The Evolution of Pre-emption in Anti-Terrorism Law:
A Cross-Jurisdictional Examination

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Abstract

Several scholars have identified an apparently new embrace of innovative pre-emptive control mechanisms developed in response to the post 9/11 world. In their opinion, the pre-emptive rationale has been used to justify the introduction of measures transcending preconceived categories of law, procedure, risk and emergency to deal with individuals or groups thought to pose a danger to the state or its citizens. The control order schemes introduced in the United Kingdom and Australia are a frequently cited example. Imposed on individuals against whom insufficient evidence to prosecute exists, control orders are controversial due to their departure from traditional criminal procedural safeguards. Restrictions and obligations, including lengthy curfews, are imposed on the basis of anticipated risk and without a finding of guilt, justified by the exceptional risk posed by terrorism and the need to protect the state and its people from a terrorist attack. Many have argued that the security paradigm is increasingly being adopted and normalised, thus changing the role of criminal law along the way. This transition is also evident in other areas of governance, expanding the boundaries of risk and uncertainty, creating hybrids of previously distinct areas of law, affecting the separation of powers, ultimately altering how emergencies and exceptions are conceived and implemented. Indeed, much of the debate around control orders stems from their hybrid nature, thus not fitting neatly into our ready-made categories of pre-conceptions about executive and judicial issuance, and civil and criminal frameworks.

The purpose of this study is to establish the characteristics of pre-emption in anti-terrorism legislation, tracing their evolution across time and place, paying particular attention to the effect of 9/11. Using an interdisciplinary and cross-jurisdictional approach, the underlying mechanisms of pre-emption are examined via different case studies. The historical example of internment in Northern Ireland during the 1970s contextualises the subsequent analysis of contemporary control orders in both the UK and Australia. A comprehensive analysis of the statutes identifies the provisions giving rise to the pre-emptive issues identified in the literature. The subsequent implementation in both jurisdictions is discussed, focusing on the legal challenges, as well as the recently announced British plans to abolish the control order scheme in 2012. Extending the analysis beyond the two central jurisdictions, France and Germany’s pre-emptive anti-terrorism measures round out the case studies.
The analysis identified both static pre-emptive characteristics, as well as some which changed over time, and between jurisdictions. Differences pre and post 9/11 are discussed, the most striking variation being the scope with which such measures are implemented; significantly decreasing over time, control orders were issued at a fraction of the rate of internment. Although control orders are part of a more general evolution towards precautionary government strategies, i.e. where states act in uncertain conditions in the absence of empirical evidence, the findings indicate that control order implementation, certainly in Australia, has not always been pre-emptive, instead being issued in reaction to individuals having trained with a proscribed terrorist organisation. More significant than the number of anti-terrorist measures, I suggest that it is in fact the discourse of pre-emption that appears to have thrived post 9/11, developing into a meme in criminological and socio-legal literature. A proposed framework for evaluating precautionary measures outside of the traditional binary classifications of law concludes the study.
Statement of Originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Susan Donkin
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<tbody>
<tr>
<td>AFP</td>
<td>Australian Federal Police</td>
</tr>
<tr>
<td>ASBO</td>
<td>Anti-social Behaviour Order</td>
</tr>
<tr>
<td>ASIO</td>
<td>Australian Security Intelligence Organisation</td>
</tr>
<tr>
<td>ATCSA</td>
<td><em>Anti-terrorism, Crime and Security Act 2001</em> (UK)</td>
</tr>
<tr>
<td>cCO</td>
<td>Confirmed Control Order</td>
</tr>
<tr>
<td>DCO</td>
<td>Derogating control order</td>
</tr>
<tr>
<td>DO</td>
<td>Detention order</td>
</tr>
<tr>
<td>DST</td>
<td>Direction de la surveillance du territoire (French domestic intelligence agency)</td>
</tr>
<tr>
<td>DTO</td>
<td>Detention of Terrorists Order</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>FM</td>
<td>Federal Magistrate</td>
</tr>
<tr>
<td>GOC</td>
<td>General Officer Commanding Northern Ireland</td>
</tr>
<tr>
<td>HO</td>
<td>Home Office</td>
</tr>
<tr>
<td>HRA</td>
<td><em>Human Rights Act 1998</em> (UK)</td>
</tr>
<tr>
<td>HS</td>
<td>Home Secretary</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
</tr>
<tr>
<td>iCO</td>
<td>Interim Control Order</td>
</tr>
<tr>
<td>ICO</td>
<td>Interim Custody Order</td>
</tr>
<tr>
<td>IRA</td>
<td>Irish Republican Army</td>
</tr>
<tr>
<td>JHRC</td>
<td>Joint Human Rights Committee</td>
</tr>
<tr>
<td>MI5</td>
<td>The Security Service (British domestic intelligence agency)</td>
</tr>
<tr>
<td>MO</td>
<td>Modus operandi</td>
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MP  Member of Parliament
NDCO  Non-derogating control order
NISS  Northern Ireland Secretary of State
NSIA  National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)
NSW  New South Wales
NT  Northern Territory
PDO  Preventative Detention Order
PIRA  Provisional IRA
PTA  Prevention of Terrorism Act 2005 (UK)
PRONI  Public Records of Northern Ireland
QLD  Queensland
RAF  Red Army Faction (Rote Armee Fraktion)
RUC  Royal Ulster Constabulary
SA  South Australia
SCPO  Serious Crime Prevention Order
SDLP  Social Democratic and Labour Party
SIAC  Special Immigrations Appeal Commission
SPA  Civil Authorities (Special Powers) Acts (Northern Ireland) 1922
StGB  Strafgesetzbuch (German Criminal Code)
StPO  Strafprozessordnung (German Code of Criminal Procedure)
TPIM  Terrorism Prevention Investigation Measures
TRO  Travel Restriction Order
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1 Introduction

1.1 The Pre-emptive Turn in Criminal Justice

In recent years, several scholars have identified a change in criminal law procedures (Ashworth, 2009; Crawford, 2006; Dershowitz, 2006; Ericson, 2007; Gross, 2003; Zedner, 2009b), many identifying a shift towards a pre-emption paradigm in the post 9/11 era (De Goede, 2008; Lendermann, 2009; McCulloch, 2009; McCulloch & Carlton, 2006; McCulloch & Pickering, 2009, 2010; Zedner, 2007b, 2009a). A considerable terminology around the legal preventive framework has developed to describe what Alan Dershowitz called “a conceptual shift in emphasis” (2006, p. 2) from deterrence to prevention, signalling an increasing trend away from traditional reactive criminal justice principles (Dyzenhaus & Thwaites, 2007; Lynch, McGarrit, & Williams, 2010). For instance, Jude McCulloch (2009) described pre-crime as criminalising “acts that have never happened to deal with threats that are not yet and may never be” (p. 152), its rationale being the prevention of harm via the pre-emption of threats. McCulloch and Pickering described its “anticipatory logic [as] the antithesis of the temporally linear post-crime criminal justice process that commences from the presumption of innocence and progresses through a number of discrete stages involving investigation, collecting evidence, charge, trial and, in the case of a guilty verdict, punishment” (2009, p. 632). Pre-crime and pre-emption thus imply a temporal shift, where reacting to crime becomes secondary to preventing it (Zedner, 2007a). However, Lucia Zedner (2007b, p. 192) argued that pre-emption differs from prevention: “Whereas the preventive turn of the criminal law is triggered in the main by acts ‘more than merely preparatory’ to a specified offence, pre-emption legitimates substantial curtailments of individual liberty at earlier points in time – often without the requirement of mens rea, still less actus reus.” Many of the observations and critiques related specifically to departures from criminal law principles and safeguards, and the resultant effect on civil liberties. Paradoxically, Dershowitz (2006) argued that the need for preventive mechanisms is greater in societies with greater procedural safeguards, since these make securing convictions more difficult. Frequently associated with terrorism post 9/11, a prominent exemplar of this apparently new pre-emptive trend is the control order scheme introduced in both the United Kingdom and Australia in 2005.
1.1.1 Control Orders

Control orders, a preventive order against terrorism suspects for whom there is insufficient evidence to prosecute introduced in Britain and Australia, are a commonly cited example of the new breed of pre-emptive measure. Their application has been highly controversial in both countries (Attorney-General’s Department, 2008; Security Legislation Review Committee, 2006; Zedner, 2009a). Several scholars found that legal principles and civil liberties have been put under substantial strain by the new pre-emptive measures (Bronitt, 2008; Goldsmith, 2008; Keyzer & Blay, 2006), compromising some of the fundamental rights which Kent Roach believes we seem to take for granted (Roach, 2007). There are several concerns. Control orders can be imposed without any conviction or even evidence of terrorist activity. In this sense, they signal a dramatic departure not only from conventional, reactive criminal law, but also sex offender detention orders, which are triggered after a conviction. Suspects must thus be correctly identified through intelligence if this measure is to be effective (Ruddock, 2007). Unlike other offences, the burden of proof required is only on the balance of probabilities, i.e. the civil standard of proof. This is because control orders are executively issued civil orders, designed to severely restrict movement, but not deprive individuals of liberty. However, breaching the obligations set out in a control order is punishable by up to five years imprisonment, leading scholars to refer to them as hybrids between civil and criminal law (Ashworth, 2009; Bonner, 2006). Described as civil preventive orders by the British Home Office, and specialist executive restraint orders by Clive Walker (2011), critics argue they destabilise the very foundations of our adversarial system of justice, which is built upon the right to a fair trial, the presumption of innocence and transparency of court proceedings (Bonner, 2007; Lynch, 2006a; Lynch & Williams, 2006; McCulloch & Pickering, 2009; Zedner, 2007b, 2009a), leading some observers to liken control orders to bail or parole for innocent people (Walton, 2005). Moreover, their controversial nature has cast doubt as to the constitutional validity of control orders in Australia (Lynch & Reilly, 2007).

The use of preventive orders without conviction is not novel to control orders, nor to the post 9/11 era. For example, in Britain, in addition to the Anti-Social Behaviour Order (ASBO), there is also the Sexual Offences Prevention Order, issued to protect individuals from serious sexual harm. Ashworth and Zedner (2007) argued that public protection was a key driving factor in the introduction and justification for such orders. They argued that even given this rationale, procedural safeguards need to be in place, and that the restrictions imposed are proportionate to the risk posed. While controversy has long been associated with anti-terrorism laws, recent legislative innovations have come under intense scrutiny due to their departure from well
established criminal procedural safeguards. The control order regime illustrates the juxtaposition between risk and uncertainty, placing its jurisdiction away from the criminal process, into an administrative realm with increased executive power. Much of this development has been justified in the name of pre-emption (McGarrity & Williams, 2010).

Many have argued that the emergence of pre-emption in the criminal justice system is a result of integrating the national security paradigm in reaction to terrorism, as well as influencing anti-terrorism discourse (De Goede, 2008; McCulloch, 2009; McCulloch & Pickering, 2010; Zedner, 2007a, 2009b). McCulloch and Pickering (2009) highlighted the inherent tension between the supposedly impartial criminal justice system and the inherently political national security strategy. Also, national security has much more of a pre-emptive aim than does the criminal justice system. Rather than being the trigger for this pre-emptive shift, Dershowitz believed that 9/11 simply legitimated it, citing several historical precedents. Indeed, many scholars and politicians who argued that 9/11 changed the rules of the game (Brown & Woolf, 2005; Jeffery, 2005) had a tendency to either omit historical forerunners, or dismiss them as being different. History provides plentiful examples of pre-emptive action by state and government actors, the law providing the foundation for many such actions. If ignored, observers risk failing to acquire a deeper understanding of the issues providing much needed context underpinning the debate. Control orders are not the first time the UK has incorporated pre-emptive legislation in the fight against terrorism. Internment was re-introduced during the Troubles in Northern Ireland in August 1971, giving the authorities the power to detain suspects indefinitely without trial. This policy was in effect until the end of 1975. The UK’s ‘management’ of terrorism has not run smoothly, its path littered with miscarriages of justice and human rights concerns (G. Martin, 2006; Oliver, 2002; Ransley, 2002; Reiner, 1992). Indeed, a recent study has shown that the majority of responses created more backlash than deterrence (LaFree, Dugan, & Korte, 2009). While states might sometimes be forced to use draconian measures in times of crisis (Szabo, 1970), such findings highlight the importance of applying a degree of aforesaid rather than simply reacting in ways which may well pacify the public outcry, but exacerbates the very problem one is attempting to address, especially when current British anti-terrorism legislation has been described as even more draconian than previous incarnations (Michaelsen, 2005b).

