

NSW Council for Civil Liberties ('NSWCCL') and the Sydney Institute of Criminology ('SIC')

Updated Submission to the INSLM's Review of Division 105A of the *Criminal Code*

23 June 2022

Continuing Detention Orders ('CDOs')

Issue 1: Repeal CDOs

The NSWCCL and SIC maintain that the Commonwealth government should give serious consideration to whether the CDO scheme provided for by Div 105A of the *Criminal Code Act 1995* (Cth) ('Criminal Code') is necessary.¹ We concede that there would be a place for a continuing detention order scheme if there were terrorist offenders whom the state could prove would probably cause, or facilitate the commission of, grave harms even if they were subject to extended supervision orders ('ESOs'). But, given the extent of the restrictions that an ESO may place on a person's freedoms,² and given the unreliability of risk prediction,³ we find it difficult to accept that the state could ever prove that a person subject to such an order was, despite this, more likely than not to perpetrate, or support or facilitate, a 'terrorist act'⁴ in the future.⁵

Issue 2: Alternatively, amend the CDO scheme to make it as consistent as possible with human rights

The NSWCCL and SIC maintain that, if the CDO scheme is retained, the Commonwealth government should amend that scheme to ensure that it operates as consistently as possible with human rights. In so arguing, we make several submissions:

- First, the government should alter the test created by s 105A.7(1) of the Criminal Code. A Court should only be able to impose a CDO on an eligible offender if it is satisfied that, in the absence of such an order, there is (a) a greater than 50% chance⁶ (b) that the offender will commit, or support or facilitate the commission of, a 'terrorist act'.⁷
- Secondly, the government should ensure that detention under a CDO is truly non-punitive.⁸ We note in this regard that, in *M v Germany*, the European Court of Human Rights held a German preventive detention scheme to be punitive, on the basis that detainees were 'detained in ordinary prisons, albeit in separate wings'⁹ and there

¹ See NSWCCL and SIC Written Submission, pp. 4 and 16.

² See *Criminal Code Act 1995* (Cth) s 105A.7B.

³ See NSWCCL and SIC Written Submission, pp. 23-5.

⁴ See *Criminal Code Act 1995* (Cth) s 100.1 (definition of 'terrorist act') – and note the offence created by s 101.1(1).

⁵ For a fuller statement of this argument, see Andrew Dyer and Josh Pallas, 'Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights (and What to Do about It)' (2022) 33(1) *Public Law Review* 61, 73-5.

⁶ NSWCCL and SIC Written Submission, pp. 20-3; Dyer and Pallas (n 5) 80-2.

⁷ NSWCCL and SIC Written Submission, pp. 16-20; Dyer and Pallas (n 5) 78-80.

⁸ NSWCCL and SIC Written Submission, p. 17; Dyer and Pallas (n 5) 75-8.

⁹ [2009] VI Eur Court HR 169, 214 [127]. Compare *Criminal Code Act 1995* (Cth) s 104A.4(1)-(2).

were no special rehabilitative resources directed at them.¹⁰ We also note that, in response to *M*, and other decisions like it, the German authorities, at ‘considerable cost’, built special preventive detention centres and provided detainees with access to ‘individual and intensive psychiatric, psychotherapeutic ... [and] socio-therapeutic treatment’.¹¹ If the Commonwealth government is unwilling to go to such expense, it should at least repeal s 105A.4(1)(a) of the Criminal Code, which provides that ‘the management, security or good order of the prison’ is a sufficient reason to treat a person subject to a CDO other than ‘in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment’. The NSWCCCL and SIC support recommendations of the Australian Human Rights Commission (‘AHRC’)¹² and the Law Council of Australia (‘LCA’)¹³ to this effect.¹⁴ We also support the AHRC’s recommendations 12-15 in its submission to this Review and the LCA’s recommendations 36-39 in its submission dated 17 September 2020 to the Parliamentary Joint Committee on Intelligence and Security (which forms part of its submission to this Review).

