undertaken in this matter in early 2024 and the ESO was affirmed.[91]

Ghazzawy (application for ESO rejected)

Most recently, the Supreme Court of New South Wales, considered an application brought for the imposition of an ESO. Button J did not consider that an ESO was necessary under the Code.

Ibrahim Ghazzawy pleaded guilty to the offence of making a document connected with preparation for a terrorist act contrary to s 101.5(1) of the Code. He was sentenced and

[88] *Attorney-General v Hadashah Sa'Adat Khan* [2022] VSC 507.
[89] *Attorney-General v Hadashah Sa'adat Khan (No 2)* [2022] VSC 687.
[90] *Attorney-General v Hadashah Sa'Adat Khan* [2022] VSC 507 [27].
[91] *Attorney-General v Hadashah Sa'adat Khan (No 3)* [2024] VSC 58.

appealed sentence. On appeal he received a head sentence of imprisonment of 8 years with a non-parole period of 6 years. His sentence expired on 9 December 2023.

Prior to his sentence expiring, an application for an ISO was granted.

In declining to make the ESO it was noted that there needs to be an unacceptable risk of committing a Part 5.3 offence within the maximum term of an ESO (being 3 years). It is not sufficient that there is an unacceptable risk of committing such an offence many years after release.[92] In this case, where the Attorney-General was applying for an order for 12 months the relevant risk period was for the same amount of time.[93]

Whilst his Honour was concerned about the development of a risk that Mr Ghazzawy might commit a terrorist offence, he was not satisfied on the balance of probabilities of the development of such a risk.[94]

INSLM Review of Division 105A and the future of CDOs

On 3 March 2023 the Independent National Security Legislation Monitor (INSLM), who was at that time, Grant Donaldson SC, reported to the Attorney General regarding the operation, effectiveness and implications of Division 105A of the Code, pursuant to s 6(1C) of the *Independent National Security Legislation Monitor Act* 2010 (Cth) (INSLM Act).

The Review made a number of recommendations, which are attached. The most significant of these was that CDOs should be abolished, but a number of other recommendations were made which would constitute substantial reform to the legislation if adopted.

The INSLM's report is now before the The Parliamentary Joint Committee on Intelligence and Security (PJCIS).

[92] *Attorney-General of the Commonwealth of Australia v Ghazzawy (Final)* [2024] NSWSC 208 [23]-[24].
[93] Ibid [28].
[94] Ibid [58].

Further cases/resources

Attorney-General (Cth) v Amin (Preliminary) [2023] NSWSC 1280

Attorney-General of the Commonwealth of Australia v Amin (Final) [2023] NSWSC 1586

Australian Human Rights Commission – Review into Division 105A of the Criminal Code (post sentence orders) Submission to the Independent National Security Legislation Monitor

Independent National Security Legislation Monitor Report – Division 105A (and related provisions) of the *Criminal Code Act 1995* (Cth)

Minister for Home Affairs v Pender [2021] NSWSC 1644

Dr Emily Corner and Dr Helen Taylor, Centre for Socia Research and Methods, The Australian National university – Testing the Reliability, Validity, and Equity of Terrorism Risk Assessment Instruments

Victorian Sentencing Manual – Chapter 34.6