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1 Tony Blair’s famous announcement made shortly after the 7/7 bombings at which he announced tighter measures to ultimately facilitate expulsion of extremist from Britain.
2 Internment is discussed in more detail in Chapter 5
3 Prominent examples include the Birmingham Six and Guildford Four, who were wrongly imprisoned for 16 years and 14 years respectively.
1.2 A Pre-emptive Note on Terminology

It is important to clarify the central concept around which this study is examined, namely pre-emption. Much of the legislation giving rise to this thesis actually describes its purpose as being preventive. As such, it aims to prevent terrorist acts from happening at some point in the future. I do not argue that pre-emption is not a form of prevention, on the contrary. The concept of pre-emption is a familiar one in other disciplines, such as international relations, political science and defence studies. In military action doctrine, a state that has notice of an imminent attack is authorised to strike pre-emptively, i.e. before it happens, in an effort to prevent the attack (Cooper, 2006). In the wake of 9/11, the United States (US) made a significant amendment to its pre-emptive military action doctrine, authorising a pre-emptive strike in situations where the threat is merely speculative and unpredictable, thus shifting it from imminent to emergent threats (Cooper, 2006; Stern & Wiener, 2006). Rather than being a pre-emptive tactic, this more closely resembles a preventive strategy, the difference being the elapsed time between an imminent threat and a more long-term plan to prevent a threat from developing (Brailey, 2003; Levy, 1987). The war rhetoric, which has been readily adopted by states post 9/11, encourages a lack of accountability and proportionality (McSherry, 2006; C. Walker, 2004). Indeed, according to Dershowitz (2006), pre-emption has much the same effect.

An imminent threat in a pre-emptive strike or war implies the threat is known (Stern & Wiener, 2006). Translating this analogy to the legal arena would mean that acting pre-emptively means that the threat this person poses is known, and can thus be acted upon. For instance, an individual might be in the process of planning an attack against a certain target. In that case, a targeted threat has emerged, and the individual can be charged with preparatory offences. On the other hand, precautionary logic implies the threat is unknown. This appears to be a more suitable analogy with regards to control orders, as the individuals are merely suspected of involvement in terrorist activities. Indeed, the lack of evidence does not prevent the authorities from issuing restrictions and obligations. However, Stern and Wiener argued that there are no known risks, only degrees of uncertainty.

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\(^4\) A detailed overview of the terminology used in this thesis is presented in Chapter 3.

\(^5\) Levy (1987, p. 91) cites three further distinctions, namely the source of the threat, the consequences of inaction and the incentives to strike first.
1.3 Purpose of Research

Despite the embrace of the pre-emption paradigm in the literature post 9/11, as well as its apparent effect on the criminal justice system, a detailed analysis of the principle of pre-emption in relation to anti-terrorism law is missing from the literature. The present study addresses this gap. The aim of this thesis is to contribute towards a better understanding of pre-emption via an interdisciplinary analysis in relation to anti-terrorism law. I propose to do so via the following research questions:

1. **What are the characteristics of pre-emption as a legislative tool?**
   a. What are its aims?
   b. How and under what circumstances is it used?
   c. Are these principles used and applied (implemented) consistently across jurisdictions?

2. **Has anti-terrorism legislation post 9/11 affected the use of pre-emption?**
   a. How and under what circumstances was it used previously?
   b. Has there been a noticeable change in reaction to the events of 9/11?

Thus, the purpose of this work is twofold. The first is to determine the characteristics of pre-emptive anti-terrorism legislation across time and place. Through several case studies this thesis traces the evolution of pre-emptive anti-terrorism laws, examining the aims, the circumstances under which such legislation was used, as well as the circumstances effecting changes using both historical and contemporary examples. By expanding the analysis to four jurisdictions, the aim is to contribute a more comprehensive account of the underlying principle of pre-emption. The second objective builds on the first, namely to determine whether post 9/11 implementations of anti-terrorism law have affected the use of pre-emption, both as a concept and a practice. Despite the proliferation of the literature around pre-emptive anti-terrorism legislation post 9/11, I argue that such measures are but a variation in a line of pre-emptive laws; and although it has been argued that the exception is turning into the norm, such measures are being resorted to at a decreasing rate. In contrast, what has been increasing is the use of the term pre-emption.
1.4 Chapter Overview

The foundations for my thesis are laid over the next three chapters. I begin by conducting a review of the literature on control orders. Much of the literature has focused on the pre-emptive nature of these orders since they impose restrictions or obligations without a finding of guilt. The implications for fundamental principles of justice, such as the right to a fair hearing, their quasi-judicial or hybrid nature, and the distinction between restriction and deprivation of liberty have been dominant critiques. This pre-emptive governmental strategy is examined against the theoretical backcloth of governance, risk and uncertainty, as well as the exception invoked on the basis of extraordinary risk, in Chapter 3. The role of law as a tool of governmentality is explored and how it fits more generally within the overall government response to risk and uncertainty. Given that many of the derogations identified in Chapter 2 were introduced on the basis of extraordinary risk and uncertainty, the emergency paradigm is explored.

My justification for using an interdisciplinary approach is outlined in the methodology section in Chapter 4. Considering much of the contemporary literature on control orders explores them through single discipline-focused lenses, the present study aims to address this gap by contextualising the debate with historical and cross-jurisdictional materials.

My first study in Chapter 5 examines the pre-emptive rationalities underlying internment in Northern Ireland in its last incarnation between 1971 and 1975. Its overarching aim is identified, as well as how and under what circumstances it was used, providing the historical grounding of this research.

Having identified pre-emptive mechanisms used in a previous response to terrorism in Northern Ireland, I proceeded to examine the contemporary anti-terrorism measure identified as pre-emptive in both the United Kingdom and Australia: the control order. Chapter 6 analyses the statutory bases for the control order scheme in both the United Kingdom and Australia, i.e. the Prevention of Terrorism Act (PTA) 2005 (UK) and the Anti-Terrorism (No.2) Act 2005 (Aus). Again, particular attention is paid to the pre-emptive strategies, as well as the processes and safeguards that have been affected as a result of these laws. The implementation of the statutes is further explored in Chapter 7. Focusing on discussions of pre-emptive principles, I conducted a thorough analysis of the only two Australian control order cases to date, namely those of Jack Thomas and David Hicks. Both cases yield interesting insight into the pre-emptive justification as the basis for issuance. The analysis of the British control order cases revealed a similar finding. However, given the differences in both number
of orders (N=48) and their less transparent implementation, rather than replicating the thorough approach adopted for the Australian cases, the analysis of UK control orders was divided into three parts. The first part focused on the available data pertaining to each control order case in an effort to shed some light on underlying trends, such as the proportion of domestic to foreign controlees. The second part of the analysis examined the most significant legal challenges to the regime, highlighting the conflicting values set out in the statute and its incompatibility with human rights provisions such as the ECHR and the British Human Rights Act 1998. The final part of the UK study focused on the role of the Independent Reviewer of Terrorism Legislation, Lord Alex Carlile of Berriew QC, and his annual reporting duties under the PTA 2005. While he voiced some concern with regards to the implementation of control orders, most notably the length of the curfew, he remained a staunch supporter of the regime, both with regards to the necessity and appropriateness of orders made, as well as the necessity of the measure as a whole.

During the writing of this thesis, the British Coalition government announced the abolition of control orders at the end of 2011. In light of this development, the proposed replacement orders, Terrorism Prevention Investigation Measures (TPIMs), are discussed, highlighting the differences and similarities with its predecessor in Chapter 8.

Chapter 9 further extends both the historical developments and the cross-jurisdictional comparisons by examining the French and German pre-emptive responses to terrorism. The French pre-emptive approach preceded 9/11 by half a decade with its introduction of the association de malfaiteurs in relation to a terrorist undertaking. Its centralised judicial system and close collaboration between the Judiciary and the intelligence services yet further distinguish the French approach from the UK and Australian responses. Germany, on the other hand, given its history, has long refused to jump on the pre-emptive bandwagon. Only recently was a law criminalising the preparatory stages of an offence introduced, within which features a clause offering potential terrorists an incentive to cease activities prior to the actus reus eventuating.

These findings gathered over time and across four jurisdictions inform the broader endeavour of my thesis which is to comment on the evolution of pre-emptive anti-terrorism laws. Chapter 10 traces how certain governmental strategies have remained static over both time and place, whereas others have undergone variations and were subjected to judicial selection procedures. I argue that these evolutionary changes reflect the increasing awareness and necessity to adhere to human rights principles. Moreover, given the reactively preventive application of
control orders, I conclude by suggesting that pre-emption itself has evolved into a meme, i.e. a culturally transmitted idea, which thrived in the post 9/11 climate of uncertainty.
2 A Reactive Assessment of Control Order Literature

2.1 Introduction

Much of the literature identified the post 9/11 era as increasingly relying on pre-emptive measures to deal with terrorism. Having selected control orders as the primary case study through which to examine pre-emptive anti-terrorism legislation, this chapter provides an overview of the literature on control orders, in both the British and Australian context. The literature at the heart of this thesis, the identification of pre-emptive anti-terrorism law as a predominantly post 9/11 national security phenomenon, is critical of the apparent effect pre-emption has had on civil rights. A central tenet of civil libertarian critique of control orders is that they fundamentally undermine the basic presumptions of criminal procedures (Ashworth, 2006; Bonner, 2006; Zedner, 2009b), affecting the right to a fair trial, transparency, proportionality and ultimately adversarial justice. The aim of this chapter is to break down the literature into an examination of the legal framework underlying control orders, before examining its effect on their practical application. Throughout this analysis particular attention will be paid to the underlying rationale of pre-emption and its role in justifying said deviations from the normal presumptions.

Since their introduction in 2005, control orders have been divisive owing to their ability to impose serious restrictions and obligations on individuals based on an intelligence-led, low standard of proof in a civil process originating with the Executive. Advocates of the scheme, mostly practitioners or politicians of whom there are comparatively few, argue that control orders are performing an important function, albeit imperfectly (Simcox, 2010). While some acknowledge that such impositions on individual liberty without any prior conviction may be seen as controversial, they believe the enormous threat to public safety is sufficient justification (Ruddock, 2007). Moreover, proponents of the Australian scheme argue that it includes sufficient safeguards to allay any fears (McDonald, 2007). More importantly, the British Independent Reviewer of Terrorism Legislation, Lord Carlile, though critical of some aspects of the scheme, advised against its abolition, citing the lack of a viable alternative (Carlile of Berriew, 2010). On the other hand, control orders have been widely criticised by politicians, civil liberty organisations and academics alike, much of the criticism focusing on procedural issues and civil liberties. The British-based National Council for Civil Liberties (Liberty) has described control orders as unsafe, unfair, and undermining the right to a fair trial and the presumption of innocence, which goes against British traditions of liberty and justice (Bronitt, 2008; Bronitt & McSherry, 2010). Baroness Kennedy went even further, describing
control orders as “absolutely abhorrent and totally disgraceful in its abuse of civil liberties”. A vocal critic of the scheme, Lucia Zedner (2007b) described them as “unprecedentedly intrusive” (p. 176) and “an extraordinary measure that does serious damage to basic presumptions of criminal procedure...violating the presumption of innocence, the right to a fair trial, adversarial justice, transparency and proportionality” (p. 179). Finally, David Bonner went as far as to call derogating control orders “internment by another name” (Bonner, 2007, p. 22).

