Parliamentary Joint Committee on Intelligence and Security

Review into AFP Powers, RE control orders

1. This is a joint submission to the Parliamentary Joint Committee on Intelligence and Securoty on AFP powers, in particular control orders. The submission is prepared by Isabelle Skaburskis, legal practitioner at Doogue + George Defence Lawyers, Melbourne Victoria; and Dr Clarke Jones, criminologist and Senior Research Fellow, Australian National University. This submission was drafted in consultation with and is endorsed by other Australian solicitors who have acted for respondents in control order proceedings—Anthony Brand, Principal, Slades & Parsons Solicitors, Melbourne Victoria; Domenic Care, Partner, James Dowsley and Associates, Melbourne, Victoria; James Caldicott, Lawyer, Caldicott Lawyers, Adelaide, South Australia; Milane Le, Lawyer, Galbally & O'Bryan, Melbourne, Victoria.

2. There has been an explosion in the use of control orders since 2019, largely involving low-level terrorism offenders. As a control order imposes exceptional restrictions on a person's liberty for preventive and not punitive purposes, this normalisation in their use is unacceptable. It will be argued that the proliferation in control orders is not a matter of necessity, but is a consequence of inadequate safeguards.

3. It will be argued in this submission that firstly, this proliferation is largely the result of the 2014 amendments to the control order provisions; and that the statutory proportionality test that would ordinarily ensure an appropriate limitation on a person's liberty is unworkable in the current circumstances.

4. Second, a further contributing factor in the unprincipled expansion in the use of control orders is that respondents face significant obstacles in preparing a proper response to an application. The practical obstacles raise issues of procedural fairness, and has created a situation where the case law has not developed to clarify the legislation and criteria according to which controls can be assessed by courts.

5. Finally, it is submitted that reliance on control orders as a standard post-sentence measure for individuals associated with terrorism offences interferes with that individual's reintegration. Instead of mitigating risk, control orders further isolate and stigmatise people who are likely already feeling marginalised and oppressed. They raise barriers to fulsome engagement with protective factors in the community including education, employment and religious groups. Therefore, overreliance on such highly restrictive measures that are disproportionate to the risk posed by the individual does not create an environment of increased security, but the effect is the opposite.

6. In conclusion, it is submitted that the power to impose control orders ought to be used only as a measure of last resort, if at all, and only in circumstances where it can be shown that they are necessary to protect the Australian public. This requires changes to the legislation and to the funding capabilities of legal aid commissions to ensure proper representation for respondents. With greater opportunity to present a fulsome response, courts will become more sophisticated in their capacity to assess risk presented by people who adhere to marginalised belief systems.

7. Instead of governments investing its resources in monitoring and surveillance of people convicted of low-level terrorism offences, research and funding should be diverted to more effective methods of supervised reintegration. More use should be made of supervision whilst on parole. State police should invest further in diversity engagement officers that facilitate access to community supports and to engage communities that could be classed as 'hard-to-reach'. In addition, communities should be enabled and incentivised to assist people who face significant obstacles to reintegration, including stigma and marginalisation, without facing scrutiny themselves.

I. Control order legislation

8. Control order legislation was introduced into the *Criminal Code* (Cth) in 2005,[1] following the terrorist attacks in London, UK in July of that year. The legislation was amended in 2014 by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (Cth).

9. In 2005, the grounds upon which an application for a control order could be made were limited to circumstances where the order would "substantially assist in preventing a terrorist act"[2] or where a senior Australian Federal Police (AFP) member "suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation."[3] A control order made on these grounds supposes either an imminent threat to the security of persons in Australia, or a remote threat by someone who may have the contacts and capacity to carry out a terrorist attack.

