Review of AFP Powers

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

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Legal Aid NEW SOUTH WALES

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 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 **Commonwealth Crimes Unit** is a specialist Unit within the Criminal Law Division which represents people charged with Commonwealth offences, including terrorism related offences including those convicted of terrorism related offences who are refused parole or are about to have their parole revoked.

Legal Aid NSW's **High Risk Offender Unit** was established in 2019 as a separate, specialist team within the Criminal Law Division. The Unit represents offenders subject to applications by the NSW Attorney General for post-sentence detention or supervision under the *Crimes (High Risk Offenders) Act 2006* (NSW) and *Terrorism (High Risk Offenders) Act 2017* (NSW).

We gratefully acknowledge the assistance of University of Sydney Law School students Philip Adams, Xudong Shen, John Su, Chen Zhao and Casey Zhu whose research undertaken as part of the Sydney University Law Reform & Policy Project under the supervision of Dr Grant Hooper and Professor Simon Rice OAM has informed this submission.

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Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's Review of AFP powers. Our submission is confined to the Committee's reference to consider the *operation, effectiveness and implications of Divisions 104 and 105 of the Criminal Code (which provide for control orders and preventative detention orders in relation to terrorism) and any other provision of the Criminal Code Act 1995 as it relates to those Divisions.*

The following comments focus on the interoperability of Division 104 (control orders) and Division 105A (continuing detention orders or **CDOs**) and recommendations for expansion of Division 105A to include extended supervision orders (**ESOs**) made by the Independent National Security Legislation Monitor (**INSLM**) in 2017.

The submission draws on the extensive experience and expertise of lawyers in both our Commonwealth Crimes Unit, who represent individuals charged with and/or convicted of Commonwealth terrorism offences, and the High Risk Offender Unit, who represent offenders subject to applications for post sentence detention or supervision under the *Terrorism (High Risk Offenders) Act 2017* (NSW) (the **THRO Act**). Experience of proceedings under the THRO Act provides valuable lessons for a Commonwealth ESO regime.

We support previous recommendations of the first INSLM and the COAG Review Committee for repeal of Division 105, as well as the complementary state and territory preventative detention order regimes. We further support the recommendation of the former INSLM Walker that the control order regime be repealed. Should Division 105A be expanded to include ESOs, there would appear to be even less justification for retaining a separate control order regime.

The INSLM's 2017 Review

Division 105A of the *Criminal Code 1995* (Cth) established a regime for the continuing detention of high-risk terrorist offenders (CDO regime). As far as we are aware, the Division has not yet been used.

In 2017 former INSLM Renwick recommended that state and territory supreme courts be given jurisdiction to make an ESO (while still retaining jurisdiction to make a CDO), warning that:

> *The current position is that divs 104 and 105A of the Criminal Code potentially give rise to the need for different applicants to make separate applications in respect of the same offender, in different courts, and seeking to satisfy different tests. That is not in the interests of the offender, the agencies responsible for making the respective applications, or the multiple courts which may have to hear them, hence my recommendation that a single court can make a CDO or alternatively an ESO*.[1]

[1] INSLM, *Reviews of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders,* 2017, p. 71.

The INLSM further recommended that:

a. the Commonwealth Attorney-General also be the applicant for an ESO

b. there be no new pre-conditions before the Attorney-General commences Division 105A proceedings for an ESO

c. an application may be made for an ESO in relation to a person who is already the subject of a CDO or ESO

d. the same controls and monitoring regime be available for an ESO made under Division 105A as a control order made under Division 104

e. the government consider making the special advocates regime available for applications under Division 105A

These recommendations have been supported by both this Committee[2] and by the Australian Government.[3]

The following submission focusses on the risk that a Commonwealth ESO scheme, without adequate safeguards, could lead to the very scenario it is designed to prevent: multiple and/or consecutive applications being brought in respect of the same offender, subject to different legislative tests and with competing monitoring and supervision requirements under state and the federal ESO schemes.

We also highlight the need for supervision and monitoring of ESOs to be directed to support, rather than undermine, an offender's compliance with the order and their reintegration into the community. The object of Division 105A is to ensure the safety and protection of the community (s105A.1). In the broader context, as observed by the High Commissioner for Human Rights, 'the purpose of security measures is, fundamentally, to protect freedom and human rights.'[4] Without adequate safeguards to prevent the oppressive use of multiple post-conviction order schemes, the fundamental purpose of Division 105A to protect freedom and human rights may be undermined.