Much of the civil liberties criticism of control orders thus relates to this apparent derogation from well established criminal law safeguards. Yet it is important to reiterate that technically, control orders are a civil measure and thus not subject to the same standards as a criminal trial. Many of these issues have arisen due to the hybrid nature of control orders (McCulloch & Pickering, 2010). Much like the Anti-Social Behaviour Order (ASBO)8 in the UK, the control order is a civil measure designed to prevent the individual from engaging in the type of behaviour giving rise to the order in the first place. However, a breach of any of the conditions set out in the order without reasonable excuse has the potential to elevate the measure to the criminal realm, and the controlee could face up to five years imprisonment. So while the initial conduct did not bring about prosecution under the traditional criminal justice paradigm, breaching a condition of the order may. In addition to the civil and criminal overlap, control orders have also been described as executive-judicial hybrids (Bonner, 2007); while they originate with the Executive, they also require judicial approval. It is essential to consider their administrative origins in any reflection on pre-emptive principles, as this will affect both their underlying aims, as well as the standards against which they should ultimately be evaluated against. It is to this debate that I now turn.

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7 In Britain, there are two types of control orders, derogating and non-derogating, which refer to the necessity to derogate from Article 5 of the European Convention on Human Rights, i.e. the right to liberty and security, see Appendix A. Further elaborated on in section 2.3.3 of this chapter, the difference between the two species of order is explained in detail in Chapter 6. Most of the analysis in this thesis focuses on the non-derogating variety, as these are the only ones which have been issued to date.
8 ASBOs are civil preventive orders designed to protect individuals or neighbourhoods from anti-social behavior. Like with control orders, breaching a condition of the order constitutes a criminal offence punishable by up to five years in prison.
2.2 Legal Hybrids Framing Control Orders

While the control order process is described in more detail in Chapter 6, a brief overview is necessary here to situate the reader. In Australia, control orders originate with the Australian Federal Police (AFP) who present the Attorney General with a copy of the proposed order for consent, before seeking approval from a Federal Magistrates Court. So although they are applied for by the Executive, they require judicial approval on the balance of probabilities that making the order would substantially assist in preventing a terrorist act, or that the person has either provided training to or received training from a listed terrorist organisation. Moreover, the court needs to be satisfied that the conditions set out in the order are reasonably necessary, appropriate and adapted for the purposes of protecting the public from a terrorist act. Australian courts are able to amend or withdraw certain obligations, and are thus not bound by the conditions set out by the AFP. In the UK, the Home Secretary issues a non-derogating control order if he or she has reasonable suspicion of the individual’s involvement in terrorism or believes it necessary to protect the public from a risk of terrorism. Approval from a High Court judge must be sought within seven days. However, unlike the Australian Judiciary, their British counterparts must approve the order, unless the Home Secretary’s reasoning is obviously flawed. Although this process appears judicial, it blurs the boundaries between the Executive and the Judiciary, due the limited discretion available to British judges.

2.2.1 Separating the Executive from the Judiciary

Pre-empting terrorism events has increasingly become a government priority, and this has given rise to new administrative or executive measures to deal with the problem (International Commission of Jurists, 2009). According to the International Commission of Jurists (2009), the evidentiary requirements established within the criminal justice system have partly been succeeded by a new framework of administrative, civil and immigration law. Immigration proceedings, for instance, allow governments more discretion due to their greater flexibility in the provision of legal safeguards compared to criminal proceedings. The same applies in control order hearings, where the degree of judicial oversight is limited by the lower standard of proof required to impose an order (Kavanagh, 2010). Control orders are issued by the Executive to prevent a terrorist act by an individual suspected of posing a threat to national security before it occurs (International Commission of Jurists, 2009).

David Bonner (2007) defined executive measures as “a product of the empowerment through law of the executive branch of government to take action affecting rights of legal individuals,
whether people or corporations, without any need for prior judicial approval of that action” (p. 21). For example, all police-initiated matters are executive functions, including the arrest and charge of an individual prior to judicial review in court. Control orders are often referred to as executive measures because they originate with the Home Secretary in the UK or the Australian Federal Police in Australia. Although Bonner (2007) acknowledged that the court approval needed to issue a control order may lead some observers to deny them as purely executive, he prefers to refer to them as hybrid powers, due to the British Judiciary’s statutory limitations to refuse such requests. This apparently subtle distinction has raised concerns about the Executive undermining the independence of the Judiciary (Lynch, et al., 2010).

Under the Separation of Powers doctrine, each branch of government maintains a degree of independence so as to prevent one arm from exerting arbitrary power/rule. This aims to ensure that the Judiciary is free from political agendas when deciding on matters of constitution or legal questions. Traditionally, the Judiciary monitors the Executive, ensuring its actions are carried out within the confines of the law. However, Ericson (2007) highlighted that allocating discretion to the administrative branch of government can be beneficial, as it is well equipped to deal with uncertainty. Conversely, others argue that increasing executive power and discretion to law enforcement undermines liberal-democratic principles, leading to an abandonment of legal guarantees and protections potentially exposing citizens to arbitrary state power (Ericson, 2007; McCulloch & Carlton, 2006). Bonner warned that executive measures often “lack the transparency and safeguards of the criminal prosecution approach to which they both provide an alternative and a supplemental means of dealing with threats to national security” (2007, p. 352).

History has shown that national security measures are deferred to the Executive (Bonner, 2007; Dyzenhaus & Thwaites, 2007; Zedner, 2005). Bonner (2007) argued that executive measures introduced in reaction to national security inherently deviate from the standards expected in criminal law, starting with the presumption of innocence. There have always been limited exceptions to this presumption, principally including remand procedures. Those exceptions however have been narrowly defined by the courts and subject to review, e.g. by habeas corpus. The United Kingdom has long used executive measures against terrorists, ranging from exclusion and deportation on security grounds to internment in Northern Ireland in the 1970s (Bonner, 1992, 2007; C. Walker, 1992, 2004, 2011), as have other nations. In Australia, for example, the Minister for Foreign Affairs has increasingly made use of his power.

9 The Australian control order scheme allows for greater judicial discretion, see Chapter 6.3
10 In Australia, federal judicial power can only be exerted by courts listed in s 71 of the Constitution, i.e. the High Court, federal courts and state courts.
to cancel or refuse to reissue a passport post September 11 (Harris Rimmer, 2010). Criminal law is not always considered suitable to effectively deal with the kinds of demands which arise in the context of national security (Bonner, 2007). Walker (C. Walker, 2011) has highlighted that compared to a criminal process, executive measures allow for greater executive input, free from judicial independence, allowing the prioritisation of national security over individual fairness. For example, one of the concerns raised with control orders is that the Home Secretary can request an order if he or she reasonably suspects\(^{11}\) the individual of being involved in terrorism-related activity, which is an even lower standard of proof than the civil one, i.e. on the balance of probabilities (Zedner, 2009a).

While the Executive decides on what measures to implement to protect the public, the role of the Judiciary is to decide whether these measures are lawful or not, a role which is not always very popular with the Executive or indeed the general public (Lynch, 2006b). The Judiciary has a long-standing history regarding security-related issues, treating them with respect and esteem (Bonner, 2006; Zedner, 2007b). However, some have argued that the role of the courts is not to support the national security agenda of executive government, nor to pander to public fear in deciding cases (Lynch, 2006b). Both Dyzenhaus & Thwaites (2007) and Roach (2002) argued that the Judiciary needs to uphold the rule of law and our deep-seated commitments, even during times of crisis or emergency. However, the responsibility of upholding civil liberties should not fall entirely on judges, since their record during both World Wars has been questionable (Bonner, 2007; Spjut, 1986; White, 2007). The inclusion of safeguards and appeal avenues, though not necessarily of the same standards as the procedural protections of the criminal process, is seen as an important distinction between control orders and the rights afforded to Guantanamo detainees (Ip, 2007). However, Zedner believes control orders provide only limited judicial review procedures (Zedner, 2007b). Indeed, the statutory basis of the British Prevention of Terrorism Act 2005 limits the court’s ability to dismantle the control order scheme on the basis of human rights violations (Kavanagh, 2010). Moreover, due to the non-derogating order’s apparent compliance with human rights provisions, the Home Secretary retains greater control over the process than he would with derogating orders (Bonner, 2007).

\(^{11}\) Reasonable ground for suspicion is frequently used in policing, e.g. to justify a search. Code A of the Codes of practice, sections 2.2-2.11 of the Police and Criminal Evidence Act 1984 (UK) (PACE) lay out the grounds for reasonable suspicion and are found in Appendix B. For a more detailed overview see Quinton, Bland, & Miller (2000).
Although detention is not usually determined by the Executive, there are instances, usually related to national security and emergency provisions, which empower it to act in such a way. The basis upon which such orders are issued are often vaguely defined threats to national security based on unconfirmed intelligence reports, leading the Eminent Jurists Panel on Terrorism to call for executive detention to be used only in “genuine declared states of emergency threatening the life of a nation” (International Commission of Jurists, 2009, p. 110). States have long felt it their responsibility to protect their citizens from dangerous acts or individuals, be it from international foes or internal dissidents or groups; and as such, have introduced various measures tailored to both the circumstances and era (McSherry, 2006). In fact, even in cases not relating to national security individuals may be subject to administrative detention. For instance, Australia’s Migration Act 1958 (Cth) provides for compulsory administrative detention of unlawful non-citizens prior to deportation on the grounds of community protection (Dyzenhaus & Thwaites, 2007). Being civil in nature, migration controls avoid being subject to the more stringent criminal law standards set out in international human rights conventions. Bonner (2006) argued that the Executive should not be exempt from acting within the legal authority provided to it, which includes adherence to the various human rights provisions the state has instituted domestically and signed up to internationally. Using prevention as the justification to circumvent safeguards might not be novel, but Zedner (2007b) argued that safeguarding its citizens does not give a state immunity from the law. In Britain, obligations under the European Convention on Human Rights (ECHR) are considered more binding due to more developed and respected enforcement mechanisms compared to the International Covenant on Civil and Political Rights (ICCPR). Moreover, the introduction of the British Human Rights Act 1998 (HRA) saw a high degree of overlap between it and the provisions contained in the ECHR. Recent legal challenges to the control order scheme showed that the HRA has had an empowering effect on the British Judiciary, leading to increased judicial scrutiny of executive measures (Bonner, 2007).

Balancing the mandate of public protection with an individual’s human rights can be divisive enough operating within a single legal framework, as some of the examples in Chapter 2.4 will highlight. However, the hybrid nature of control orders adds yet another layer of complexity.

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12 These are further discussed in Chapter 2.4
13 And in some cases, indefinite detention (Al-Kateb v Godwin (2004) 219 CLR 562)
14 Despite Australia’s signature on the ICCPR, it has not yet given its international obligations domestic effect (McSherry & Keyzer, 2009; Michaelsen, 2005a).
15 See for example A and others v Secretary of State for the Home Department [2004] UKHL 56 and [2005] 2 WLR 87, further discussed in Chapter 7.3.2
The next section briefly outlines the civil law framework in which control orders are set up, before contrasting it to the criminal system against which they are frequently measured.