10. In 2014, the grounds upon which an order may be sought were expanded. Five additional grounds were added, including engaging in hostile activity in a foreign country,[4] preventing the provision of support for a terrorist act,[5] or that a person has provided support for or facilitated the engagement in a hostile activity in a foreign country.[6] Most relevantly, the amending legislation also included the additional circumstance where a senior AFP member

> suspects on reasonable grounds that the person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation (within the meaning of subsection 102.1(1)) or a terrorist act (within the meaning of section 100.1).[7]

11. The second reading speech justified this inclusion by reference to the recommendation of the Independent National Security Legislation Monitor ('INSLM'),[8] in particular the second and fourth annual reports.[9]

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1 *Anti-Terrorism Act (No 2) 2005* (Cth), Schedule 4.
2 *Anti-Terrorism Act (No 2) 2005* (Cth), s 104.2(1)(c)(i).
3 Ibid, s 104.2(1)(c)(ii).
4 *Criminal Code 1995* (Cth), s 104.2(1)(c)(iii).
5 Ibid, s 104.2(1)(c)(vi).
6 Ibid, s 104.2(1)(c)(vii).
7 Ibid, s 104.4(1)(c)(iv).
8 "Further enhancements included in the Bill will… address the recommendation of the Independent National Security Legislation Monitor to extend the regime to those convicted of terrorism offences where it would substantially assist in preventing a terrorist attack. This will better enable the AFP to mitigate the threat posed by individuals who have engaged in hostile activities overseas or otherwise demonstrated their commitment to a terrorist cause." Commonwealth, Hansard, Senate, Second Reading speech, 24 September 2014, 7000 (George Brandis, Attorney-General).
9 Parliament of Australia, *Counter-terrorism Legislation Amendment (Foreign Fighters) Act 2014,* Summary: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s976 .

12. In the second annual report, Bret Walker SC remarked upon the exceptional nature of control orders, and the concerning restrictions they impose on a person's liberty in cases where an individual is not charged with or convicted of a criminal offence.

> They are striking because of their provision for restraints on personal liberty without there being any criminal conviction or even charge. They may superficially resemble the familiar bail jurisdiction of criminal courts, but fundamentally differ on this account. That is, although a CO is founded on the connexion of the person against whom it is sought with the commission of a terrorist offence, there need not be any pending charge or any charge ever at all. COs are therefore radically different from remand in custody or conditional bail, which are judicial powers available only because a trial of pending charges is in prospect.[10]

13. The recommendation of the INSLM in that report was:

> Recommendation II/4: The provisions of Div 104 of Part 5.3 of the Code should be repealed. Consideration should be given to replacing them with *Fardon* type provisions authorizing COs against terrorist convicts who are shown to have been unsatisfactory with respect to rehabilitation and continued dangerousness.[11]

14. The INSLM recommendation does not suggest that a conviction alone is sufficient to warrant a control order, but that:

> propensity would need to be shown in relation to like offences for which he or she has been convicted (to the standard of beyond a reasonable doubt), and his or her current dangerousness would have to be assessed, permissibly on the balance of probabilities….
>
> Proof of terrorist crime plus proven dangerousness would be much less disturbing of the principle of legality than the latter without the former. … Those who can be shown at the end of their (usually rather long) sentences of imprisonment to have resisted CVE attempts or to have failed to show rehabilitation easily fit a *Fardon* model. [12]

15. It is submitted that the 2014 amendments to the control order scheme do not reflect the INSLM's recommendations. The essence of the report is that the control order scheme creates an exceptional power to restrict a person's liberty, and must be reserved for cases where the respondent is proven to be dangerous to society. It supposes reliable forms of risk assessment as there are for sex offenders; and it assumes that deradicalization programmes will be made available to offenders. In fact, control orders are being used against people who

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10 Australian government, Independent National Security Legislation Monitor (Bret Walker SC), *Declassified Annual Report*, 20 December 2012, 6.

11 Ibid, 44.

12 Ibid, 37.

have been convicted of low-level offending, who seem to pose little if any danger to society post release.