- Thirdly, the Commonwealth government should remove the matters referred to by, respectively, ss 105A.6B(1)(g) and 105A.6B(1)(h), from the non-exhaustive list of matters to which a Court must have regard when determining whether the statutory tests created by, respectively, ss 105A.7(1)(b) and 105A.7A(1)(b) are satisfied. That is, when deciding to make a CDO – or an ESO – the Court should be required to consider neither the offender’s history of terrorist offending nor the views of the sentencing court when sentencing him or her.¹⁵
- Fourthly, though the SIC and NSWCCCL did not mention this matter in our Written Submission,¹⁶ we agree with the AHRC’s recommendation that the INSLM consider whether s 105A.3 of the Criminal Code should be amended so as to have the CDO scheme apply only to those who have been sentenced to a certain number of years’ imprisonment.¹⁷ We also argue, consistently with the position adopted by Legal Aid

¹⁰ [2009] VI Eur Court HR 169, 214 [128]. Compare *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1, 15 [37], 15 [39] (Kiefel CJ, Bell, Keane and Steward JJ). See too Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007 (18 March 2010) (“*Fardon v Australia*”); Human Rights Committee, *Views: Communication No 1635/2007*, 98th sess, UN Doc CCPR/C/98/D/1635/2007 (18 March 2010) (“*Tillman v Australia*”).

¹¹ *Ilseher v Germany* (European Court of Human Rights, Grand Chamber, Application Nos 10211/12 and 27505/14, 4 December 2018) [222].

¹² Australian Human Rights Commission Written Submission, p. 50 (Recommendation 11).

¹³ Law Council of Australia, ‘Review of Australian Federal Police Powers’ (Parliamentary Joint Committee on Intelligence and Security, 17 September 2020) 69 (Recommendation 40).

¹⁴ We acknowledge, too, that there is obvious force in Legal Aid NSW’s submission that the government should amend s 105A.4 to require that a person detained under a CDO not be held, in any circumstances, with sentenced or remanded inmates. See Legal Aid NSW Written Submission, p. 23.

¹⁵ NSWCCCL and SIC Written Submission, p. 25.

¹⁶ Though see NSWCCCL and SIC Written Submission, pp. 12-13 and Dyer and Pallas (n 5) 70, where we argue that, ideally, preventive detention regimes should apply only to those who have been convicted of serious violent offending.

¹⁷ AHRC Written Submission, p. 26 (Recommendation 2). See also Law Council of Australia (n 13), p. 62 (Recommendation 30), where a sentence of 7 years’ imprisonment is mentioned.

NSW,¹⁸ that s 105A.1 of the Criminal Code should be amended to provide that rehabilitation of relevant terrorist offenders is an object of Division 105A.

Issue 3: Relationship with ESOs

As suggested above, the NSWCCCL and SIC recommend that ESOs should act as the only – or, failing that, primary – mechanism for managing a terrorist offender’s risk to the community following the expiry of his or her sentence. That is, ESOs should be retained (although, as argued below, some modifications should be made to the ESO scheme created by Div 105A). We maintain that an ESO scheme *can* operate compatibly with human rights standards,¹⁹ and that the prosecution of those who contravene an ESO *can* be justified²⁰ – though we agree with the AHRC’s concerns about the prosecution of trivial breaches of ESO conditions²¹ and with the AHRC’s Recommendations 23-25 in its Written Submission to this Review.²²

ESOs

Issue 1: The NSWCCCL and SIC support all but one of the AHRC’s recommendations regarding ESOs

Since the SIC and the NSWCCCL drafted our Written Submission to this Review, the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth) has come into force. As a result, ESOs rather than control orders are now the primary method used by the state to supervise ‘terrorist offenders’²³ who are thought to remain dangerous after the expiry of their respective sentences. The NSWCCCL and the SIC support the bulk of the AHRC’s recommendations regarding ESOs. Specifically, the NSWCCCL and the SIC agree that: (i) the definition of ‘specified authority’ in s 100.1(1) of the Criminal Code should be altered in the manner recommended by the AHRC;²⁴ (ii) the AHRC’s recommendation 18, relating to the *consensual* participation in rehabilitation programmes etc, should be effected;²⁵ and (iii) the AHRC’s recommendations 19²⁶ (relating to the monitoring of those subject to ESOs), 20²⁷ (relating to applications for exemptions), 21²⁸ (relating to the consideration of the effect of proposed ESO conditions on an individual offender’s circumstances) and 22²⁹ (relating to the variations of interim supervision orders (‘ISOs’)), should also be effected. Moreover, as

¹⁸ Legal Aid NSW Written Submission, p. 5 (Recommendation 6).