[2] Recommendation 10 of the 2018 *Review of the police stop, search and seizure powers, the control order regime and the preventative detention order regime* is that *the Criminal Code be amended as required to implement an Extended Supervision Order (ESO) regime which would include any of the controls that can be imposed under a control order, similar review mechanisms, and other associated changes consistent with the model recommended by the Independent National Security Legislation Monitor at paragraphs 9.40 to 9.47 of his 2017 review*.
[3] Tabled on 24 May 2018.
[4] Mary Robinson, UN High Commissioner for Human Rights, Note to the Chair of the Counter Terrorism Committee: A Human Rights Perspective on Counter-Terrorist Measures (23 September 2002)

The risk of multiple post-conviction regimes

The risk of multiple and consecutive applications in respect of the same individual under both Division 105A and state post-conviction order schemes is most apparent in NSW, where the majority (if not the entirety) of applications for post-sentence supervision of high risk terrorist offenders has been brought. In the following discussion, we outline the NSW scheme and its implementation to date. We suggest that the present Inquiry consider recommendations for minimum safeguards to be included in Division 105A to ensure it is a fair and proportionate response to the threat of future terrorist offending, consistent with the objects of the Division and Australia's international legal obligations.

Overview of the NSW scheme

The THRO Act commenced on 6 December 2017. It provides a scheme for the State to apply for CDOs and ESOs, as well as interim detention and supervision orders and ex parte emergency detention orders. The threshold for making of interim supervision orders following a preliminary hearing is low, as the Court is required to assume that the facts alleged in the State's supporting documentation are proved and to consider whether those facts would justify the making of an ESO. ESOs can be imposed for a maximum of three years, and there is no statutory limit on how many subsequent applications can be brought.[5]

Unlike the Commonwealth CDO scheme, there is no "index offence" required to have been previously committed that is of the same nature of the risk to be assessed for the application: the "notional" index offence; the initial trigger for eligibility under the THRO Act is "any NSW indictable offence".[6] In this way, the THRO Act operates broadly to capture individuals who have never been convicted of a terrorist or a terrorism-related offence, but rather whose other prior conduct or conduct while in custody has brought them to the attention of authorities and who, it is then alleged, pose an unacceptable risk of committing a serious terrorism offence in the future.

The State must also establish that the offender falls into one of three categories:

1. *A convicted NSW terrorist offender*: a person who has been convicted of intentionally being a member of a terrorist organisation under s310J of the *Crimes Act 1900* (NSW) (s8, THRO Act). There have been no such convictions to date.

2. *A convicted NSW underlying terrorist offender*: an offender who has been imprisoned for an indictable offence which is a serious offence committed in a terrorism context (s9, THRO Act); and

[5] Section 26(6) and 26(8).
[6] Section 7.

3. *A convicted NSW terrorism activity offender*: an individual who

   (a) has at any time been subject to a Commonwealth control order
   (b) has at any time been a member of a terrorist organization, or
   (c) has at some point made a statement in support of any terrorist act or violent extremism or has had some affiliation with any person or group that is or was advocating support for any terrorist act or violent extremism (s10, THRO Act).

Unlike other post-conviction schemes, the THRO Act enables the Court to make a declaration, on preliminary application by the State, that an individual is an eligible offender before the commencement or determination of a substantive application for post-sentence supervision or detention.[7] The effect of such declaration is that the State does not need to establish the matters in the declaration in the later application until the declaration expires or is revoked[8]. Only declarations that a person is a convicted NSW terrorism activity offender are time limited.[9] Declarations can be sought in respect of the same individual on multiple occasions.[10]

With no required nexus between the index offence and the risk of terrorist offending post-sentence, an individual may be detained and/or subjected to strict supervision and monitoring without the usual safeguards of criminal prosecution for a terrorism offence. Even where an application does not succeed at final hearing, the offender may be subject to an interim supervision orders following a preliminary hearing at which the State's evidence is not properly tested. Due to the onerous and intensively monitored conditions, and the strict liability nature of the offence provision, interim orders can be readily and inadvertently breached, resulting in bail refusal and a further custodial sentence.

