

ANNEXURE B: KEY DIFFERENCES BETWEEN CONTROL ORDERS UNDER DIVISION 104, *CRIMINAL CODE ACT 1995 (CTH)* AND ESOs UNDER *TERRORISM (HIGH RISK OFFENDERS) ACT 2017 (NSW)*

Note: matters highlighted in green reflect safeguards under the Cth scheme that are not reflected in the THRO Act. Where relevant, reference is also made in the right hand column to provisions under Division 105A, Criminal Code.

| Element | Control Orders under Division 104, Criminal Code | Extended Supervision Orders under THRO Act | |
|------------------------|---|--|---|
| Applicant | Senior AFP member (with consent of Federal Attorney General), based on one of prescribed number of relevant suspicions (suspicion on reasonable grounds) | NSW Attorney General on behalf of the State of NSW. | |
| Jurisdiction | Federal Court/Federal Magistrates Court | State Supreme Court | |
| Who is eligible | Any person aged 14 years or older (subject to criteria below under "Grounds"). | Any person aged over 18 years who is serving a sentence of imprisonment for a NSW indictable offence and who is a: <ul style="list-style-type: none"> - convicted NSW terrorist offender (i.e., an offender serving a sentence of imprisonment for an offence against s 310J of the <i>Crimes Act 1900</i> (NSW)) - convicted NSW underlying terrorism offender (i.e., an offender who is serving a sentence of imprisonment for a NSW indictable offence which is deemed a 'serious offence' occurring in a 'terrorism context'; or - convicted NSW terrorism activity offender (i.e., has been subject to a Cth control order, a member of a terrorist organisation; is making or has previously made any statement (or is carrying out or has previously carried out any activity) advocating support for any terrorist act or violent extremism, or has or previously had any personal or business association or other affiliation with any person/group/organisation advocating support for any terrorist act or violent extremism. | |
| Grounds | <ul style="list-style-type: none"> a. the order would substantially assist in preventing a terrorist act. b. The person has provided training to, received training from, or participated in training with a listed terrorist organisation. | <p>THRO</p> <p>Court must be satisfied to a high degree of probability, that the offender poses an unacceptable risk of committing a serious terrorism offence (i.e. offence against Part</p> | <p>Div. 105A, Criminal Code</p> <p>Court is satisfied to a high degree of probability, on the basis of admissible evidence, that</p> |

| | | | |
|--|---|---|--|
| | <p>c. The person has engaged in a hostile activity in a foreign country.</p> <p>d. The person has been convicted in Australia of an offence relating to terrorism, a terrorist organisation, or a terrorist act.</p> <p>e. The person has been convicted in a foreign country of an offence that is constituted by conduct that would constitute a terrorism offence</p> <p>f. Making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act.</p> <p>g. The person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country</p> <p>AND</p> <p>Court must be satisfied, on the balance of probabilities, that each of the obligations, prohibitions and restrictions to be imposed on the person is reasonably necessary, and reasonably appropriate and adapted, to achieve the objects of the control order system.</p> | <p>5.3 of the Cth Criminal Code which carries more than 7 years jail) if not kept under supervision under the order.</p> <p>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.</p> | <ul style="list-style-type: none"> - the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community - there is no other less restrictive measure that would be effective in preventing the unacceptable risk. |
| <p>What is taken into account</p> | <ul style="list-style-type: none"> - Objects of Div 104 - the best interests of a child (where 14-17 year old) - the impact of the obligation, prohibition or restriction on the controlee's circumstances (including financial and personal circumstances). | <p>THRO</p> <ul style="list-style-type: none"> - safety of the community - reports from compulsory psychological examinations - other expert assessments as to future risk of terrorism offending - 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 - report of NSW Correctives and Police & a prescribed terrorism intelligence authority as to the extent to which the offender can reasonably and | <p>Div. 105A, Criminal Code</p> <ul style="list-style-type: none"> - the safety and protection of the community - reports from compulsory psychological examinations - other expert assessments as to future risk of terrorism offending - reports of relevant State or Territory corrective services or relevant expert relating to the extent to which the offender can reasonably and practicably be managed in the community - any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and |