2.2.2 Civil versus Criminal Realm

Despite the many criticisms in relation to the apparent departure from criminal procedural safeguards, it is important to reiterate that control orders are in fact civil measures. In contrast to criminal law, civil law deals with aspects between individual citizens which are not generally of interest to the state; however, some overlap exists. In the common law systems, civil law is divided into administrative or regulatory law, and private law. Administrative law generally focuses on state-citizen relations concerning lawful, as opposed to unlawful activities, i.e. the instrument is regulation as opposed to the criminal process. That being said, previously clear distinctions between criminal law and administrative law have become blurred more generally, and not just in relation to anti-terrorism (Ashworth, 2000; Australian Law Reform Commission, 2003; Bronitt & McSherry, 2010; Cotterrell, 1992; Mazerolle & Ransley, 2005). For instance, serious wrongdoings in regulatory and private law are being criminalised, whereas the criminal law has adopted civil procedures and remedies (Ashworth, 2000; Ashworth & Zedner, 2010; Mazerolle & Ransley, 2005). Importantly, the two types of law differ as to their procedural characteristics. The civil standard of proof is on the balance of probabilities. Civil courts are able to impose conditions and injunctions on individuals in reaction to a wrong committed by one person against another, but never criminal punishment in the form of incarceration. The latter, technically, is only possible after a finding of guilt in criminal proceedings (Bronitt & McSherry, 2010). Notable exceptions include detention under mental health regimes and immigration detention. Increasingly, however, established criminal law safeguards are being circumvented or supplemented by hybrid or quasi-criminal measures, such as Anti Social Behaviour Orders (ASBOs) and control orders. While incarceration is not necessarily considered at the outset, this “parallel system of questionable justice” as Zedner (2009b, p. 81) called it, despite operating within the civil realm, imposes considerable criminal sanctions if orders are breached. ASBOs and control orders exemplify the hybrid nature in that the measure is civil, aimed at preventing future behaviour, but has the potential to criminalise future behaviour which, if not subject to an ASBO or control order, would not constitute a

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16 See for instance developments in environmental protection or workplace health and safety, as well as examples in family law (Mazerolle & Ransley, 2005)
17 See Article 5 of the ECHR in Appendix A
criminal offence, and would certainly not be subject to the same severe sanctions as those issued in criminal cases (Ashworth & Zedner, 2007; Ramsay, 2009).

The criminal justice system is, for the most part, retrospective and retributive, reacting to offences or transgressions already committed via prosecution and sentencing. Lacey described criminal law as focusing on “the formally established norms according to which individuals or groups are adjudged guilty or innocent” (Lacey, 2002, p. 265). In cases where a defendant pleads not guilty, the burden of proof is on the prosecution to prove their guilt beyond a reasonable doubt. In order to do so, both the actus reus and the mens rea need to be established. Exceptions to the rule include self-defence, diminished responsibility or insanity, in which case the burden of proof rests upon the defendant, though he or she is only required to prove their case on the balance of probabilities. If found guilty, the defendant is sentenced and punished, which in most industrialised countries means imprisonment (Hudson, 2002).

Having explored the legal foundation of the control order’s hybrid framework, in what follows I outline, in relation to the implementation of control orders, the key principles caught up in the hybrid framework, i.e. evidence versus intelligence, the right to a fair trial, and finally, punishment versus prevention. These conflicting and often dichotomous paradigms arise from the juxtaposition of the traditionally retrospective criminal justice system, with the more preventive aim of the control order aimed at preventing future conduct.

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18 Nuisance behavior, for example
19 The act/crime committed (Latin: guilty act)
20 The state of mind/intent (Latin: guilty mind)
21 It is worth noting that these presumptions are being broken down even in criminal law. For instance, there are instances where the onus of proof has been reversed, e.g. in cases of mental impairment, as well as offences where no mens rea is required (Ashworth, 2000; Bronitt & McSherry, 2010; Lynch, 2006a, 2006b; McSherry, 2004). Lynch (2006b) quoted Chief Justice Spigelman in Lodhi v The Queen ((2006) 199 FLR 303, 318) as saying that terrorism has created a “unique legislative regime” with regard to criminalising preparatory acts, due to the decision to have criminal responsibility arise at an earlier stage than for the usual conspiracy charge.
2.3 Hybrids in Action

As discussed, control orders are legal hybrids in two senses, in that they blur boundaries between executive and judicial functions, as well as between criminal and civil or administrative measures. This section discusses three areas where this hybridity causes tension. Evaluating control order procedures against criminal safeguards highlights several procedural shortcomings. In a nutshell, control orders are criticised for their restrictions, which some argue are punitive in nature, imposed on the basis of intelligence material which is kept secret from the controlee, thus affecting his or her right to a fair trial. Moreover, they are imposed on individuals against whom insufficient evidence to prosecute exists. Consequently, the first point examines the admissibility of intelligence material as evidence, before discussing how non-disclosure affects an individual’s right to a fair trial. I conclude this analysis by highlighting why civil liberty critiques argue control orders should be evaluated against criminal and not civil standards, namely that the severity of the restrictions exceed the preventive realm, constituting punishment, imposed in a process lacking the basic safeguards.

2.3.1 Evidence versus Intelligence

Control orders are issued against individuals who are suspected of involvement in terrorist activities, but who cannot be prosecuted. Several reasons might exist why prosecution of an individual might be impossible, thus necessitating the issuance of a control order (Zedner, 2007b). For instance, evidence gathered against a suspect may be inadmissible if it is sensitive in nature or risks the safety of the intelligence source (Manningham-Buller, 2005; Roach, 2010; Zedner, 2007b). Moreover, as with other preventive measures, the ‘evidence’ in control order cases is not required to conform to the stringent rules of evidence in criminal proceedings due to the civil nature of the order. However, despite the less stringent rules of admission, intelligence information in control order cases is often afforded the same weight as evidence. It is precisely this lack of evidence as the basis of often severe restrictions which is seen as controversial.

In many ways, intelligence and evidence are diametrically opposed. Unlike evidence, which is challengeable and ideally should hold up to scrutiny in a court of law, intelligence is often unreliable (Roach, 2010). As both Lynch (2006b) and Roach (2010) have argued, intelligence is concerned with risk, whereas evidence and police work on the other hand are more focused on a particular act or crime after it has been committed. Thus, intelligence is more closely linked to prevention and based on suspicion, whereas evidence is reactive and used to prove
someone’s guilt (Roach, 2010). Kent Roach (2010) neatly summarised the underlying assumptions of the competing paradigms. The six most pertinent distinctions with regards to this thesis are presented in Table 2.1.

Table 2.1 - Roach’s Operating Assumptions of Competing Intelligence-Evidence Paradigms

<table>
<thead>
<tr>
<th>Evidence</th>
<th>Intelligence</th>
</tr>
</thead>
<tbody>
<tr>
<td>About past events (crimes)</td>
<td>About future threats to security (risk)</td>
</tr>
<tr>
<td>About acts (even the agreement in conspiracy or the step beyond preparation in attempt)</td>
<td>About status (being placed on a watch list) and risk (being denied security clearance)</td>
</tr>
<tr>
<td>Public unless special circumstances, such as public ban</td>
<td>Secret or on a ‘need to know’ basis, unless special circumstances</td>
</tr>
<tr>
<td>Subject to cross-examination and confrontation of one’s accuser</td>
<td>Not subject to cross-examination because of need to protect sources, methods and promises of confidentiality (caveats) given to foreign agencies</td>
</tr>
<tr>
<td>Presented and evaluated by legal experts and juries. Expertise must be established to allow opinion evidence to be introduced</td>
<td>Presented and evaluated by employees of the intelligence agencies, allied agencies and decision makers in government. Expertise is assumed and opinions readily accepted and acted upon.</td>
</tr>
<tr>
<td>There is a need for evidence to relate to specific charges and to have a probative value that is greater than prejudicial effect</td>
<td>No rules of relevance and expansive cross-referencing in databases that are presumed to be reliable</td>
</tr>
</tbody>
</table>

Adapted from Roach (2010, p. 52)

Of particular importance to this research is the first distinction, namely that intelligence is focused on future events (Roach, 2010; C. Walker, 2011). The aim of intelligence is to gather sufficient information to prevent a crime from occurring in the first place, i.e. pre-empting it. In the context of security, the focus on risk highlights a degree of uncertainty, as much of the intelligence gathered is incomplete and unable to provide the complete picture (Manningham-Buller, 2005). Indeed, in a famous speech, the former head of MI5, Dame Eliza Manningham-Buller repeatedly pointed out that much of the terrorism-related intelligence post 9/11 was too fragmented and uncertain to even warrant assessment and interpretation, never mind meeting the standards of evidence in court (Manningham-Buller, 2005; Press Association, 2003; Roach, 2010). The testing of evidence in cases involving national security is restricted,
making meaningful review of decisions challenging (Dyzenhaus & Thwaites, 2007). However, Bonner (1992) warned that even good intelligence can still fall short of the standards of evidence.

Some have argued that the advent of preventive measures has increasingly blurred the boundaries between evidence and intelligence (Lynch, 2006a, 2006b; Pickering, McCulloch, & Wright-Neville, 2008; Ransley & Donkin, 2009; Roach, 2010; The Street Review, 2008). According to the Eminent Jurists Panel, risk has replaced proof (International Commission of Jurists, 2009). Imposing restrictions on individuals found on the balance of probabilities to pose a risk to others is not unique to anti-terrorism or control orders, domestic violence and mental health orders being other examples (McDonald, 2007; McSherry, 2002). The Australian Judiciary accepts criminal intelligence in place of evidence, even in non-terrorism cases (Appleby & Williams, 2010; Lynch, et al., 2010). In the UK, there have been repeated calls to admit intercept evidence in control order and terrorism cases (Carlile of Berriew, 2011; S. Macdonald, 2007). However, some critics argue that the reliance on intelligence material in such cases raises concerns about the lack of procedural safeguards, which although not technically required in civil cases, should be adhered to given the seriousness of the suspicions against the individual.

2.3.2 Procedural Safeguards

A central tenet of civil libertarian critique of control orders is that they fundamentally undermine the basic presumptions of criminal procedures (Ashworth, 2006; Bonner, 2006; Lynch, 2006a; Lynch & Williams, 2006; McSherry, 2006; Zedner, 2007b, 2009b). While there is much debate around the universality of criminal law principles (Bronitt & McSherry, 2010, p. 86 ff), there are certain protections afforded to defendants in criminal proceedings, so-called procedural safeguards, which are considered a basic and fundamental principle of a fair trial in many countries, although there is considerable variation between jurisdictions (Ashworth, 2000; Metcalfe, 2009). These safeguards typically include the following (Metcalfe, 2009):

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22 Section 3 of the Serious and Organised Crime (Control) Act 2008 (SA), which sets out the making of control orders in an organized crime context, defines criminal intelligence as “information relating to actual or suspected criminal activity...the disclosure of which could reasonably be expected to prejudice criminal investigations, to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or to endanger a person’s life or physical safety”

23 By Lords Lloyd and Newton, as well as the DPP

24 For example, in Canada, these rights are enshrined in section 11 of the Charter of Rights and Freedoms. See Appendix A for Article 6 safeguards of the ECHR.
**Right to be informed of the accusation against oneself** – know what charges are being brought or the allegations made;

**Right to be heard** – in addition to having the right to make representations, each party has the right to challenge any evidence relied upon in court;

**Equality of arms** – being informed of all the evidence relied upon by the other party or the judge, so as to be able to challenge it in court;

**Right to confront one’s accuser** – meaning being able to question any witnesses relied upon by the prosecution;

**Right to counsel** – closely related to equality of arms, this principle ensures the right to legal representation;

**Presumption of innocence** – to be presumed innocent until proven guilty in a fair and impartial trial.

Conceived to protect individuals from arbitrary state power and against miscarriages of justice (McCulloch & Carlton, 2006), these safeguards are considered the norm in many countries today and as a result have been enshrined in both domestic and international human rights conventions, such as the HRA, the ECHR and the ICCPR. However, these conventions often fulfil more of a symbolic value, as they are not automatically binding on signatory states, and can be derogated from in emergencies. In western democracies, fairness is a fundamental and universal presumption of law, legitimising the criminal justice process (Bronitt & McSherry, 2010), making the observance of procedural safeguards all the more important.