II. Normalisation of exceptional measures

16. The 2014 amendments have contributed to an alarming expansion in the use of control orders over the last two years. Prior to the 2014 amendments, only two control orders had been made: in the cases of Jack Thomas and David Hicks in 2006 and 2007 respectively.[13]

17. Each of those orders were made on the grounds that the individuals had received weapons training with a terrorist organisation. There was evidence before the court that Jack Thomas had received weapons training for combat purposes at an al-Qaida training camp in Afghanistan, that he was taken into the confidence of senior al-Qaida members; and had been approached by a senior al-Qaida operative to return to Australia for the purposes of conducting a terrorist attack designed to bring down the Australian government. [14]

18. The evidence in support of the application for David Hicks, it was accepted that Mr Hicks had undertaken training with al-Qaida and another listed terrorist organisation in Pakistan and Afghanistan over the course of two years. During that time, he trained in shooting tactics, hand to hand combat, guerrilla warfare, advanced marksmanship, sniper training, house entries, information gathering and surveillance, etc, and had combat experience.[15]

19. There was at least one control order brought in 2016 against a 19-year-old in circumstances where a terrorism charge had been withdrawn on grounds of insufficient evidence.[16]

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13 *Jabbour v Thomas* [2006] FMCA 1286; *Jabbour v Thomas (No 3)* [2006] FMCA 1425; *Jabbour v Hicks* [2007] FMCA 2139; *Jabbour v Hicks* [2008] FMCA 178

14 *Jabbour v Thomas* [2006] FMCA 1286, [13]-[23].

15 *Jabbour v Hicks* [2007] FMCA 2139, [13]-[20].

16 *Gaughan v Causevic* [2016] FCCA 1693.

20. Since 2019, the author is aware of ten control order applications that have been brought, where interim or finals orders were made.[17] In at least eight of these cases,[18] control orders were made on the grounds that the person had been convicted of a terrorism offence, or a foreign incursion offence. One was made after a conviction was overturned on appeal.[19]The author is not aware of any case where an application for a control order was made and successfully defeated.

III. Grounds and statutory tests

A. Expansion of the grounds upon which an order may be made

21. It is clear from the numbers of control orders made since 2019 that the 2014 amendments to the *Criminal Code* expanding the grounds upon which a control order can be made, have significantly contributed to their increased prevalence. Section 104.4(1)(c)(iv), whereby an application made be sought in any case where a person was convicted of "an offence related to terrorism", pre-empts the requirement to demonstrate on the balance of probabilities that a person is likely to commit or support an act of terrorism or has the skills and capacities to do so. Necessarily, this means that control orders can be applied for and made in circumstances where it cannot be shown that there is a threat of such acts occurring.

22. The 2014 amendments also include as a ground for making an order that a person "has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country".[20] The definition of "hostile activity" includes an almost indeterminate range of politically active behaviour overseas.[21] In addition, this provision expands the regime to individuals who have attempted or assisted another in an attempt to leave the country for ideological reasons, but otherwise pose no threat or danger themselves.

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17 *Booth v Kadir Kaya* [2020]FCA 764; *Booth v Dacre* [2020] FCA 751; *Booth v Granata* [2020] FCA 668; *Booth v Murat Kaya (No 2)* [2020] FCA 1119; *Booth v Naizmand* [2020] FCA 244; *Booth v Namoa* (No 2) [2020] FCA 73; *Booth v Thorne No 2* [2020] FCA 1196; *McCartney v Abdirahman-Khalif (No 2)* [2020] FCA; *McCartney v EB* [2019] FCA 183. In addition, there is one others that the author is aware of, for which there are no reasons publicly available. There may be others that the author is not aware of.

18 *Booth v Kadir Kaya* [2020]FCA 764; *Booth v Dacre* [2020] FCA 751; *Booth v Granata* [2020] FCA 668; *Booth v Murat Kaya (No 2)* [2020] FCA 1119; *Booth v Naizmand* [2020] FCA 244; *Booth v Namoa* (No 2) [2020] FCA 73; *Booth v Thorne No 2* [2020] FCA 1196; *McCartney v EB* [2019] FCA 183.