| | | | |
|--|--|--|--|
| | | <p>practicably be managed in the community</p> <ul style="list-style-type: none">- any treatment or rehabilitation programs and other programs or initiatives in which the offender has had an opportunity to participate, the willingness of the offender to participate in any such programs or initiatives, and the level of the offender's participation in any such programs or initiatives- options (if any) available if the offender is kept in custody or is in the community (whether under supervision) that might reduce the likelihood of the offender re-offending over time- the likelihood that the offender will comply with the obligations of an ESO and level of compliance with past community based orders- the offender's criminal history (including prior convictions and findings of guilt in respect of offences committed in New South Wales or elsewhere), and any pattern of offending behaviour disclosed by that history- the views of the sentencing court- any beliefs or commitments of the offender (whether of an ideological, religious, political, social or other nature) that support engaging or participating in terrorism activities. | <p>the level of the offender's participation in any such programs;</p> <ul style="list-style-type: none">- the level of the offender's compliance with any obligations to which he or she is or has been subject while on parole, or on interim or final CDO- the offender's history of any prior convictions for, and findings of guilt made in relation to, any terrorism offence- the views of the sentencing court- any other information as to the risk of the offender committing a serious Part 5.3 offence. |
|--|--|--|--|

| | | | |
|--|---|---|--|
| Process | Interim Orders (ex parte), Urgent Interim Control Orders and confirmed control order (inter partes) | Preliminary proceedings for declaration that person is relevant offender (can be multiple) Only declarations in respect of convicted NSW terrorism activity offender are finite (15 months). Preliminary and final hearing. | |
| When can order be sought? | Any time | THRO Within the last 12 months of the offender's current custody or supervision for any NSW indictable offence or under an existing interim supervision order, ESO or CDO. | Div. 105A, Criminal Code Within the last 12 months of the offender's current custody for a Cth terrorism offence. |
| Length | 12 months maximum (or 3 months if aged 14-17). Successive orders may be made. | THRO 3 years maximum. Successive orders may be made. ESO commencement may be deferred for up to 7 days for community supervision to be organised. | Div. 105A, Criminal Code No more than 3 years that the Court is satisfied is reasonably necessary to prevent the unacceptable risk. Successive orders may be made. |
| Disclosure & response: timing | Confirmation hearing must be at least 7 days after service of interim order. Court must take into account that the person may need to prepare in order to adduce evidence or make submissions to the court in relation to the confirmation of the order (including they may be in custody). | THRO The application must be served on offender within 2 days after it is filed. Disclosure must take place as soon as practicable after the application is made. | Div. 105A, Criminal Code Offender must be given copy of application within a reasonable period before the preliminary hearing. |
| Disclosure: scope | Interim Control Order: Summary of grounds only, and can exclude information is likely to prejudice national security (within the meaning of the <i>National Security Information (Criminal and Civil Proceedings) Act 2004</i> (Cth)). Confirmed Control Order: additional written details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the | THRO All relevant documents etc, whether or not intended to be tendered in evidence as soon as practicable. Index and access on request is sufficient compliance with State's disclosure obligations. | Div. 105A, Criminal Code AFP Minister must ensure that reasonable inquiries are made to ascertain any facts known to any Commonwealth law enforcement officer or intelligence or security officer that would reasonably be regarded as supporting a finding that the order should not be made. |

| | | | |
|--------------------------------------|--|--|---|
| | <p>basis of the confirmation of the order (subject to broad exceptions for national security etc evidence).</p> | | <p>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.</p> |
| <p>Risk Assessment Report</p> | <p>No equivalent provision</p> | <p>THRO No equivalent provision</p> | <p>Div. 105A, Criminal Code The court appointed expert's report may include any one or more of the following matters:</p> <ul style="list-style-type: none"> - assessment of risk of terrorism offending; - the pattern or progression to date of behaviour on the part of the offender in relation to serious Part 5.3 offences, and an indication of the nature of any likely future behaviour in relation to serious terrorism offences - efforts made to date by the offender to address the causes of his or her behaviour including participated in rehabilitation/treatment programs and whether has had positive effect - any relevant background of the offender, including developmental and social factors - factors that might increase or decrease any risks of future terrorism offending |
| <p>Prescribed conditions</p> | <ul style="list-style-type: none"> - Place restrictions - Prohibition/restriction on leaving Australia | <p>Extensive list of presumptive and discretionary conditions.</p> | <p>Discretionary</p> |

- Curfew (but for no more than 12 hours within any 24 hours)
- Electronic monitoring
- Non-association (except with the person's lawyer)
- a prohibition or restriction accessing or using specified forms of telecommunication
- a prohibition or restriction on the controlee possessing or using specified articles or substances
- a prohibition or restriction on the controlee carrying out specified activities (including in respect of his or her work or occupation)
- a requirement that the controlee report to specified persons at specified times and places
- a requirement that the controlee allow himself or herself to be photographed and fingerprinted
- requirement that the controlee participate in specified counselling or education, with consent