Several concerns have been raised in control order cases, many of them around the absence of the defendant from the process, the closed nature of the sessions and a process which, as a result, can no longer be considered fully adversarial. Australian control orders have largely escaped these critiques, as the process is not necessarily conducted *ex parte*, and a controlee and/or their legal representation is involved in the process. British control order hearings are conducted *ex parte*, i.e. with the controlee and/or his representatives absent. This process, although not unique to control order hearings, is usually not considered problematic when used at interim hearings (Metcalfe, 2009). Moreover, control order hearings are frequently conducted in closed sessions, i.e. behind closed doors, excluding the public and, more

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25 Under Article 15 of the ECHR for example. See Appendix A.
26 The differences between the two countries’ implementation is further discussed in Chapter 7.
importantly, the defendant. In an effort to address some of these critiques, a system of Special Advocates was introduced. Special Advocates have two functions, namely to disclose and represent, meaning they are able to view the incriminating material and make representations on their client’s behalf (Bonner, 2007; Kavanagh, 2010). However, once they have been party to the secret material, Special Advocates are prohibited from further communicating with the person they represent. So, if a control order is issued to an individual against whom the court believes material linking him to terrorist-related activities exists, which is not disproved (Bonner 2006), he or she is left with virtually no opportunity to defend himself against the accusations. In addition to conflicting with the human rights provisions, a system relying on ex parte hearings, Special Advocates and closed sessions can no longer be considered fully adversarial (Bonner, 2006, 2007; Joint Committee on Human Rights, 2005; Kavanagh, 2010; Metcalfe, 2009). Indeed, Baroness Kennedy warned that hearing secret evidence would turn the High Court into a secret commission (Bonner, 2006).

The use of closed sessions and Special Advocates severely compromises the right to a fair trial, putting the controlee at a serious disadvantage (Bonner, 2006, 2007). Indeed, Kavanagh (2010) expressed doubts over the extent to which a system of Special Advocates is able to deliver a procedurally fair outcome. However, Article 6 of the ECHR (right to a fair hearing) only applies to criminal proceedings, and since control order proceedings are subject to civil rules of evidence, they do not provide individuals with the same safeguards afforded in criminal trials (Ashworth & Zedner, 2007, 2010). Indeed, it has been argued that control orders were deliberately set up as a civil preventive executive measure to avoid having to guarantee the individual a fair trial as required under Article 6 of the ECHR (Joint Committee on Human Rights, 2006; Zedner, 2007b). In both Zedner’s and the Joint Committee on Human Rights’ opinion, since Article 6 only applies to criminal proceedings, states have tried to circumvent adherence by establishing non-criminal measures. This view is also shared by Lynch, McGarrity and Williams with regard to the Australian scheme, arguing that the civil nature of the orders make them more “flexible” (Lynch, et al., 2010, p. 6). Ashworth and Zedner (2010) described the designation of civil preventive orders as non-criminal a problem of undercriminalisation given the failure to comply with criminal procedural safeguards in cases with potentially serious

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27 And explicitly excludes immigration hearings
28 Zedner (2007b) highlighted that a state’s designation of a measure as non-criminal is not always sufficient to avoid it being interpreted as such by the ECHR. The status of control orders as criminal proceedings has been called into question by both the Council of Europe Commissioner for Human Rights and the Joint Human Rights Committee (JHRC) (Bonner 2007).
29 Contrary to previous research with described an increasing trend towards criminalising behaviour (Ashworth, 2000; Crawford, 2006).
consequences; arguing that criminal proceedings should not be replaced with civil ones in cases that might result in a deprivation of liberty (Ashworth & Zedner, 2007).

2.3.3 Restriction versus Deprivation of Liberty

Traditionally, the deprivation of liberty is seen as a severe punishment for serious offences reserved for use following a guilty verdict in a criminal trial, and often as a last resort (Ashworth, 2002; Cohen, 1979; von Hirsch, 1990). Non-criminal detention is reserved for specific situations, often where there is a risk of harm to a specific individual or the population as a whole, for instance in mental health cases or to prevent the spread of infectious diseases. In those situations detention is justified under the proviso of protection, not for the purposes of punishment.

The hybrid nature of control orders also affects the issue of deprivation of liberty, particularly in the UK where curfews are often significantly longer than in Australia, and the option of derogating control orders depriving the controlee of liberty exists. In addition to the procedural issues arising due to the hybrid nature of the scheme, the difference between the two British species of control order, i.e. derogating and non-derogating, is not always clear cut, particularly as the difference hinges on the distinction between restricting someone’s liberty and depriving them of it. Indeed, the obligations set out in a non-derogating control order can be severely restricting, but as long as they do not actually deprive someone’s liberty, they are not considered in violation of Article 5 of the ECHR, i.e. the right to liberty and security. Yet, the point at which restriction becomes deprivation is neither explicitly enunciated in Article 5 of the ECHR nor the UK PTA itself. The decision about where the boundary between restriction and deprivation is lies with the Home Secretary and the High Court (Bonner, 2006; Zedner, 2007b). In reality, even under the non-derogating control order the conditions have been described as considerably inhibiting any normal life (Carlile of Berriew, 2006), even equating to house arrest (Zedner, 2007b). It is important to reiterate that civil proceedings are not in a position to assign punishment. Control orders are intended to be preventive in nature, not punitive. That being said, restrictions or even detention appear may more legitimate if labelled as preventive, thus sufficiently distinguishing them from punishment (Pratt, 1997; Zedner, 2009b).

See Appendix A
Punishment in the form of a custodial sentence is generally proportionate to the crime and its duration determined at the sentencing stage. Exceptions are made in cases of serious or violent offenders, where protecting the public from serious harm justifies longer periods of detention\(^\text{31}\) (Ashworth, 2002, 2005; McSherry & Keyzer, 2009). There are different aims of criminal sanctions, including deterrence, both specific and general, incapacitation, rehabilitation, retribution, and, perhaps the most overarching and relevant here, the protection of harm to others (Ashworth, 2005; Cornall, 2007; Ip, 2007; N. Walker, 1982). Viewed through the lens of deterrence, punishment, although reactive, also has a clear preventive and future-orientated rationale to it (Bronitt & McSherry, 2010). This applies both for the individual who is deterred from offending in the first place, in which case it pre-emptively prevents, and the offender who decides not to re-offend, hence being reactively preventive. That being said, well established doctrines and judgments purport that punishing anticipated future conduct is wrong (Blackstone, 1769; Duff & Garland, 1994), as it compromises long-established procedural safeguards (Keyzer & Blay, 2006; Lynch, 2006a). Without a finding of guilt detention is considered arbitrary if its aim is punishment (McSherry, 2006; McSherry & Keyzer, 2009). However, the dichotomy between what does and does not constitute punishment is fraught with difficulty considering that even if the aim of an act may not be punishment, the resultant detention will often be perceived and experienced as such (McSherry, 2006). This perception is likely heightened if there is no finding of guilt, merely suspicion of involvement. Andrew Ashworth argued that if someone’s liberty is to be deprived, it should be made on a “proper evidential basis for predictions” (2009, p. 107), and only in extreme situations to protect others. Still, it is important to reiterate at this point that the control orders issued to date in both the UK and Australia have not amounted to preventive detention requiring derogation.

Nevertheless, critics argue that there are three reasons why control orders can be argued to be punitive in nature (Joint Committee on Human Rights, 2006; Zedner, 2007b). The first reason relates back to the issue of evidence, or rather, the lack thereof in control order cases. For a control order to be issued, there is a suspicion of involvement in terrorist-related activity, a serious allegation of being guilty of or preparing for a very serious criminal offence. Yet no evidence for such ‘charges’ is required, as the controlee would/will, depending on your view point, be guilty of such offences at some point in the future. Secondly, despite control orders being civil in nature, the serious restrictions on liberty of even non-derogating orders are more

\(^{31}\) In the case of serious sex offenders, for example, where any detention imposed in addition to their completed sentence must be non-punitive in nature to be constitutionally valid (Fardon v Attorney-General (Qld) (2004) 223 CLR 575).
onerous than the traditional civil ones, coming close to being equivalent to criminal punishment in their severity (Zedner, 2007b). Restrictions on movement and house arrest have been described as a de facto loss of liberty (International Commission of Jurists, 2009). Moreover, with the potential of annual renewal, such restrictions could extend beyond the duration of traditional criminal sanctions (Zedner, 2007b). In a scathing remark, the European Commissioner of Human Rights, Gil-Robles remarked: “[s]ubstituting ‘obligation’ for ‘penalty’ and ‘controlled person’ for ‘suspect’ only thinly disguises the fact that Control Orders are intended to substitute the ordinary criminal justice system with a parallel (but more intrusive) system run by the executive” (Zedner, 2007b, p. 195). Finally, the potentially unintentional breach of one of the obligations, something even Lord Carlile highlighted would be quite easy to do (Carlile of Berriew, 2006), could result in a prison sentence of up to five years (Ashworth, 2009).

The potentially punitive character of control orders raises a philosophical debate about the moral justifications of punishing someone prior to committing an offence. Zedner (2007b) suggested that there are two opposing schools of thought. The first believes that if there is absolute certainty of the alleged offence occurring, then punishment today is just as valid as waiting until after the event. On the other hand, up until the actual commission of the act, a so-called window of opportunity exists, allowing the individual to refrain until the last minute. In fact, Lendermann (2009) warned that by moving the actus reus forward along the axis to include preparatory offences, the motivation to abandon the terrorist act is greatly reduced. While these debates may appear somewhat philosophical, there are examples outside of the terrorism context which can be used to contextualise the debate, as discussed in the following section.

2.4 Other Pre-emptive Measures
The notion of trying to pre-empt crime is neither novel nor exclusive to anti-terrorism (Bronitt, 2003). For instance, the practice of ‘binding over’, a precautionary measure to prevent future crime, dates back to the fourteenth century.32 This practice, although originating in civil law, can incur criminal sanctions if not adhered to (Bronitt & McSherry, 2005). However, it is worth noting that the court requires admissible evidence that without the order, there is a real risk of a breach of the peace occurring (Crown Prosecution Service, 2009). A modern and frequently cited example of a preventive order is the Anti-Social Behaviour Order (ASBO) in the United

32 Justice of the Peace Act 1361
Other Pre-emptive Measures

Kingdom (Ashworth, 2009; S. Macdonald, 2007). An ASBO is a civil preventive order which aims to protect people or entire neighbourhoods from intimidating and anti-social behaviour rather than punishing the culprit for it (Home Office). However, a breach of the conditions of the order constitutes a criminal offence punishable by up to five years in prison. The relevant standard of proof is that of beyond reasonable doubt due to its quasi-criminal nature, as opposed to the civil standard of balance of probabilities in binding over or civil orders (Bronitt & McSherry, 2005). While the Labour government insisted ASBOs were only ever issued in exceptional circumstances, their large number (17,000 between 1999 and 2008) and the fact that they were issued in response to different offences such as prostitution casts doubt on that assertion. There are examples of other applications of preventive laws, such as domestic violence orders and the recently introduced orders to control outlaw motorcycle gangs in South Australia, New South Wales and the Northern Territory.