19 *McCartney v Abdirahman-Khalif (No 2)* [2020] FCA

20 *Criminal Code* (Cth), s 104.4(1)(c)(vii).

21 *Criminal Code* (Cth), s 117.1(1) Definitions: "*engage in a hostile activity".*

23. Both of these grounds are problematic given the broad interpretation of the relevant legislation and the remote connection to any actual act of violence. The five recent control orders in Victoria illustrate this point.

24. Shayden Thorne, Murat Kaya, Kadir Kaya, Antonio Granata and Paul Dacre were each convicted of an offence under s 119.4 *Criminal Code* (Cth) for assisting another, Robert Cerantonio, to prepare to travel to the Philippines by boat. The criminal intention was that, if they arrived in the Philippines, Mr Cerantonio intended to provide some means of support or encouragement to an unspecified party fighting in the civil war in the southern Philippines.[22] The prosecution was relieved of the obligation of particularising what form that support would take, to whom it would be provided, or when—details of which were all unknown even to the offenders themselves.[23]

25. It was accepted by the sentencing judge that none of the five co-accused named above were planning to partake in hostilities themselves. There was no evidence of having sought or obtained weapons or undergone weapons training. Their criminality extended to complicity in assisting Mr Cerantonio in his endeavours to travel abroad—an intention that the sentencing judge found was doomed to fail. The judge in this case found that the offending was on the lower end of seriousness.

26. It is known to the authors of this report that the motivation of at least one of those co-accused was to live and raise his child in an environment of strict Islamic law. There was no evidence that this individual had an allegiance to ISIS, and there was evidence that he disagreed with much of its ideology, including the requirement to engage in violence against innocent people.

27. In this case, the charges resolved to a plea after three years of pre-trial, and on two degrees of complicity—complicity in the preparatory acts; and Mr Cerantonio's intended but practically impossible, complicity with an unknown perpetrator of hostile activities. This demonstrates how remote a conviction for a terrorism offence or a foreign incursion offence can be from any potential harm.

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22 *R v Cerantonio & Ors* [2019] VSC 284.

23 *Dacre and Ors v R* [2018] VSCA 150.

28. With the expanded grounds upon which a control order can be made, an application is warranted in circumstances where there was little or no possibility that they would have engaged in violence or harmful behaviour. An applicant need only to provide evidence of a conviction, and the grounds are made out.

Recommendation 1: the grounds upon which a control order can be made should be narrowed. A control order application should only be brought in circumstances where it can be proven that there is a likelihood of future harm, not merely on the basis of past conviction.

B. Reasonably necessary and reasonably appropriate and adapted

29. If there are grounds upon which an order may be made, the court must be satisfied that the controls themselves are reasonably necessary and reasonably appropriate and adapted to prevent a terrorist act or a foreign incursion.[24] This test requires the court to determine whether the restrictions imposed on a person's liberty are proportionate to the nature and degree of risk. In principle, this is an important safeguard in the control order legislation. It ought to ensure that the control order itself is tailored to the requirements of each case. In practice, however, the test has little meaning.

30. In the case of *Gaughan v Causevic*,[25] the Federal Court explored at length what is required by this statutory test, and referred to the decision of the High Court in *Thomas v Mowbray*.[26] Gummow and Crennan JJ held in that case that "judicial techniques must… be applied in relation to each proposed obligation, prohibition and restriction", and the need to mitigate risk is to be weighed against the impact of the circumstances of the person who is to be the subject of the control.[27] Chief Justice Gleeson in that case held that it was not beyond the capacity of the court to determine whether someone who had undergone training with a terrorist organisation might pose a risk of terrorism-related offending in the future.[28]

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24 *Criminal Code* (Cth), s 104.4(1)(d).
25 [2016] FCCA 1693.
26 [2007] HCA 33.
27 Ibid, [99].
28 Ibid, [28].[14/1]