The THRO Act lacks key safeguards of procedural fairness and proportionality found in Divisions 104 and 105A of the Criminal Code. For example:

- There is no proportionality test in respect of the conditions and restrictions that can be placed on an ESO offender, or the length of that order, under the THRO Act, as there is under Division 104.[11]

- The Court is not required to consider the impact of an obligation, prohibition or restriction on the offender's circumstances (including financial and personal circumstances) when making an ESO under the THRO Act (as it is required to do when making a control order).[12]

[7] Section 12(2).
[8] Section 12(8).
[9] Section 12(5).
[10] Section 12(9).
[11] That is, that the each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted for the stated purpose: Section 104.4(1)(b).
[12] Section 104.4(2)(c).

- When assessing the future risk of terrorist offending under the THRO Act, the Court is required to have regard to results of any assessment as to the likelihood of *persons with histories and characteristics similar to those of the offender* committing a serious terrorism offence.[13] There is no such obligation under Division 105A.

- The scope of the State's express disclosure obligations is generally more limited under the THRO Act than under Division 105A.[14]

- The volume and nature of surveillance and monitoring of an ESO is significantly more onerous under the THRO Act than the conditions available on a control order.[15]

Other key differences between Divisions 104 and 105A of the Criminal Code (Cth) and the THRO Act are detailed in **Annexure B**.

The NSW Scheme in practice

To date, no applications have been brought in NSW in relation to a "convicted NSW terrorist offender". Applications have instead been brought on the broader bases that the person is either a "convicted NSW underlying terrorism offender" and/or a **"**convicted NSW terrorism activity offender". Neither of these categories rely on a finding of guilt to the criminal standard, or a criminal conviction. The latter category was broadened in 2018 to include advocating support for "violent extremism" by amendments made by the *Community Protection Legislation Amendment Act 2018* (NSW).[16] This third category of eligibility casts a very wide net in its application to any statements made in the past or to any past or present associations of the offender. The NSW Court of Appeal has observed that this provision may be satisfied if an offender presently serving a sentence of imprisonment for a NSW indictable offence put up a picture of Osama Bin Laden in their cell room seventeen years ago.[17]

[13] Section 25(3)(c), THRO Act.

[14] Section 105A.5(2)(a) provides that the AFP Minster it to 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. Section 105A.5(3) further provides that the application must include any report or other document that the applicant intends, at the time of the application, to rely on in relation to the application; and include material/statement of any fact the applicant is aware of that would reasonably be regarded as supporting a finding that the order should not be made.

[15] Compare section 29, THRO Act with section 104.5(3), Criminal Code.

[16] The term "violent extremism" is not defined in the THRO Act. In *State of New South Wales v Barez (Final)* [2020] NSWSC 555 (12 May 2020) Walton J observed that the amendment was intended to broaden s 10(1)(c) so as to capture conduct in support of violent actions that might not satisfy the technical definition of terrorist act. For example, an act not directed at coercing the government or intimidating a section of the public (at [32]).

[17] *State of New South Wales v Naaman (No 2*) [2018] NSWCA 328 at [26].

In proceedings to date under the THRO Act "index" offences have included:

- take and driving conveyance without consent[18]
- intentional or reckless damage to property[19]
- intentionally damaging property, resist police and assault police[20]
- driving recklessly in a police pursuit, driving whilst disqualified, and dangerous driving[21]

Concerningly, applications under the NSW scheme have been brought against a disproportionate number of Aboriginal offenders.[22] In the first application under the THRO Act the State sought to detain an indigenous man beyond his two and a half year sentence for stealing a car, as a result of statements he made while in custody. In making a two year ESO against the defendant, the Court observed:

> *The whole process of the imposition of an ISO or an ESO on a person in that category may exacerbate, rather than ameliorate, the radicalisation of such a person. That is the fear in relation to Mr Ceissman….*
>
> *Little attention has been paid, in the proceedings before the Court, to the positive aspects of any programs that are to be undertaken or suggested. Without them, the whole process envisaged by the THRO Act may be counter-productive.*[23]

Examples of other applications brought in respect of indigenous offenders under the scheme are in **Annexure A** to this submission.