While punishment and detention are most frequently associated with criminal law, there are civil law provisions that allow for the detention of individuals against their will prior to committing an offence. Preventive measures have long been used to deal with public order offences, such as controlling inebriates and unruly teenagers. As C.H. Reeve put it: “Without order, there can be no stable enjoyment of liberty. Therefore, the penalty of such abuse of liberty as disturbs order should be the forfeiture of the right to liberty” (Reeve, 1892, p. 105). This justification is still considered appropriate and not in contradiction with Article 5(1)(e) of the European Convention on Human Rights (ECHR) which states that the detention of persons of unsound mind, alcoholics, drug addicts or vagrants, as well as to prevent spreading of infectious diseases, is considered lawful. Involuntary detention is justified in cases where the aim is treatment or where there is at risk of harming themselves or others, in the case of mental illness, for example, or indeed to prevent the spread of infectious disease (McSherry, 2002). Contemporary mental health legislation originated out of the state’s desire to protect its citizens from dangerous acts (Finnane, 1981; Garton, 1988; R. Moran, 1985; N. Walker, 1968). Its rationale is founded both in treatment and protecting the community. In Australia, the balance between public protection and taking into account the mentally ill person’s rights varies between states (McSherry, 2002; Rangarajan & McSherry, 2009). Bernadette McSherry has highlighted that all Australian jurisdictions have review mechanisms in place concerning

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33 For a direct comparison between control orders and the ABSO, see Stuart Macdonald (2007)
34 The future of the ASBO is further discussed in Chapter 8.3
35 Serious and Organised Crime (Control) Act 2008 (SA), Criminal Organisations Legislation Amendment Act 2009 (NSW), Serious Crime Control Act 2009 (NT)
36 NSW for instance has no public protection consideration
the involuntary committal of individuals with mental illnesses. However, jurisdictions vary greatly on the type of order under which someone is detained, either through administrative power or by judicial order. There are also provisions contained within family law in cases of alleged sexual abuse of a child. Similarly to control orders, the courts are also often faced with a lack of evidence. In such cases, a High Court decision\(^\text{37}\) established that restrictions should be applied in cases where the child is, on the balance of probabilities, exposed to an ‘unacceptable risk’ of sexual abuse. McSherry highlighted the importance of the so-called Briginshaw test\(^\text{38}\) used to satisfy the standard of proof.

\begin{quote}
The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.
\end{quote}

\textit{Dixon J quoted in McSherry (2002)}

However, the high standard of proof makes establishing sexual abuse challenging due to the difficulties obtaining reliable and impartial evidence (McSherry, 2002). Indeed, similar difficulties would likely be encountered if applying the Briginshaw test to terrorism cases.

Not all preventive measures sit outside the criminal law framework. Control order cases have also seen several comparisons made to preventive measures within criminal law, such as bail applications, indefinite sentences, parole and probation (McSherry, 2002). In bail applications the general assumption is that individuals should be granted bail unless they pose a particular risk either to a particular person or the population as a whole, or that they might abscond before going to trial. Even in cases where bail is denied, the detained person has been charged with a crime and is awaiting trial by his or her peers. However, in Britain, even in the most serious of cases this has been interpreted as conflicting with Article 5 of the ECHR.\(^\text{39}\)

\(^{37}\) \textit{M v M} (1998) 166 CLR 69
\(^{38}\) Named after \textit{Briginshaw v Briginshaw} (1938) 60 CLR 336 at 362
\(^{39}\) In May 2008, SIAC released Omar Mahmoud Othman, more commonly known as Abu Qatada, on bail conditions which were stricter than control order obligations, including a 22 hour curfew. See also \textit{Manchester Police, R (On the Application Off) v Hookway & Anor} [2011] EWHC 1578 (Admin) (19 May 2011)
Outside the security context, the existing element of pre-emption in the criminal justice process is related to dangerousness and how this related to risky individuals and groups, some of which were to be controlled to preserve the political status quo (McCulloch & Pickering, 2009; Pratt, 1997). Preventive legislation has been introduced to supervise and, in exceptional cases, even preventively detain offenders perceived as being particularly dangerous or risky upon their release from prison to prevent recidivism (Keyzer & Blay, 2006; Mercado & Ogloff, 2007). In keeping with the actuarial trend in criminal justice, offenders are risk-assessed prior to release to determine their risk of re-offending. An important distinction between these and other preventive measures is that they target convicted offenders upon the completion of their served sentence. A commonly cited example is the serious sex offender legislation enacted in the United States, Canada, New Zealand, Queensland and most Australian states. A variety of conditions tailored to the offender’s circumstances may be imposed by the court, including treatment, limitations on employment, curfews or prohibiting contact with certain individuals (Wood & Ogloff, 2006). Any breach constitutes an indictable offence. In more serious cases, offenders may be detained indefinitely, the justification being the prevention of highly likely future offending and thus, the protection of the community. John Pratt described extended sentences as ushering in a new penal concept, one where sanctions could be imposed without committing an offence (Pratt, 1997, p. 58). Despite the imposition of such measures on a convicted offender, serious concerns with regard to human rights have been raised, not least since these intensive supervision orders may last for up to 15 years in some states. Served in the community, these intensive supervision orders impose similar restrictions to control orders on the individuals, including curfews, restrictions on movement and employment and electronic tagging (Wood & Ogloff, 2006). Opponents of such measures argue that the principles of due process are not observed, since the offender, having served his or her sentence, is subjected to further supervision or detention.

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40 Actuarial justice focuses on evaluating future risks, often associated with dangerousness or treatment programs
41 Dangerous Prisoners (Sex Offenders) Act 2003 authorises the continued incarceration of a sex offender post-sentence
42 Vic, WA, NSW, SA
43 In Victoria, orders and recidivism risk are revised every three years. If after 15 years the individual is still considered high risk, a further supervision order for an additional 15 years may be applied for.
2.4.1.1 Evidence of Future Offending

Detaining individuals for the purposes of prevention highlights the difficulties in making predictions about the future likelihood of offending and the associated difficulty with addressing uncertain anticipated risk and harm. Unlike control orders, preventive detention of sex offenders and in mental illness cases relies on expert medical opinions to support assertions of future risk of the individuals in question (McSherry, 2006; Mercado & Ogloff, 2007). One might argue that the severity of detention makes the inclusion of expert evidence paramount. While the underlying aim of these measures is to protect the population, McSherry (2006) argued that the rationale of protecting the community is often based on vague and flawed assessments of risk, and should not be the justification for deprivation of liberty, making judicial review essential. Even predictions based on extensive expert testimony have been found to be “prone to very significant degrees of error when matched against actuality” (Stephens J in Veen (No 1) at 464, quoted in McSherry, 2002, p. 38). Moreover, studies show that preventive laws have only a minor impact on the total number of sexual offences (McSherry & Keyzer, 2009; Mercado & Ogloff, 2007; Wood & Ogloff, 2006). This may in part be due to the limited application of such laws, which were never intended to be applied broadly, but only in exceptional cases.

The requirement for supporting evidence, however, was not always in place. Much of the early developments in dangerous lunatic law mirror the inadmissibility of evidence in today’s control order cases. For instance, the first dangerous lunacy statute in England introduced preventive confinement for dangerous individuals suspected of being insane on the basis of mere suspicion of insanity alone. Medical evidence was not considered essential until the 1840s. In Ireland, although not compulsory, medical evidence informed at least some decisions to commit (Finnane, 1981). However, Mark Finnane (1981) found that initially it was relatively easy to commit individuals, as no safeguards for a person’s liberty were in place. A few years later, growing criticism saw the law amended in 1845, requiring a minimum of one credible witness before committing someone as a dangerous lunatic. Implementation of this safeguard, however, proved somewhat inefficient and counterproductive, as people ended up in gaols for long periods of time with no judicial recourse or medical evidence (Finnane, 1981). The process of committing and detaining a lunatic was rarely questioned, whether by doctors nor reformers, with no official review or appeal process against detention (Finnane, 1981). There was an ongoing debate over whose interest was being served, the public’s or the inmate’s.

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44 Veen (No 1) [1979] 143 CLR 458; and Veen (No 2) (1988) 164 CLR 465
45 Criminal Lunatics Act 1800 39&40 Geo. III, c.94, s.3
46 Following the introduction of the Dangerous Lunatics Act 1838
Many of the same issues arose with the introduction of the *Dangerous Lunatics Act* in other jurisdictions, e.g. in New South Wales from 1843. Medical evidence was initially difficult to secure in courts, blurring insanity and criminality (Garton, 1988). Indeed controlling populations became linked to crime prevention via preventive detention.

Given the difficulties associated with predicting future behaviour, even when reviewed by relevant experts, ensuring the proportionality of preventive measures becomes increasingly complicated. To overcome the traditionally reactive principle of proportionality, Zedner (2007b) proposed a two-tiered approach to pre-punishment proportionality, one which goes beyond the current standard of proof of having reasonable suspicion about the potential risk posed by a particular individual: assessing the severity of the anticipated/threatened harm, as well as the likelihood of the event/harm actually occurring. Furthermore, she argued that the greater the impact of preventive detention (*or obligations*) on an individual, the greater the need for evidence of actual dangerousness. To ensure continued proportionality, Zedner stressed the need for continued review of the risk posed by controlees to see if the restrictions set out in the order are still needed. However, this appears difficult to do in practice if the pre-emptive measures are actually effective in preventing the anticipated events; only the lifting of restrictions could highlight new/continued risks posed by that individual. Proportionality is difficult to determine if the risk is uncertain. It is important to highlight at this point that these challenges are also inherent in non-terrorist related instances. Parole boards and mental health tribunals, for instance, are required to make such judgements on a daily basis.

### 2.5 Summary

One of the central questions of this research concerns the apparent embrace of innovative new pre-emptive control mechanisms developed in response to the post 9/11 world, and their effect on civil liberties. Control orders were devised to be able to deal with individuals against whom insufficient evidence existed to prosecute them in a criminal trial. The restrictions and obligations imposed are justified as being proportionate and necessary to protect the public from a terrorist attack. While both the British non-derogating control orders and the Australian orders used to date fall short of detaining individuals, they impose strict measures which are considered proportionate to the threat posed. Moreover, they are meant to be tailored to the individual’s circumstance to adequately prevent them from engaging in behaviours which would put others at risk.
Much of the debate around control orders stems from their hybrid nature, thus not fitting neatly into our ready-made categories of preconceptions about executive and judicial issuance, and civil and criminal frameworks. Moreover, their preventive intent aimed at protecting the public from a terrorist attack appears to have circumvented some of the safeguards against which such measures are evaluated. Although control orders incorporate more judicial elements than previous executive measures, they still struggle to adhere to the standards of the criminal process. Being civil measures they are not required to meet the more stringent safeguards.

However, several arguments have been put forward as to why control orders should nonetheless adhere to the safeguards enshrined in international conventions. Considerable restrictions and obligations, which have been found to amount to house arrest in some British cases, are imposed on the basis of potentially unsound intelligence of which the controlee is not informed, rather than on evidence capable of standing up to scrutiny in a court of law. Procedural safeguards designed to ensure a fair trial are thus compromised, alienating the procedure from its adversarial traditions, arguably becoming more inquisitorial in character. Given the severity of some of the conditions, the line between punishment and prevention becomes blurred. Simply introducing a preventive rationale into a civil measure does not automatically make it less punitive (Zedner, 2007b, 2009b). Moreover, breaching any of the preventively imposed obligations might lead to a criminal charge resulting in imprisonment.

This chapter has examined several other preventive measures exhibiting apparent parallels to the issues raised in relation to control orders. Indeed, several historical examples not only predate 2001, but were implemented to deal with non-terrorist threats to order. While there are indeed similarities between other preventive measures and control orders, some have argued that control orders go even further than the reactive prevention measures issued to sex offenders given that they issue similar obligations, such as curfews and restrictions on movement, even without a finding of guilt (McSherry, 2006; White, 2007). Despite Pratt’s assertion that the introduction of indeterminate sentences ushered in the beginning of prevention of future crime, the interventions introduced to control these offenders are applied after sentencing for violent and sexual crimes or after repeat offending, the aim being to prevent further offending, i.e. recidivism. There is a clear distinction between individuals who are either having an existing sentence extended or are required to adhere to restrictions upon their release from prison, i.e. where preventive measures are applied in reaction to an offence, reactive prevention; and those who are detained or restricted on mere suspicion without any finding of guilt, i.e. pre-emptive prevention. One aims to prevent an individual from re-
offending upon completion of a served sentence, i.e. post-crime, the other aims to prevent them from potentially offending at some point in the future, without necessarily having offended in the past, i.e. being purely pre-emptive. The difference between reactive and pre-emptive prevention is further described in Chapter 3.5.