31. It is submitted that this test does not operate in the manner contemplated by the High Court in *Thomas v Mowbray*, in the post-2014 context of the expanded control order scheme. Increasingly, without a requirement to demonstrate that a person has an inclination or the capacity to carry out an act of terrorism, control orders are seemingly made by reference to a person's beliefs. The case of *EB* referred to the individual's Salafist ideology to support the finding that a control order was reasonably necessary, appropriate and adapted.[29] In the case of *Naizmand*, the court assessed risk by reference to the respondents support for Shariah law, and his associations with family members who hold "extremist" views.[30] In the case of the five aforementioned co-accused from Victoria, they were sentenced on the basis of their adherence to extremist thinking.[31]

32. The references to concepts such as "extremist" views or ideology, or radicalisation are fraught with conceptual challenges and misunderstandings. Often expressions of Muslim conservatism or traditionalism have been mistakenly conflated with extremist ideology, radicalisation, and/or associated with terrorism. In reality, the concepts – conservatism, extremist, radical, and terrorism – are distinct. There are many Muslims who choose to adhere to 'stricter' understandings of Islam, but completely eschew or denounce the use of violence or terrorism. They may be classed as extreme, but for the most part, conservative Muslims reject violent extremism. Salafi scholars, for example, who often hold ultra-conservative views, denounce terrorism, discrediting groups like al-Qaida and ISIS (Islamic State of Iraq and Syria).

33. It's also worth clarifying the word "Salafi", which is not a homogeneous movement, nor a homogeneous interpretative stance, but should rather be understood as an umbrella term for those who seek to return to the way of the pious predecessors. Therefore, defining Salafism can be challenging "because the term is often used inappropriately".[32] Many experts see it in a negative light and associate it with violent extremism or terrorism.[33] After 9/11, Salafism has been widely discussed among journalists, politicians, and academics, who have made "correlations between Salafi belief and radicalization" even though "such correlations are extremely weak or non-existent".[34]

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29 *McCartney v EB* [2019] FCA 183, [14.1].
30 *Booth v Naizmand* [2020] FCA 244, [9.1]-[9.2].
31 *R v Cerantonio & Ors* [2019] VSC 284, [99].
32 Hamdeh, E. (2016). Special issue on Salafism. The Muslim World (Hartford), 106(3), 407.
33 Olsson, S. (2014). Proselytizing Islam - problematizing "Salafism". *The Muslim World*, 104(1-2), 171-197.
34 Ibid.

34. Based on the above, there is no reliable way to assess risk of ideological offending. Control orders are made on the strength of ASIO risk assessments, forensic risk assessments, and the unstructured opinion of a police commander by reference to a vast array of evidence including non-reviewable decision of the Executive government and prison management.

35. However, assessments are based on ill-conceived concepts of radicalisation[35], where Muslims are on a set trajectory or so-called observable pathway towards committing acts of violent extremism. Such a hypothesis has been discredited by social scientists and practitioners around the world as there "are no statistically compelling indicators that can consistently or reliably predict a person's path towards radicalisation or embrace of violent extremism"[36]. Often theories of radicalisation are "conceptualised without any reference to actual empirical evidence"[37].

36. Forensic reports rely on structured professional judgment tools that are unvalidated by any professional body. It is not possible to calibrate a risk assessment tool for ideological offending when the sample size is as small as it is and there is no evidence by which reliable rates and causes of recidivism can be assessed.

37. There is also a considerable risk of bias in formulating judgments of future risk in cases involving Islamic ideology. Psychologists, Courts, police commissioners, prison managers deciding prisoner classification, and others in a decision-making role in the correctional and counter-terrorism environment are generally not well versed in Islam. Therefore, they are ill-equipped to determine whether and to what extent an individual's beliefs may deviate from mainstream Islamic beliefs. It is likely then that decision-making at all levels of a person's incarceration, ranging from prisoner classification and placement, to eligibility for parole, will reflect this lack of nuance in interpreting a person's behaviour and therefore an assessment of their risk. Incidents in custody may be misconstrued as referring to an "extremist" belief

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35 Kundnani, A. (2012). Radicalisation: the journey of a concept. Race & Class, 54(2), 3–25; Coolsaet, R. (2016). 'All Radicalisation is Local': The genesis and drawbacks of an elusive concept. Egmont Royal Institute for International Relations.; Hedges, P. (2017). Radicalisation: Examining a Concept, It's Use and Abuse. Counter Terrorist Trends and Analysis, 9(10), 12-18.