The interoperability of post sentence terrorist offender schemes

The breadth of the NSW scheme highlights the need for express safeguards at a Commonwealth level against the risk of concurrent or consecutive applications on behalf of State and Commonwealth Attorneys General against the same individual. The most obvious safeguard would be for the Commonwealth to deal exclusively with high risk terrorist offenders post sentence. Alternatively, the NSW scheme could (and in our view, should) be amended to incorporate the principles of necessity and proportionality that are found in the Commonwealth regime and that reflect international human rights obligations.

In either case, the THRO Act should not be considered an appropriate model for a Commonwealth ESO scheme under amendments to Division 105A. It is not a proportionate, targeted or necessary response to the threat of terrorism. The broad powers

[18] *State of NSW v Ceissman* [2018] NSWSC 1237
[19] *State of New South Wales v White (Final)* [2018] NSWSC 1943
[20] *State of NSW v Dickson (final)* [2020] NSWSC 100
[21] *State of New South Wales v Alam* [2020] NSWSC 295
[22] Of reported applications brought to date in respect of 17 individuals, 4 of the have concerned indigenous offenders: *State of NSW v Ceissman*; *State of New South Wales v RC (No.2)* [2019] NSWSC 845; *State of New South Wales v Dickson* [2020] NSWSC 100 and *State of New South Wales v GB by his Tutor* [2020] NSWSC 913 (17 July 2020).
[23] *State of NSW v Ceissman* [2018] NSWSC 1237 at [168] – [170].

provided to the Executive to go behind the usual safeguards of a criminal trial undermines both the role of an independent judiciary and the rule of law in a democratic society.

Absent tightening of provisions of the THRO Act to reflect an amended Division 105A, the THRO Act might become the preferred mechanism to apply for post sentence orders. This would possibly render the Commonwealth superfluous, in NSW at least, and where an offender is serving a jail term at the relevant time for a NSW indictable offence. This could result in a situation where the Commonwealth and NSW counter-terrorism agencies decide to seek orders under the less stringent NSW regime, rather than bringing an application in respect of the same conduct and same offender under the Commonwealth regime, or as an alternative to a criminal prosecution for a terrorism offence. At worst, the respective authorities could pursue applications under both schemes. This "pincer movement" against an offender would not only subvert the Commonwealth scheme, but would undermine public confidence in the administration of justice.

These issues are more than just academic, as can be seen in the case of *State of New South Wales v Elmir*,[24] summarised below.

State of NSW v Elmir

Mr Elmir was charged in December 2016 with a foreign incursion offence under section 119.1 of the *Criminal Code Act 1995* (Cth). The offence involved his travel to Turkey and attempt to enter Syria to make contact with persons connected to Islamic State. Following his return to Australia in 2016 (his father brought him home) he was arrested and remanded in custody. While awaiting trial, he punched two prison guards, and following pleas of guilty, was convicted of two counts of assault. He was sentenced to concurrent terms, expiring on 17 January 2019 and 17 March 2019, respectively. These assaults comprised the index offences to ground an application under the THRO Act.

On 4 February 2019 Mr Elmir pleaded guilty to the foreign incursion offence. On August 2019 he was sentenced in the Supreme Court's Criminal Division to five years and five months gaol with a non-parole period of four years and one month, expiring on 21 May 2021.

In between his plea and sentence - that is, before the criminal proceedings in respect of the Commonwealth offence had been finalised - the State commenced civil proceedings in the Supreme Court seeking a three year ESO against Mr Elmir, to commence at the end of his sentence. The State argued that Mr Elmir was a convicted NSW terrorism activity offender, being a person "advocating support for any terrorist act or violent extremism." The State relied in part on the same evidence that was before the Court for the Commonwealth offence.

Mr Elmir argued that this process was an "atypical and somewhat artificial exercise, brought about by an application which sought to extend the reach of NSW legislation to bring the defendant within the Act for a foreign incursion offence which was not itself an eligible offence under the THRO Act." He further submitted that the effect of the length of

[24] [2019] NSWSC 1867

the order sought by the State would be crushing, oppressive and a disincentive to rehabilitation, contrary to the primary object of the THRO Act to ensure the safety and protection of the community.

The Court rejected these arguments and made a 12 month ESO to commence at the end of Mr Elmir's sentence for the foreign incursion offence. It found that the features of the foreign incursion offence amounted to advocating support for engaging in terrorist acts or violent extremism. The order was made despite the Court's acknowledgment that the steps identified by the experts as relevant to rehabilitation and the mitigation of risk had yet been undertaken by the defendant. (at [191]).