- to permit any enforcement officer to visit and enter offenders home/ to access an offender's computer /electronic equipment/to permit seizure of any computer etc
- restrictions on use specified services or facilities
- periodic reporting
- notification of change in address
- requirement to participate in intervention programs or initiatives
- electronic monitoring
- residence at an address approved by an enforcement officer
- not to reside in or resort to specified locations or classes of locations
- non-association/contact with specified persons or classes of persons
- not to engage in specified conduct or classes of conduct
- not to engage in specified financial, property or business dealings (including not to enter into specified agreements or hold specified interests in connection with such dealings)
- not to possess or use specified objects or substances
- not to engage in specified employment or classes of employment
- not to change the offender's name
- compliance with sex offender registration legislation
- comply with specified requirements in connection with the offender's access to and use of the internet
- to provide any enforcement officer with information about any phone or internet access use
- an electronic identity used, or intended to be used, by the offender
- to provide information in relation to any employment or any financial affairs

The following conditions must be imposed unless court orders otherwise

- supervision and obey all reasonable directions of an enforcement officer (including in respect of providing a schedule of movements)
- wear electronic monitoring equipment as directed and not tamper with, or remove, the equipment
- residence
- not to leave New South Wales without approval

| | | | |
|----------------------|--|--|--|
| | | <ul style="list-style-type: none"> - to submit to the search of the offender's person and residence and the search and seizure of the offender's vehicle, computer, electronic and communication device or any storage facility, garage, locker or commercial facility under the offender's control - to comply with rules or by-laws (or both) of any approved accommodation for the offender - not to use prohibited drugs, or obtain drugs unlawfully or abuse drugs lawfully obtained - to submit to drug and alcohol testing - prohibition on possession of firearms, weapons, spear guns, explosives - to be available for interview at such times and places as an enforcement officer may from time to time direct - to undergo ongoing psychological or psychiatric assessment or counselling (or any combination of these) as directed by an enforcement officer - not to start on the offender's own initiative any job, volunteer work or educational course without the approval of an enforcement officer - to obey any reasonable direction by an enforcement officer about communication, internet access and use of electronic devices (including, but not limited to, approval of devices used, method of communication, access to internet and restrictions on deleting information) - to permit an enforcement officer to visit the offender at the offender's residential address at any time and, for that purpose, to enter the premises at that address - to notify an enforcement officer of any intention to change the offender's employment if practicable before the change occurs or otherwise at his or her next interview with an enforcement officer - not to associate (including using third parties) with any person(s) specified by an enforcement officer, whether face to face or by written correspondence or electronic means - not to change the offender's name or use any other name without notifying an enforcement officer - not to frequent or visit any place or district specified by an enforcement officer | |
| <p>Review</p> | <p>Controlee or applicant can apply to vary interim control order. A control may be added to a confirmed control order on the application of the AFP Commissioner. A Confirmed Control</p> | <p>THRO ESO may be varied or revoked on application by offender or State if court is</p> | <p>Div. 105A, Criminal Code Compulsory annual review by Minister.</p> |

| | | | |
|---------------------------------|---|---|---|
| | Order can be varied or revoked on application of the controlee or the AFP Commissioner. AFP must apply to vary/revoke if grounds for order no longer exist or certain condition(s) should no longer be imposed. | satisfied that circumstances have changed sufficiently to render the order unnecessary. Correctives and Police to provide annual reports must indicate whether the Commissioner concerned considers the continuation of the extended supervision order to be necessary and appropriate. | Offender can also apply and court may 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, to review the order. |
| Breach: mens rea | Strict liability | Strict liability | |
| Breach: penalties | 5 years There is also an offence for a third party who interferes with tracking device (also carries 5 years) | 500PU and/or 5 years jail | |
| Evidence | Probability of risk posed by the offender is determined only on the basis of admissible evidence. | THRO No equivalent provision. ¹ | Div. 105A, Criminal Code Probability of risk posed by the offender is determined only on the basis of admissible evidence |
| Restrictions on evidence | <i>National Security Information (Criminal and Civil Proceedings) Act 2004</i> (Cth) provides the court can make orders, the consequences of which may include the withholding of sensitive information from the controlee (and their legal representative) and their exclusion from the proceeding when the court considers that information should be withheld. | Attorney General or a prescribed terrorism intelligence authority can apply to the Supreme Court to request that information be dealt with as terrorism intelligence. The Supreme Court must take steps to maintain the confidentiality of terrorism intelligence, including hearing evidence about the intelligence in private or restricting access to the terrorism intelligence. The Supreme Court must provide either the offender or the offender's | Div. 105A, Criminal Code <i>National Security Information (Criminal and Civil Proceedings) Act 2004</i> (Cth) provides the court can make orders, the consequences of which may include the withholding of sensitive information from the offender (and their legal representative) and their exclusion from the proceeding when the court considers that information should be withheld. |

