

Recommendations of the Independent National Security Legislation Monitor

The Independent National Security Legislation Monitor (INSLM), Mr Grant Donaldson SC, conducted a statutory review of Division 105A of the *Criminal Code Act 1995* (Cth) and any other provision of that Code as far as it relates to that Division. The report of the INSLM was presented to the Parliament on 30 March 2023. The Attorney-General's Department and Department for Home Affairs draw the attention of the Parliamentary Joint Committee on Intelligence and Security to the recommendations of the INSLM listed below, as they are relevant to the issues which have been discussed in the departments' submission to this review.

- Recommendation 1: I recommend that Div 105A be amended to abolish continuing detention orders.
- Recommendation 2: I recommend that the objects of Div 105A be amended to include, as an express object of the Division, rehabilitation and reintegration of the subjects of a post-sentence order back into the community.
- Recommendation 3: I recommend that Div 105A.5 be amended to reflect the following.
 - A. First, s 105A.5(2A) should be amended to expand the class of those to whom the AFP Minister must inquire beyond Commonwealth law enforcement officers or intelligence or security officers. Those to whom inquiries are to be directed must include all departments and agencies of the Commonwealth that the AFP Minister believes may hold information relevant to supporting a finding that a post-sentence order should not be made. Where the AFP Minister believes that applicable material may be in the possession of a third party, the AFP Minister is to advise the defendant of this and provide details of the third party and the nature of the material.
 - B. Second, the AFP Minister or a legal representative of the AFP Minister ought to file with the application an affidavit that details the inquiries made to ensure compliance with the Minister's obligations under s 105A.5(2A).
 - C. Third, one week prior to any final hearing of the application, the AFP Minister or a legal representative of the AFP Minister ought to file and serve on the defendant details of the inquiries made since the last affidavit to ensure compliance with the Minister's obligations under s 105A.5(2A).
 - D. Fourth, there should be new provisions of Div 105A, to the following effect:

The Minister shall disclose to the defendant all information of which the Minister is aware that is in the form of an expert opinion, scientific evidence or research, which differs from such evidence to be relied upon by the Minister, or which in some way casts doubt on the opinions or evidence on which the Minister intends to rely. In particular, the Minister shall disclose to the defendant all expert opinion, scientific evidence or research relevant to assessment of the risk of the defendant committing a serious Pt 5.3 offence in the future including research in respect of tools used by relevant experts in forming their opinions.
 - E. Fifth, the AFP Minister or a legal representative of the AFP Minister ought to file with the application an affidavit that details the inquiries made to ensure compliance with the Minister's obligations under this new provision.

- Recommendation 4: I recommend that the definition of ‘relevant expert’ in s 105A.2 be repealed.
- Recommendation 5: I recommend that a new definition of ‘relevant expert’ replace it and be in a form that reflects the following:
 - ‘relevant expert’ means persons with expertise in and who are qualified to express opinions as to the risk, and means of ameliorating the risk, of a defendant committing terrorist acts.
- Recommendation 6: I recommend that s 105A.7A(1) be amended, and all other provisions of the Division consequentially so, to make plain that any reports or evidence of relevant experts can only be admitted to evidence if admissible by the applicable laws of evidence.
- Recommendation 7: I recommend that Div 105A be amended to remove the requirement for a court to have regard to any opinion evidence of any witness that is not admissible.
- Recommendation 8: I recommend that s 105A.6B(1) be amended to provide that in making a decision under s 105A.7A(1) the court must have regard to the objects of Div 105A and may have regard to the other matters provided for in s 105A.6B(1)(b)–(i)
- Recommendation 9: I recommend that s 105A.7A(1)(b) be amended to delete the words ‘after having regard to matters in accordance with section 105A.6B’.
- Recommendation 10: I recommend that s 105A.7A(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.
- Recommendation 11:¹ I recommend that s 105A.7(2) be deleted and that s 105A.7(1) be amended to reflect the following:
 - (b) the court is satisfied on the balance of probabilities, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence; and
 - (c) the court is satisfied on the balance of probabilities that:
 - (i) each of the conditions; and
 - (ii) the combined effect of all of the conditions; to be imposed on the offender by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community from that unacceptable risk and to aid the defendant’s rehabilitation and reintegration into the community.
- Recommendation 12: I recommend that s 105A.7E (specifying the conditions that must be made if electronic monitoring is ordered) be repealed.
- Recommendation 13: I recommend that within the next 3 years the Attorney-General’s Department publish a report responding to the following provisional recommendation:
 - An independent statutory body - the ESO Authority - will be created.
 - The ESO Authority will comprise members with skills suited to its functions. One member should be a senior legal practitioner.
 - The ESO Authority will oversee specified authorities to ensure that ESOs are administered

uniformly and consistently throughout the Commonwealth.

- The ESO Authority will oversee the provision of services that are to assist subjects of ESOs with their rehabilitation and reintegration into their communities.
 - At every review by the court of every ESO, the ESO Authority will report on the specified authority's exercise of delegated powers by the specified authority in respect of the person the subject of review.
 - At every review by the court of every ESO, the ESO Authority will report on subjects' compliance with conditions of ESOs and on the provision of services that are to assist with rehabilitation and reintegration of the subject into their community.
 - At every review by the court of every ESO, the ESO Authority will, if requested to do so by the court, provide any assistance requested but in particular on whether the ESO conditions are achieving their purpose and if not suggest changes.
- Recommendation 14: I recommend that s 105A.15A and reg 9 of the Criminal Code Regulations 2019 be repealed.
 - Recommendation 15: I recommend that they be replaced by provisions to the following effect:
 - If a post-sentence order proceeding is before a Supreme Court of a State or Territory, the Commonwealth will bear the reasonable costs and expenses of the offender's legal representation for the proceeding which includes costs of engaging expert witnesses if required.
 - Prior to the preliminary hearing to be held pursuant to s 105A.6 the Commonwealth and the defendant's solicitor or, if none has been appointed, the defendant, will confer to agree the quantum or the bases for charging of such fees and expenses and the manner in which they will be paid by the Commonwealth.
 - If at the preliminary hearing there is no agreement, the court will convene a hearing to be held as soon as practicable thereafter to enable the court to make orders as to the quantum or the bases for charging of such fees and expenses and the manner in which they will be paid by the Commonwealth