Mr Elmir was effectively tried and punished twice for the same conduct. The combined power of the State and Federal authorities worked to lengthen a sentence imposed only months earlier, undermining the integrity of the sentencing process, and resulting in the NSW Supreme Court sitting concurrently in its civil and criminal jurisdiction in respect of the same individual and the same conduct. In our view, this case is a disturbing example of the potential overreach of counter terrorism legislation.

Other potential scenarios

Without clear safeguards to prevent duplicative or multiple regimes operating against the same individual the following scenarios could arise, causing unnecessary confusion and complexity for both courts and offenders alike. Further detail of the differences in the THRO Act and the relevant Commonwealth schemes (i.e., in Divisions 104 and 105A) is provided in **Annexure B**):

Scenario 1: Offender X is subject to an ESO under the Commonwealth regime and the THRO Act. Both orders require him to undergo drug and alcohol counselling. He enters a drug and alcohol rehabilitation programme, but after three weeks decides to withdraw. He is consequently breached and remanded in custody for failure to comply with a condition of the State ESO, where the same condition under the Commonwealth ESO provides that participation in counselling be consensual)[25].

Scenario 2: The Supreme Court is considering an application by Offender Y for review of his Commonwealth ESO on the basis of his changed circumstances. Before this application is determined, the State of NSW seeks an application for an ESO under the THRO Act.

Scenario 3: Offender Z is nearing the end of his sentence for a Commonwealth terrorism offence. While in custody, he assaults another prisoner. He is charged and convicted of assault causing actual bodily harm. Both the State and Commonwealth seek ESOs against Z. The Court is required to consider two different unacceptable risk

[25] Section 104.5(6), *Criminal Code Act* provides that *a person is required to participate in specified counselling or education only if the person agrees, at the time of the counselling or education, to participate in the counselling or education.*

tests: in the State proceedings, the Court is not required to determine that the risk of an eligible offender committing a serious terrorism offence is *more likely than not* in order to determine that there is an unacceptable risk of the offender committing such an offence.[26] No such qualification applies in the Commonwealth proceedings. In another version of this scenario, the Commonwealth Attorney General seeks a CDO under Division 105A at the same time that the State Attorney General seeks an ESO.

The impact of multiple supervisory regimes

An individual who is both convicted for a Commonwealth terrorism offence and serving a sentence of imprisonment for a NSW indictable offence would be faced not only with the prospect of potential application(s) for an ESO under both the THRO and under Division 105A, but will also be subject to:

- A strict test for the granting of Commonwealth parole by the Commonwealth Attorney General. As a result of the introduction of a presumption against parole in the *Counter-Terrorism Legislation Amendment (2019 Measures No.1) Act 2019* (Cth), parole will only be granted to such offenders in exceptional circumstances;

- An arguably stricter test for the granting of state parole under section 159C *Crimes (Administration of Sentences) Act 1999* (NSW). This test will prevent an offender's release to parole unless the State Parole Authority is satisfied that they will not engage in, or incite, or assist others to engage in, terrorist acts or violent extremism.

Such offender could also be subject to:

- Application under non-terrorist high risk offender regimes. The THRO Act expressly provides for that possibility in section 16.

- Potential applications by State Police for firearms and weapons prohibition orders. In our experience, such applications are commonly made and granted against individuals subject to high risk terrorist offender applications, regardless of their outcome.

Finally, wide-ranging restraints on a person's employment, movement and associations with others and other supervision requirements are also available to police, the NSW ODPP and the NSW Crime Commission under the *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW).[27]

[26] Section 21, THRO Act.
[27] Orders under this regime can be imposed on individuals that have been convicted of a serious criminal offence in the past who have been acquitted of such crimes or were initially charged, but had the charges withdrawn. Breaching the conditions of a serious crime prevention order carries a

Proposed safeguards

A court tasked with sentencing an offender for multiple offences must have regard to the totality principle, and ensure that the overall sentence is "just and appropriate" to the totality of the offending behaviour. An element of this principle is that a court should avoid imposing a "crushing sentence", that is, an extremely long total sentence that will induce a feeling of hopelessness and destroy any prospects as there may be of rehabilitation and reform.[28]