36 Barzegar, A., Powers, S., & El Karhili, N. (2016). Civic Approaches to Confronting Violent Extremism: Sector Recommendations and Best Practices. Retrieved at https://www.britishcouncil.us/sites/default/files/civic_approaches_to_confronting_violent_extremism_-_digital_release.pdf

37 Aly, A., & Striegher, J. (2012). Examining the role of religion in radicalization to violent Islamist extremism. *Studies in Conflict & Terrorism*, 35(12), 849-862.

system, when in fact they can be legitimately defended by reference to mainstream Islamic beliefs. These decisions and reports construing beliefs as radicalised or extremist then form the basis of the material contained in a control order application with little or no reference to the behaviour or belief that they are referring to.

38. The lack of understanding of Islamic beliefs and practices that pervades the evidence in support of a control order application hinders the Court in its capacity to properly conduct the balancing exercised supposed by the tests in s 104.4(1)(d). Instead, Courts rely on sweeping and often unexplored assertions in the evidence that a person was (and therefore is) "radicalised", that they held (and therefore hold) "extremist" beliefs.

39. To properly determine whether a control is reasonably necessary and reasonably appropriate and adapted to the stated purpose, the Court must be in a position to assess the nature and gravity of the actual risk, not merely the risk professed by the applicant. It is submitted that the Court is not able to do that when the risk is framed in terms of a person's religious and political beliefs.

40. That the Court is unable to properly apply the s 104.4(1)(d) test is evidenced by the striking similarity between all control orders made. The order imposed on David Hicks who trained with al-Qaida in urban warfare and disguise are framed in the same terms as the order made for Harun Causevic, the 19-year-old for whom there was insufficient evidence to support a prosecution, much less a conviction; or for Shayden Thorne, who held no intention or ideological commitment to violence and whose offending was doomed to fail from the outset. There is no development of criteria apparent in the case law as to how the proportionality of each control is to be assessed, or how it can accommodate different degrees of risk, or the nature of the risk presented in each case.

IV. The practical barriers to contesting an order

A. The legislation

41. An argument might be made that if respondents were more pro-active in contesting applications for control orders, then courts may become more sophisticated in assessing the material before them and a body of principle may develop. However, the particularities of the

legislation combined with the grievous inequality of arms between applicant and respondent effectively precludes a proper response to an application.

42. Firstly, a considerable flaw in the legislation is that applications for interim orders can be made *ex parte*. Although it seems that respondents are in practice given notice of a pending application, sometimes this is done with so little notice—less than a week, for example—that there is no practical opportunity to prepare a response. The applicant will justify their late service by reference to the fact that they could have proceeded with no notification at all.

43. That control orders could be made *ex parte* is a provision that was included in the original legislation. It becomes highly problematic in light of the 2014 amendments that expand the grounds of the control order to include circumstances whereby someone has been convicted of an offence related to terrorism.

44. In cases like nine of the ten most recent cases where control orders have been brought against people at the end of their sentence, there has been a sense of urgency by the applicant and the courts to ensure an interim control order is made prior to that person's release. The making of the interim order is rushed, on the understanding that the substance of the order can be contested at the confirmation hearing.