To summarise, the literature on control orders has focused on three key points: Firstly, control orders are hybrid measures which exist outside of the traditional legal frameworks, enabling digression from well established procedural safeguards in criminal cases. Secondly, these deviations are justified on the basis of the exceptional risk posed by terrorism and the need to protect the state and its people from a terrorist attack. Finally, given that control orders are issued on the basis of anticipated risk rather than reacting to an actual act, they appear to constitute a more pre-emptive species of preventive order compared to the more reactively preventive ones. While control orders and other preventive measures are justified as exceptional and are often introduced as temporary measures, there have been critics arguing that they are increasingly taking on a permanent character. Accordingly, I have chosen to examine pre-emption and its effect on legislation through multiple theoretical lenses. Three central themes emerge: governance, risk and emergency, as discussed in the next chapter.
3 Theoretical Framework

3.1 Introduction

This thesis is a study of how pre-emptive legislation has been used in an attempt to control terrorism in different jurisdictions. At the heart of the debate is how the pre-emption rationale has been used to justify the introduction of measures transcending ‘traditional’ boundaries of law, procedure, risk and emergency to deal with groups or individuals thought to pose a danger to the state or its citizens. This chapter sets the context for the study, beginning with an analysis of the role and limits of legislation. Legislation can be examined and interpreted through various theoretical lenses, not least due to it being a product of the interaction of legal, political and social spheres. However, the introduction of preventive legislation raises specific questions of governance and risk, i.e. the shift from reactive to pre-emptive responses reflects a greater focus on identifying and regulating perceived risks. The state-focused anti-terrorism interventions and their modes of control provide a valuable opportunity for scholars to expand upon the rich theoretical literature on governance and risk. Governmental perspectives provide insight into how power, authority and governance are shared by diffuse institutions throughout society (Mazerolle & Ransley, 2005). In recent years, the face of governance has shifted toward risk assessment and management of risky populations, introducing a more anticipatory focus in criminal justice. The rise of actuarial approaches in criminal justice has filtered into the debate on terrorism, preventive legislation being just one example thereof. This chapter expands on the themes of governmentality and risk as they apply to terrorism and the development and implementation of (pre-emptive) anti-terrorism legislation. In the context of extraordinary risk and uncertainty, the emergency paradigm and its justifications of derogations are then discussed and examined. This is particularly important in the context of the UK’s derogating control order scheme. While the non-derogating control order and its Australian counterpart might not require such derogation, their introduction has been divisive nonetheless. It is with this debate that I conclude this chapter.

3.2 Legislation as a Tool of Governmentality

Control orders do not fit squarely into single categories of either governance or legal frameworks; instead they are hybrids of executive and judicial issuance, sitting within the civil realm with the possibility of turning criminal. Both the British and Australian governments have described control orders as a necessary tool to protect their citizens from the enormous and uncertain threat posed by terrorism. Modern states have a duty to protect their citizens
(Ashworth, 2009), but there has been a long debate about how they go about doing so. For example, Hobbes (1651) maintained that the best form of prevention was to trust in a power greater than any individual, i.e. the sovereign power. Each individual voluntarily gives up their right to self governance, instead assigning all rights and responsibilities to the sovereign. As Barry Hindess (1996) elaborated, “[t]hrough the Covenant the sovereign is authorized to use such power as he thinks best, in order to ensure the ‘Peace and Common Defence’ of his subjects” (p. 37). Locke (1690) on the other hand found the idea of sovereign power problematic due to its potential for tyranny and usurpation. He insisted in the separation of powers to ensure a degree of oversight between the pillars of government. These opposing ideals are not only still relevant today, but central to contemporary debate. Indeed, theorists since Hobbes and Locke have adopted different perspectives on the extent to which the state should monopolise and control the provision of security. Given that the mechanism at the heart of this research is legislation, it is important to examine both its role as a tool of government to achieve security, and how the state goes about implementing it.

The concept of governmentality postulates that governments employ certain technologies to activate, manage and control the population, which are implemented using particular strategies (Donzelot, 1979 cited in Rose, O'Malley, & Valverde, 2006, p. 88). Garland (1997) described governmentality as “[aiming] to anatomize contemporary practices, revealing the ways in which their modes of exercising power depend upon specific ways of thinking (rationalities) and specific ways of acting (technologies), as well as upon specific ways of ‘subjectifying’ individuals and governing populations” (p. 174). Rose, O'Malley & Valverde (2006) see technologies and strategies as being mutually formative. Legislation is an example of a technology employed as a tactical strategy to achieve a particular aim, for instance, control and security. As Shearing (2001) explained, “law becomes a device or procedure for accomplishing a way of doing things that will promote security” (p. 209). This view sees law as not only directly instrumental, but having more subtle underlying aims of generalised security and thus the wellbeing of the general population. Ericson (2007) went as far as describing law as a technology used to predict and govern the future.

States employ techniques and strategies to preserve order and security within a population, law being one of them. Legislation and the ensuing implementation are symbolic acts of rhetoric designed to reflect perceptions, attitudes and emotions evoked in response to the affront to social and moral values that crime represents (Freiberg, 2001; Roach, 2002). Indeed, crime control is an example where a major objective may be the governance of moral order
rather than actually controlling crime (Rose, 2000). Adam Crawford (2006) argued that governments introduce new legislation for two reasons, a) to be seen to be doing something, and b) because they don’t know anything else. As Bottomley & Bronitt (2006) remarked, in order to understand our laws, we must also delve into the underlying values and ideas which were present at the point in history they were introduced, akin to studying customs through time. Rose, O’Malley & Valverde (2006) described the analysis of governmentality as seeking to identify different ways of thought and how these are formed, the theory and understanding it draws from and subsequently generates and how these are applied in practice. Investigating governmental mechanisms in their purest form thus also needs to consider the underlying political rationality (Lemke, 2002). This means considering the underlying assumptions, values and objectives underpinning the decision to introduce particular legislation, and its inherent rationalities and technologies. Rather than seeing governmentality as a theory of power or governance, Rose and his colleagues (2006) described it as asking empirically verifiable questions about the events it ultimately attempts to comprehend. Indeed, governmentality’s ability to empirically support both historical and contemporary studies of government practices has attracted many scholars (Rose, et al., 2006) due to its capability of generating a judicious, historical and sociological account of modern-day processes (Garland, 1997). This is precisely the purpose of this study.

In addition to being a set of rules to help guide decision-making, law sets the standards of communal governance and regulation (Horrigan, 2003). It embodies a culture which forms part of our social structures and practices, and influences and strengthens social and political interactions (Bottomley & Bronitt, 2006). Consequently, law makers’ mandate is two-fold: first, they need to make people recognise that any new law is useful and important to society as a whole; and second, they need to limit opposition by groups adversely targeted by the new legislation (Becker, 1963). For example, Martin Killias (2006) reasoned that legislation needs to precede any practical preventive measures to induce the moral outrage in society condemning certain behaviours, such as drink driving. Without such laws in place, he argued, policy makers struggle to gain support for preventive measures (Killias, 2006). This moral outrage is not only inherent in the response to terrorism events, but also frequently the driving force behind government responses. In essence then, governmentality as a construct links power, the technologies and strategies used to achieve it, and its objects. The concept is used to explain and understand acts of governance, such as the introduction of new legislation.
Recent incarnations of preventive legislation in Australia have been introduced in reaction to serious and much publicised offences. It has been argued that the emotional weight of such events has been exploited by politicians eager to push their national security agenda (Haubrich, 2003), thus damaging the integrity of the parliamentary process and compromising human rights (Bronitt, 2008; Lynch, 2006a). For example, the Anti-Terrorism Bill 2005 (Cth) was rushed through parliament in one day, the government even recalling the Senate five days early. The Howard government justified the urgency on the basis of the act strengthening the capacity of law enforcement agencies to deal with the recent identification of a potential terrorist plot on Australian soil (Lynch, 2006a). Lynch (2006a) argued that the Howard government, recognising the political capital to be gained from security legislation, developed a pattern of ‘legislating with urgency’. Under the pretence that the immediate passage of the bill was necessary to safeguard Australia from an imminent attack, the Prime Minister attempted to limit debate in both the House of Representatives and the Senate. Lynch did not find any evidence as to a potential defect in the previous wording of the statute which might have necessitated a change, leading him to conclude that the motivation behind these amendments was political rather than substantiated by any practical shortcomings of the legislation. Similar scenarios have also repeatedly occurred in British Parliament (Donohue, 2000). Supporters argued that the safeguards incorporated into these laws ensured that an appropriate balance between the preservation of national security and human rights was struck (Ruddock, 2007). Others, however, vehemently opposed the concessions to human rights in favour of security (Bronitt, 2008; Lynch, 2007). It is precisely these emotional responses and the resultant public pressure which some argued compels politicians to respond quickly rather than to deliberate, leaving questions about efficacy and legitimacy to be answered later (Goldsmith, 2008; Lynch, 2006a; Ramsay, 2009). Serious and emotion-evoking crimes such as terrorism, sexual offences and violence perpetrated by motorcycle gangs may be used to justify the increasingly prevalent precautionary logic, but Zedner (2009) claimed that it is rapidly filtering down to less serious crimes and ways in which to justify increased data collection and other relinquishments of liberty, such as surveillance. Recent events in the UK, for example, include anti-terrorism legislation being used to secure British investors’ money in Iceland (Henley, 2008), as well as to monitor groups of noisy children (Hastings, 2008; Spiegel Online, 2008). Upholding the law in light of such strong emotions has been described as a great challenge to both the law and the courts tasked with upholding it (Lynch, 2006b). The outrage supports and feeds the government’s justification to introduce new legislative tools such as the legal hybrids discussed in the previous chapter.
In addition to providing a valuable framework for examining legislation both as a mechanism of governmental power (Foucault, 1991), as well as the underlying liberal notions of individual rights (Mazerolle & Ransley, 2005), governmentality also contributes to our understanding of risk and its management. Risk has been described as a technique of governmentality (Zedner, 2009a). As such, it is also the underlying rationale and justification for the state’s protective mandate (Aradau & Van Munster, 2007), and its use of exceptional measures. According to Shearing (2001), risk mentality has permeated state institutions, thus fundamentally reconfiguring criminal justice over the last thirty years.

### 3.3 The Evolution of Risk

#### 3.3.1 Pre 9/11

During the 1980s, governmentality scholars began to focus on governments’ increasing use of technologies of risk as a way to interpret particular problems, as well as the associated political and moral implications. Writing in the early 1990s, Malcom Feeley and Jonathan Simon (1992) also observed a shift in penal discourse toward risk and probability. The ‘new penology’, as they called it, saw a desistence from the traditional focus on the individual (his/her moral or clinical portrayal) to a more aggregate level, focusing resources into the identification, classification and management of groups, ultimately for the purposes of surveillance, confinement and control (Feeley & Simon, 1992). Custodial institutions become vessels of risk containment for potentially dangerous categories of individuals, for example sex offenders, until their level of risk is assessed and controlled (Rose, 2000). Shearing (2001) elucidated how the justification of prison, originally perceived as a deterrent, thus shifted toward incapacitation, signalling the end of the punishment paradigm. Instead, it evolved into a tool for the minimisation of harm to others, and thus, risk management (Shearing, 2001).

A growing body of literature is concerned with risk, its assessment and management (Zedner, 2006). The actuarial character of this trend was heavily influenced by economics and business models, explaining the new focus on regulation rather than intervention or response (Feeley & Simon, 1992). Beck previously described this escalating prevalence of risk as resulting in a ‘risk society’, where risk is defined as “a systematic way of dealing with hazards and insecurities” (1992, p. 21). Indeed, the concept of risk is clearly evident in our reaction to crime (Kennedy & Gibbs Van Brunschot, 2009). The incorporation of the term risk has, according to some observers, led to discourses becoming more technically sophisticated (Loader & Sparks, 2002).
Yet, as Beck (2002) highlighted, attempting to calculate certain types of risk or the occurrence of a particular event can be akin to calculating the incalculable, making the presumption of risk inherently political (Loader & Sparks, 2002; Zedner, 2006), and thus driven by the political climate of the time.