¹⁹ See NSWCCCL and SIC Written Submission, p. 16.

²⁰ NSWCCCL and SIC Written Submission, p. 29.

²¹ AHRC Written Submission, pp. 67-73.

²² AHRC Written Submission, p. 73.

²³ See *Criminal Code Act 1995* (Cth) ss 105A.2 (definition of ‘terrorist offender’) and 105A.3(1).

²⁴ AHRC Written Submission, p. 58.

²⁵ AHRC Written Submission, p. 60.

²⁶ AHRC Written Submission, p. 62.

²⁷ AHRC Written Submission, p. 64.

²⁸ AHRC Written Submission, p. 65.

²⁹ AHRC Written Submission, p. 66.

indicated above, the NSWCCCL and SIC strongly agree with the AHRC's remarks about trivial contraventions of ESO conditions³⁰ and with the AHRC's recommendations 23-25.³¹

The only, minor, way in which we depart from the AHRC's recommendations concerns s 105A.7A(1)(b) of the Criminal Code. According to the AHRC, s 105A.7A(1)(b) should provide that a Court may only make an ESO if it is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing, providing support for or facilitating a terrorist act'.³² We agree with the AHRC that a Court should only be able to impose an ESO on an offender if he or she poses a high enough risk of being responsible – either as a principal offender, or as a secondary or passive participant – for a *terrorist act*. On balance, we also agree with the AHRC that, unlike with CDOs, an ESO should be possible without the state's proving that, in the ESO's absence, the offender is more likely than not to be responsible for such a grave harm. But, given the major restrictions on liberty that an ESO can impose on an individual, we do have reservations about this last conclusion. And we think, on balance, that the state should have to prove *beyond reasonable doubt* that there is an unacceptable risk that the offender will, unless there is an ESO, perpetrate a terrorist act him or herself, or support or facilitate its commission.³³

Issue 2: The NSWCCCL and SIC agree with the AHRC's recommendation that the control order regime, created by Div 104 of the Criminal Code, should be abolished

The NSWCCCL and SIC agrees with the AHRC that, now that the ESO regime is in force, the government should repeal the control order regime for which Div 104 of the Criminal Code provides.³⁴ See also the LCA's similar proposal.³⁵ We agree with the AHRC's reasons for that recommendation.³⁶ In the alternative, we agree with the AHRC that the government should amend the Criminal Code to prevent control orders from being imposed as a post-sentence order.³⁷ Like the LCA, we are concerned about the prospect of the state's being able to make a control order application in a case where its ESO application has not succeeded.³⁸

Interim Detention Orders ('IDOs') and Interim Supervision Orders ('ISOs')

Consider altering the circumstances in which IDOs and ISOs can be made

- While now not wishing to press our submission that the IDO scheme should be repealed,³⁹ and while now acknowledging that preventative detention orders might

³⁰ AHRC Written Submission, pp. 67-73.

³¹ AHRC Written Submission, p. 73.

³² AHRC Written Submission, p. 56.

³³ See Law Council of Australia, 'Review of Division 105A of the *Criminal Code Act 1995* (Cth): Responses to Questions of 6 July 2021' (Independent National Security Legislation Monitor' (11 February 2022) [12].

³⁴ AHRC Written Submission, p. 76 (Recommendation 26).

³⁵ Law Council of Australia, 'Review of Australian Federal Police Powers' (n 13), p. 23.

³⁶ AHRC Written Submission, pp. 74-5.

³⁷ AHRC Written Submission, pp. 75-6.

³⁸ See Law Council of Australia, 'Review of Division 105A of the *Criminal Code Act 1995* (Cth)' (Letter to Mr Grant Donaldson SC of 11 February 2022).