45. However, ss 104.14(6) and (7) sets out the court's powers to revoke or vary and order at the confirmation hearing. At this stage, after an interim order has been made, it can only be revoked if the court is satisfied that there are no grounds for making the order, or if the grounds under s 104.4(1)(c) are not made out. As one of the grounds under s 104.4(1)(c) is that a person has been convicted of an offence related to terrorism, then it cannot be argued that the order be revoked, even if it is not reasonably necessary or reasonably appropriate and adapted. Under s 104.14(7)(b) the court only has the power to vary the order if it finds it is not reasonably necessary and reasonably appropriate and adapted.

46. In conclusion, in cases where an application is made on the basis of a person having been convicted of an offence relating to terrorism, then the interim hearing is of utmost importance. This is all the more important in light of the 2014 amendments. This is the only opportunity a person has to contest the very order itself. That a person is not guaranteed

sufficient time to prepare for the interim hearing, or that there is even the possibility that it be heard *ex parte*, undermines in a considerable way the right to due process.

Recommendation 2: The legislation ought to be amended to guarantee a respondent sufficient time to prepare for an interim hearing.

B. Funding

47. One of the most significant barriers to raising a proper defence against a control order is the lack of funding. A respondent will likely be reliant on state legal aid. There is generally no established system in place for assessing a funding application, and solicitors are required to apply under a "special consideration" grant. There are extensive vetting requirements to obtain such a grant, and the delays can be several months. Further, they are considered civil, not criminal matters, and there is little institutional understanding of the importance of a proper defence, or the seriousness of their consequences.

48. Whilst in other kinds of proceedings, a matter can be adjourned while funding is sought at relatively little detriment to the affected party, there are significant consequences for the respondent facing a control order application. Firstly, the court is likely to make an interim order to maintain the status quo for a person being released from custody. Once on an interim control order is in place, then any delays in proceedings work directly against the respondent. If the purpose of the applicant is to place a person under a control order for a year and the proceedings are delayed for a year to obtain funding, then the respondent effectively loses their right to contest the order. The longer that funding is delayed, the longer the person remains on an interim order, even if the intention is to contest it.

49. Secondly, when funding is approved, it is grossly inadequate. A control order application may contain upwards of 2000 pages, even in a relatively simple case of a person whose matter did not go to trial and who has been in custody for a short period of time. The applicant will have a team of 3 or more solicitors, junior and senior counsel. Legal aid for the respondent is unlikely to get funding for senior counsel, and the respondent's legal team will not be funded to prepare the matter for contest or engage in discussions for resolution. As there is little or no institutional understanding by the legal aid provider of what these kinds of proceedings

entail, and little or no appreciation for the consequences for an individual, compensation is grossly lacking.

50. Most problematic, however, is the lack of funding for expert reports. As argued above, these cases involve assessments of "extremism" and proclivity for terrorism that are largely subjective. But without the means to subject the evidence to expert scrutiny, the Court will be unable to properly evaluate its proper weight and significance.

51. Experts in the area of ideological risk assessment are relatively few, and they charge significantly for their services. Likewise for experts in Islamic theology, or criminology. They may be required to travel interstate or internationally to give evidence. The standard grant of legal aid for a psychological report is $751 including jail conference. A risk assessment report for ideological offending can cost upwards of $7000.

52. The inadequacy of legal aid funding for control order proceedings creates a situation of gross inequality of arms. The consequence is that most applications are consented to without the means to properly contest, and the jurisprudence remains undeveloped.

53. Much like a criminal matter, the liberty of a person is at stake in these proceedings. A control order may be less restrictive than prison, but it is far more restrictive than a Community Corrections Order or bail. The proceedings are relatively novel and the evidential basis for determining risk are problematic. Denying a respondent proper funding is the equivalent of denying them a fair hearing and procedural fairness. The order becomes little more than a rubber stamp of the executive.

Recommendation 3: Ensure adequate funding is provided by the Commonwealth to respondents for legal representation and expert reports, or to state legal aid providers.