Should the THRO Act be retained in its present form, we suggest that Division 105A be amended to reflect these important sentencing principles and to avoid the real prospect of indefinite detention of those convicted of terrorism-related offences. Any expansion of Division 105A should expressly provide that an offender cannot be subject to applications or orders under multiple regimes. Precedent for such safeguard is found in s310K of the *Crimes Act 1900* (NSW) which provides:

> ***Multiplicity of offences***
>
> *If--*
>
> *(a) an act or omission is an offence against both this Part and the Commonwealth Criminal Code, and*
>
> *(b) the offender has been punished for that offence under the Commonwealth Criminal Code,*
>
> *the offender is not liable to be punished for the offence under this Part.*[29]

Section 19AL of the *Crimes Act 1914* (Cth) similarly recognises the interplay between State and Commonwealth parole regimes.

Such safeguard would also reflect the principle against double jeopardy in criminal law and the importance given by our legal system to the principles of finality of verdicts in the resolution of disputes, that a person should not be harassed by multiple prosecutions about the same issue, the disparity in the powers and resources of the State as prosecutor

maximum penalty of five years imprisonment.

[28] See NSW Judicial Commission Sentencing Benchbook: https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/concurrent_and_consecutive_sentences.html at [8.200] ff.

[29] This safeguard was introduced at the same time as the NSW terrorism offence in section 310J, *Crimes Act 1900* (NSW). The former NSW Attorney General explained at that time that the Government considered that the offence provision was necessary as a temporary measure and that New South Wales would consider its repeal to avoid constitutional and operational inconsistencies: see Second Reading Speech *Terrorism Legislation Amendment (Warrants) Bill 2005* (Extract from NSW Legislative Assembly Hansard and Papers Thursday, 9 June 2005).The offence has not been repealed.

and the individual; and the fact that prosecution has in the past and may in the future be used as an instrument of 'tyranny'.[30]

Supervision and monitoring of ESOs

The INSLM has recommended that Commonwealth ESOs reflect the monitoring and supervision processes of the control order regime.[31] While we prefer the nature and greater flexibility around conditions under Division 104 than can be found in the THRO Act, the manner in which conditions are monitored and supervised carries significant risk of undermining community safety objectives in the absence of appropriate safeguards. This risk has been borne out by experience under the THRO Act.

There are significant differences between supervision and monitoring of control orders and the supervision and monitoring of offenders under the THRO Act. Generally, NSW ESOs can be described as “passive” - the default position is that an offender can do very little unless approved by an Enforcement Officer (**EO**). This results in the EO directing where the offender may live, their employment, where they may go, whom they may contact, etc. The list of conditions long and detailed and are applied for by the State in a largely standard way, with limited adaptation to individual circumstances. It is common for an ESO to have approximately 50 conditions that the defendant must follow, even where the person suffers from cognitive impairment.

ESOs carry heavy penalties for breach, notwithstanding the conduct that gives rise to the breach would in normal circumstances be lawful. In our experience, a zero tolerance approach is taken by supervising agencies to even relatively minor or technical breaches of ESOs which are dealt with by criminal punishment, namely, incarceration. This is in stark contrast to the approach taken to parole orders, where warnings are routinely utilised as an alternative management strategy for less serious breaches. For example, we are aware of offenders under ESOs imposed under the THRO Act being charged and/or incarcerated, for shaving their beard, deviating from a movement schedule, drinking alcohol and sending/receiving messages from a dating app.

In Legal Aid NSW’s experience, the approach to monitoring and supervision of an ESO offender under the THRO Act can set an offender up for failure and further incarceration, undermining their progress in the community. The recent case of *NSW v Carr* (**Annexure C**) starkly illustrates the consequences of this approach. Although that case concerned a high risk (non-terrorist) offender, in our experience a similar approach to supervision is taken in respect of offenders on ESOs or ISOs under the THRO Act.

By contrast, Commonwealth control orders are “active” - the default position is that an offender can do anything, other than what is prohibited. This results in a person having

[30] Andrew Haesler, *The Rule Against Double Jeopardy: Its tragic demise in New South Wales* (2003) NSW Public Defenders Website.
[31] See Footnote 1.

more freedom to live and work where they choose, with police oversight. Other differences are outlined in **Annexure B.**

We repeat our concerns above as to the potential duplicity and confusion that may arise where the same offender is subject to multiple supervisory conditions. The risk of breach is evident, particularly given the disproportionately high prevalence of cognitive impairment in those subject to proceedings under the THRO Act.