¹ Section 50 of the THRO Act provides that to avoid doubt, a provision of this Act that provides for a document, report or other information to be admissible in proceedings under this Act despite any Act or law to the contrary does not affect any rule of evidence with respect to the relevance or probative value of the document, report or other information once it is admitted into evidence.

| | | | |
|--|---|---|--|
| | | <p>legal representative, or both, access to or a copy of the terrorism intelligence.</p> | |
| <p>Procedural fairness safeguards: access to evidence</p> | <p>Special Advocates can:</p> <ul style="list-style-type: none"> - make submissions at any stage of a hearing - adduce evidence and cross-examining witnesses in that part of the hearing - make written submissions to the court. - Can generally communicate without restriction with the controlee and their legal representative before the advocate receives the sensitive information. However, following receipt of the information, the advocate will only be able to communicate with the controlee in writing and with the court's approval. <p>The relationship between a special advocate of a party to a civil proceeding and the party is not that of legal representative and client, though is covered by legal professional privilege.</p> <p><i>Note also: court can only make orders restricting access to certain information where the court is satisfied that the respondent has been given sufficient information about the allegations on which the control order request was based to enable effective instructions to be given in relation to those allegations.</i></p> | <p>THRO An independent third party representative can:</p> <ul style="list-style-type: none"> - make submissions on behalf of the eligible offender as the ITP considers to be in the best interests of the offender concerning: <ul style="list-style-type: none"> (i) whether or not information is terrorism intelligence, or (ii) the level of access to terrorism intelligence that should be given to the offender under this Division. <p>The role of the ITP is to provide independent and impartial representation to the offender and to act in their best interests (not on their instructions).</p> <p>No equivalent provision.</p> | <p>Div. 105A, Criminal Code</p> <p>No equivalent provision.</p> |
| <p>Safeguards re collateral use of expert reports</p> | | <p>THRO</p> <p>An expert report concerning an eligible offender may be disclosed and used in any proceedings in respect of the offender in related proceedings if it in the public</p> | <p>Div. 105A, Criminal Code</p> <p><i>Statements made by offender in compulsory assessment cannot be admitted in against the offender in criminal or civil proceedings.</i></p> |

| | | | |
|-----------------------------------|---|--|--|
| | | interest, and the information would inform the court about the history of the defendant's mental state with respect to his or her offending. This overrides any other law to the contrary or any duty of confidentiality concerning the expert report. | |
| Safeguards: other | <p>Service, explanation and notification of an interim control order.</p> <p>Fingerprints and photos of controlee must be destroyed after 12 months.</p> | <p>THRO</p> <p>Independent third party representative must be appointed if offender unrepresented.</p> | <p>Div. 105A, Criminal Code</p> <p>A terrorist offender who is detained in a prison under a CDO must be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment, subject to any reasonable requirements necessary.</p> <p>Proceedings may be stayed where offender is unrepresented and court can order Cth to pay costs of representation.</p> |
| Monitoring by | AFP or member of state police force | Correctives NSW/NSW Police Force | |
| Scope of Monitoring powers | <ul style="list-style-type: none"> enter premises with which the controlee has a 'prescribed connection' either with the controlee's consent as occupier or pursuant to a monitoring warrant to search controlee A 'control order warrant agency' (i.e. the AFP, ACLEI, Australian Crime Commission, and authorised state agencies) may apply for a control order warrant' regime into the TIA Act warrant in respect of a particular telecommunications service; alternatively, they may apply for a named person warrant | No specific powers prescribed in light of the broad conditions that can be applied and enforced without warrant. | |

| | | | |
|--------------|---|---|---|
| | <ul style="list-style-type: none"> Control order warrants under the Surveillance Devices Act | | |
| Costs | No costs orders against respondent unless they have acted unreasonably in conduct of proceedings. | THRO Costs cannot be ordered against offender. | Div. 105A, Criminal Code No provision |
| Other | No equivalent provision. | Victims have right of appearance to provide views about the order and its conditions. Prescribed terrorism intelligence authority also has standing to make submissions. | |