³⁹ NSWCCCL and SIC Written Submission, p. 26.

not always be sufficient to deal with the problem posed by terrorist offenders whose continued dangerousness only becomes apparent in the latter stages of their respective sentences,⁴⁰ the NSWCCCL and SIC remain concerned about IDOs (and, now, ISOs too). In particular, we are concerned that a person may be deprived of his or her liberty, or have his or her liberty severely restricted, for a period of 3 months⁴¹ – or more, in exceptional circumstances⁴² – upon a Court’s being satisfied that reasonable grounds exist for considering that a continuing detention order/continuing supervision order will be made in relation to him or her.⁴³

- The NSWCCCL and SIC contend that amendments should be made to s 105A.9 of the Criminal Code – and also now s 105A.9A – to ensure that IDOs/ISOs are only possible where, in the last six months of an eligible terrorist offender’s sentence, evidence or intelligence suddenly comes to light that requires such an exceptional course to be taken.⁴⁴ We note in this regard the submissions of Legal Aid NSW, which have a similar overall thrust to the position that we are advocating.⁴⁵
- The NSWCCCL and SIC also support the position advocated by the LCA,⁴⁶ namely, that a Court should be prevented from issuing an IDO – or an ISO – unless satisfied that this would be in the public interest. Moreover, we query whether there should be *any* circumstances where an ISO or IDO should be in place for longer than 3 months (we note in this regard that, until the coming into force of the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* (Cth), an IDO could be in place for no longer than 3 months, whatever the circumstances).

Right to legal representation and equality of arms

- The NSWCCCL and SIC recommend that strong consideration should be given to repealing s 105A.15A(3) (actions the Court may take when a terrorist offender is unable to engage a legal representative).⁴⁷
- Subsection 105A.15A(3) of the Criminal Code allows regulations to prescribe matters that the Court 'may, must or must not' take into account when considering whether

⁴⁰ Cf NSWCCCL and SIC Written Submission, p. 26.

⁴¹ *Criminal Code Act 1995* (Cth) ss 105A.9(6), 105A.9A(8).

⁴² *Criminal Code Act 1995* (Cth) ss 105A.9(6), 105A.9A(8).

⁴³ *Criminal Code Act 1995* (Cth) ss 105A.9(2)(b), 105A.9A(4)(c).

⁴⁴ NSWCCCL and SIC Written Submission, p. 26.

⁴⁵ Legal Aid NSW Written Submission, pp. 12-13.

⁴⁶ Law Council of Australia, 'Review of Australian Federal Police Powers' (n 13) pp. 64-5.

⁴⁷ NSWCCCL and SIC Submission, pp. 4, 26-27.

an offender's lack of representation is beyond his or her control and/or whether the costs and expenses of the offender's legal representation are reasonable.⁴⁸

- The NSWCCCL and SIC consider there is a strong public interest in ensuring offenders are adequately represented, and ensuring that the administration of justice is not mobilised to marginalise these individuals further, through unequal Court proceedings in which they lack appropriate legal representation.⁴⁹ We also note that the ambit of the power afforded to the executive to make regulations circumscribing the Court's discretion in making orders when an offender is unable to engage legal representation, is troubling. The executive should not be able to dictate to the Court what factors to consider in determining such an important issue.⁵⁰ Rather, the Court is best placed to determine which matters should be considered when determining whether to make orders to stay the proceedings for lack of representation, or that the Commonwealth is to bear certain costs.⁵¹
- While acknowledging that, to date, no such regulations appear to have been made, the NSWCCCL and SIC consider that the capacity for such regulations to be made in the first place poses a risk to civil liberties and is anti-democratic. If there is a strong public interest in having the Court consider, or not consider, particular factors in a given case, then such factors should be stated in Div 105A itself, following proper scrutiny by democratically elected members of Parliament.⁵²

⁴⁸ NSWCCCL and SIC Submission, p. 27

⁴⁹ NSWCCCL and SIC Submission, p. 27

⁵⁰ NSWCCCL and SIC Submission, p. 27.

⁵¹ NSWCCCL and SIC Submission, p. 27.

⁵² NSWCCCL and SIC Submission, p. 27.