Whether supervision of a Commonwealth ESO is ultimately undertaken by a State or Federal agency, it will be important that sufficient discretion is provided to the supervisor to give warnings about behaviour, progress a person through a staged process, and vary the directions of an order where appropriate. This will support the rehabilitative objects of an amended Division 105A, and in turn, community safety.

It will also be important that such discretion is exercised. Noting the quasi-therapeutic role of supervising EOs have in offender management,[32] we suggest that the model of parole – a system designed to help an offender to motivate, reform and rehabilitate, preparing them for the transition to their life outside prison - is a far preferable model than the NSW ESO scheme, which undermines any prospect of reform and rehabilitation. Continued access to community based mental health supports should also be facilitated given the high prevalence of mental illness in terrorism related offenders. The ability of an ISO or ESO to achieve its secondary aim of encouraging rehabilitation will be dependent, in part, on the rapport that an EO and the supervising team is able to establish and maintain. A 'zero tolerance', strict liability approach that prioritises enforcement over the sensible and informed exercise of discretion is likely to be counterproductive to deradicalization and management of criminogenic factors.

Proposed minimum safeguards

To address the above concerns, we suggest the following safeguards be included in a Commonwealth ESO scheme:

1. **A proportionality test** in respect of the conditions that can be placed on an ESO, based on s104.4 of the Criminal Code, i.e., that conditions only be imposed which are reasonably necessary, and reasonably appropriate and adapted, for the purpose addressing the future risk of serious terrorist offending.

2. A **graduated hierarchy of penalties should be available to the court**. Greater nuance and precision in determining the gravity of the violation of such orders would properly reflect the proportionality principle at sentencing. There is a risk of blanket treatment of all conduct constituting a violation of a control

[32] For example, an EO will have regular and frequent meetings with the offender, discuss pathways to offending and undertake Practice Guide to Intervention ('PGI') activities with the offender, discuss progress in therapeutic intervention, and liaise with family members.

order as intrinsically serious by reason of its connection to the previous terrorism-related activities of the defendant.[33]

3. Consideration should also be given to a **graduated hierarchy of sanctions available to the supervising agency** for breach of an ESO based on the "swift and certain" sanction model of the 2018 NSW parole reforms, whereby supervising officers are given flexibility to support the offender, where appropriate, to comply with their order by means of warnings and directions before formal action is taken for revocation of parole.

4. The **defence of reasonable excuse** should be available in respect of any breach of an ESO.

5. **Proceedings for breach of an ESO** should be dealt with by the court which made the original order (i.e., the Supreme Court). A court which is properly appraised of the history of the proceedings and the offender would be a more suitable forum for dealing with breaches than a Local Court and would enable the Supreme Court to maintain oversight of administration of the order, further streamlining the ESO process.

6. **The review mechanisms** available under Division 105A of the Criminal Code should be reflected in the Commonwealth ESO regime. Division 105A provides for compulsory annual reviews of CDOs, and for the offender to seek review where there are new facts or circumstances which would justify reviewing the order; or it would be in the interests of justice, having regard to the purposes of the order and the manner and effect of its implementation. Extending these provisions to ESOs would mitigate the risk of inadvertent breach and provide further incentive for an offender to remain compliant with the ESO. By contrast, the ESO scheme under the THRO Act provides for Correctives NSW and NSW Police to provide annual reports to the Attorney General indicating whether the continuation of the ESO is considered necessary and appropriate (section 31, THRO Act). However, these reports are not made available to the offenders, who are also precluded from accessing the reports under the *Government Information (Public Access) Act 2009 (*NSW).[34.]

[33] As noted by Matthews "Under Control, But Out of Proportion: Proportionality in Sentencing for Control Order Violations" 1422 *UNSW Law Journal* Volume 40(4).
[34] Schedule 2, Clause 16 provides for a conclusive presumption that there is an overriding public interest against disclosure of information contained in any document prepared for the purposes of the High Risk Offenders Assessment Committee established by the *Crimes (High Risk Offenders) Act 2006* or any of its subcommittees.