IV. Effective alternatives to control orders

54. There is no doubt that offenders coming out of prison after serving sentencing for terrorism require comprehensive support, including specific interventions to address aspects of mental health and criminogenic needs. Factors like marginalisation, racism, cultural and religious identity, family or relationship breakdowns mean that people coming out of prison can face

complex challenges in their rehabilitation and resettlement back into society. Therefore, it is important that any strategy to supervise offenders on their release does not contribute to creating further barriers that could hinder successful rehabilitation. An over securitised monitoring program set up by a control order could have counterproductive results, such as adding to the stressors already present in ex-offender circumstances.

55. Ex-offenders commonly have backgrounds that include poverty, dysfunctional families, little and/or interrupted education, low levels of literacy and numeracy, homelessness, limited employability skills and poor employment history. They frequently have serious physical and mental health problems, low self-esteem, and difficulty controlling behaviours, such as those related to anger and impulsiveness. Many have conditions attached to their release that makes looking for and keeping employment difficult. Those released after serving time on terrorism offences pose no exception to these common difficulties. Therefore, the extra burden of highly restrictive control orders create additional difficulties in already challenging situations.

56. Instead of mitigating risk, control orders further isolate and stigmatise persons who have been charged with or convicted of terrorism offences, and can hinder engagement with protective measures in the community including education, employment, and religious groups. Religious devotion, while sometimes very rigid, should also be considered as a protective factor and should not be viewed as a risk. Research suggests that religiosity and religious participation can be associated with a reduction in criminal offending or anti-social behaviours, can increase a person's interpersonal likability, can improve an individual's psychological and physical well-being, and can comfort someone who's facing difficult life circumstances (i.e. family problems, divorce, or unemployment). Involvement in any religion may also foster strong social networks and emotional support that constrain criminal behaviour.

57. The authors have observed in several of the cases already discussed that religion can also promote opportunities for developing pro-social friendships and associations. This is particularly important for offenders on release, where religious communities can offer safe accommodation, health services, vocational opportunities, and other support networks.[38]

[38] Jones, C.R. & Narag, R.E. (2019). Inmate Radicalisation and Recruitment in Prisons. Routledge.

Thus, religiosity can operate as a protective factor against criminal behaviour with the creation of his new faith-based social networks and social bonds.

58. Control orders, whilst not designed as punitive measures, are experienced as such on account of strict requirements, limitations and perpetual fear of being charged and remanded back in custody for accidentally picking up a telephone at work, being assigned a university email address, or attending a duty free shop in the vicinity of the airport. Measures that are protective in design are to be preferred.[39]

59. Such a strategy would include addressing short and long term needs rather than measures that create stigma and inhibit a return to normal life. Greater focus should be made on reinforcing protective factors, i.e. family, religion, culture, and improving prospects for education, employment, etc. There are pro-social ways that law enforcement can be involved, as is seen in the Diversity Engagement Programme in Western Australia. Such protective measures are designed to enable reintegration and are more likely to prevent recidivism.

Recommendation 4: Investment should be made in reintegration programmes led by local police and community organisations to promote reintegration and rehabilitation. Pro-social programmes should be put developed to address criminogenic needs and enable rehabilitation.

V. Conclusion

60. The procedural safeguards offered by the control order legislation are inadequate to properly ensure that they are limited to exceptional circumstances where they are necessary to mitigate a real risk, and that they are proportionate to that risk. The case law that has amassed in the last two years demonstrates that this is not currently the case and, in fact, go beyond probable risk and deprive people unjustifiably of their basic liberties.

[39] Donkin, S. (2014). Preventing Terrorism and Controlling Risk: A Comparative Analysis of Control Orders in the UK and Australia. Springer

61. We do know that an overreliance on control orders is counter-productive to community safety because they undermine process of rehabilitation and reintegration and fail to address a person's criminogenic needs. They ensure that a person will remain stigmatised in society, fearful and isolated once they complete their sentence. For the many people who have been subjected to control orders in recent years, especially those who have not previously formed an intention to commit violence or who have repudiated their former extremist beliefs, other means of supported reintegration should have been relied upon.

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