The emergence of the risk-orientated approach brought with it an increased focus on trying to prevent and pre-empt events (Shearing, 2001; Zedner, 2009a), resulting in the preventive detention of offenders, suspects, and immigrants. Rose (2000) suggested this trend developed in reaction to risky individuals who cannot be managed using conventional methods. Originally devised to manage and control the “underclass” or high risk group for the protection of society (Feeley & Simon, 1992, p. 467; Rose, 2000), risk management with its preventive responses began to replace rehabilitation and reintegration (Feeley & Simon, 1994). In essence, both Beck (1992, 2002) and Braithwaite (2000) argued that we have developed into a risk society with an increasing emphasis on preventive governance.

Actuarial justice and traditional risk assessment is calculated on the basis of tangible and countable facts. For example, the identification of habitual criminals as a separate class of dangerous offenders followed increased and more rigorous recording practices in the nineteenth century (Morris, 1951; Pratt, 1997).\(^{47}\) However, these types of preventive measures are used to manage the risk posed by potentially dangerous offenders after their release from prison, making this form of risk assessment reactive in nature. Importantly, the character of risk changes according to when in relation to crime commission it is considered (Kennedy & Gibbs Van Brunschot, 2009). Recently, some authors argued that risk-based approaches in public policy are being replaced by precautionary principles, i.e. protecting society against potential harms, even if they are uncertain in nature (Goldsmith, 2008; Sunstein, 2005; Zedner, 2009a). The greater reliance on actuarial techniques, however, has promoted precautionary logic as a precursor to dealing with known risk, thus affecting the legal mechanisms dealing with unfamiliar risks. Reminiscent of Donald Rumsfeld’s infamous speech (Rumsfeld, 2002),\(^{48}\) this approach of preparing for “unknown unknowns” also lays the foundation for pre-emptive measures to be applied in cases where the threat or risk has not been established. Writing in 2001, Clifford Shearing hypothesised that the emerging emphasis on risk would bring about

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\(^{47}\) More recently, incidents and locations of past crimes have been used to predict probable locations of future crimes (Johnson, Bowers, Birks, & Pease, 2009).

\(^{48}\) “Reports that say that something hasn’t happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns -- the ones we don’t know we don’t know. And if one looks throughout the history of our country and other free countries, it is the latter category that tend to be the difficult ones.”
changes in the legal framework to allow the state to apply its risk strategies to what Kennedy and Gibbs Van Brunschot (2009) referred to as the anticipatory phase of risk. Although the notion of trying to pre-empt crime is not novel, Dershowitz (2006) argued the events of 9/11 have accelerated recent legal incarnations of pre-emption.

3.3.2 Post 9/11
The emergence of terrorism as a potent ‘new’ or perceived threat since 2001 has yet further extended the new trends in governance and actuarialism in criminal justice described above. In addition to the probability of an event occurring, the magnitude and value of its outcome also affects the calculation of risk (Douglas, 1992), leading Claudia Aradau and Rens van Munster (2007) to argue that traditional risk management needs to be permanently adjusted in light of the uncertainty of potential catastrophic events. Not knowing who, when or where will be attacked promotes what Kennedy & Gibbs Van Brunshot called “a general form of prevention against all possibilities” (2009, p. 59). In essence, the new paradigm is one based on pre-emption and uncertainty which applies coercive restrictions “on the basis of what is anticipated might happen in the future” (McCulloch, 2006, p. 359). Some scholars interpreted terrorism and post 9/11 developments as supporting Beck’s notion of the risk society (Beck, 2002; Borgers & van Sliedregt, 2009); being one step ahead of the perceived threat and taking preventive action even in the absence of certainty or imminence is seen as being merely an extension thereof. However, Amoore and De Goede (2008) highlighted that while pre-emption might draw on actuarial language and techniques, it actually surpasses them. This view is also shared by Aradau and van Munster who stated that Beck’s risk society does not acknowledge that identifying risk is “not the same as recognising the uncertainty of future events” (Aradau & Van Munster, 2007, p. 95).

The pre-emptive paradigm thrives in a climate of uncertainty and fear (Lendermann, 2009; Sunstein, 2005). Uncertainty is also at the heart of precaution, which is not dissimilar to pre-emption in that it licences action if unpredictable and grave harm is threatened (Zedner, 2009a). According to Jessica Stern and Jonathan Wiener (2006), it is precisely the fact that precaution relates to unknown risks which distinguishes it from prevention. A popular concept in environmental studies since the 1970s, the precautionary principle, based on the German *Vorsorgeprinzip*, stipulates that in situations that threaten serious or irreversible damage, uncertainty or lack of evidence is no reason not to act (Borgers & van Sliedregt, 2009; Stern & Wiener, 2006; Sunstein, 2003, 2005). Precautionary risk thus incorporates uncertainty and
catastrophic consequences into the calculations of the future. Aradau and van Munster stipulated that precautionary risk is the opposite of prudence in that prudence advocates taking certain precautions in light of knowing something, as opposed to acting “under scientific and causal uncertainty” and imagining the worst case scenario (Aradau & van Munster, 2009, p. 696). They referred to the inability to calculate this uncertain risk as governing “at the limit of knowledge” (Aradau & Van Munster, 2007, p. 91; Zedner, 2009a, p. 47). Yet, several scholars believe that fear of future harm is increasingly driving government strategies (Aradau & Van Munster, 2007; McSherry, 2006; Sunstein, 2005; Zedner, 2006), leading Zedner (2009a) to conclude that uncertainty has superseded risk as the leading predicament for governments. This view was also shared by Richard Ericson (2007), observing that risk management and uncertainty caused a radical transformation of the traditional legal framework. Aradau and van Munster (2009) believe that this paradigm is also being transferred to law, which is usually enacted to something tangible and concrete, but is now being used to deal with a non-predictable future.

3.3.3 The Precautionary Rationale

Many of the issues identified in relation to control orders in the previous chapter appear to be indicative of/influenced by this increased focus on uncertainty and precaution. Ashworth and Zedner (2007) referred to this shift as contributing to the rise of the preventive state, which becomes an umbrella for all forms of prevention and pre-emption (Ashworth, 2009). Terrorism in particular appears to have served as the justification for the expansion of the precautionary principle into the political arena (Zedner, 2006), the lack of in-depth parliamentary debate being an example thereof. Aradau and van Munster cogently argued that the precautionary principle favours rapid political decisions, which they contended was also a reason for governments choosing to enact administrative decisions over the slower legal process. In their opinion, the shift toward precaution in reaction to terrorism is a new form of governmentality which draws upon uncertainty, war and surveillance technologies, but does not rely solely on pre-emptive risk management in its bid to prevent future catastrophic events (Aradau & Van Munster, 2007). Several strategies are affected by this new rationality. To highlight the effects of the precautionary principle on criminal law Richard Ericson (2007) used the term counter-law.  

49 Ericson adapted the term counter-law from earlier uses, by Foucault (Foucault, 1977), amongst others. However, as Levi (Levi, 2009) highlighted, whereas Foucault used the term to compare law and the disciplines, Ericson focused on the pursuit of security
amending existing laws to circumvent existing principles as part of the state of exception or to deal with increased uncertainty, whereas the second creates and extends surveillance networks to facilitate pre-emption (Ericson, 2007). Of particular interest to this thesis is his assertion that previously distinct categories of law, such as criminal, civil and administrative, have become blurred, evaporating legal safeguards in the process (Ericson, 2007). Similarly, Matthias Borgers and Elies van Sliedregt (2009) identified four preventive characteristics of anti-terrorism legislation, which they believe developed as a result of the risk society’s reliance on the precautionary principle:

1. **Criminalising the preliminary stage of the offence**;
2. **Expanding investigative powers**;
3. **Expanding pre-trial detention**; and
4. **Using non-criminal measures to achieve a repressive effect**.

All of these strategies are evident in Australia’s legal response to terrorism. Firstly, apart from control orders, the criminalisation of the preparatory stages of a terrorist act is a frequently cited example in the pre-emptive literature. Whilst the in-depth discussion of this topic is beyond the scope of this thesis, it is nonetheless relevant to briefly elaborate on here. Australian anti-terrorism legislation not only criminalises acts done in preparation, but acts carried out even prior to an individual forming a criminal intent during what might be interpreted as preparation, thus expanding the traditional perception of criminal responsibility to a new level. Preparatory terrorism offences 50 are targeted at criminalising acts which precede even inchoate offences 51 thereof (Gani, 2008; Lynch, 2006a; McGarrity & Williams, 2010). Traditionally, an attempt 52 required a person’s conduct to be “more than merely preparatory to the commission of the offence” (McSherry, 2004, p. 366). Yet technically, McSherry (2004) highlighted the possibility that an individual might be charged with attempting to do an act in preparation for a terrorist act. Criminalising a person’s hypothetical intention to commit a terrorist act without any supporting evidence digresses from well established common law criminal law principles, as does the reversal of the onus of proof with regards to proving the defendant’s lack of intent (Lynch, 2006a). In order to support such developments the state introduces legislation to expand its surveillance capacities to feed its

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50 S.101.5 Criminal Code 1995 (Cth)
51 Attempt, conspiracy or incitement. McCulloch & Pickering (2010, p. 18) described an attempt as requiring some evidence of acts towards that particular offence, whereas conspiracy needs proof of a plan between at least two individuals to commit an act.
52 As defined by section 11.1 of the Criminal Code 1995
need for intelligence information. Australia introduced the *Surveillance Devices Act*, expanding the Federal Police’s mandate to include responsibilities previously reserved for the Australian Security Intelligence Organisation (ASIO). The latter also gained new powers as pre-trial detention was expanded. Australia introduced both ASIO questioning and detention warrants, and preventative detention orders. The former allow ASIO to detain and question not only individuals suspected of terrorist involvement, but anyone who it believes might be able to provide them with information which might be relevant to a terrorist-related investigation.\(^\text{53}\)

The preventative detention order (PDO) is technically perhaps the closest thing Australia introduced to a pre-emptive measure.\(^\text{54}\) Referring back to the military doctrine of pre-emption which assumes an imminent attack, a PDO allows for the detention without charge of any individual suspected of being linked to terrorist activity which is believed to be imminent or has recently occurred. A preventative detention order is issued where it is believed that detaining an individual will prevent an imminent terrorist attack, or after the commission of an attack where the aim is to preserve evidence, authorising a person to be detained for up to twenty-four hours, although it can be extended for an additional twenty-four hours by a judge or federal magistrate.\(^\text{55}\)

The final point, using non-criminal measures in a repressive way, can be illustrated with control orders. Control orders are in essence a strategy of precaution used to both manage and control individuals suspected of terrorist involvement, and as such, a technology to protect its citizens from terrorism. The control order’s underlying rationality is to manage that risk by acting pre-emptively, before any harm can come to the state and its citizens, leading

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\(^\text{53}\) The new law permits either questioning for up to twenty-four hours within in a twenty-eight day period (questioning warrant, Division 3, sections 34D and 34E (*ASIO Act 1979*)); or detention for up to seven days, with up to twenty-four hours (up to 48 hours in cases where an interpreter is required) of questioning within in a twenty-eight day period (questioning and detention warrant, sections 34F to 34H (*ASIO Act 1979*)).

\(^\text{54}\) The decision to focus on the control order in this thesis instead was due to the PDO’s lack of implementation at the time of writing. Also, control orders are better suited to the cross-jurisdictional endeavour of this thesis.

\(^\text{55}\) It is important to highlight that the duration of detention may be extended up to two weeks if the order is carried over into a corresponding State-level scheme. Both the detainee and his/her lawyer must be provided with a copy of the order, which must include a summary of the grounds upon which the order was made. During a preventative detention order a person has the right to contact a lawyer, although communication may be monitored. However, the detainee is only allowed to inform a family member that they are safe, but not contactable for the time being. Questioning of the suspect is prohibited apart from confirming the detainee’s identity and ensuring their safety and well being. No preventative detention order has been made in Australia at the time of writing. The reason for the limited questioning permitted under this order is that the aim is to prevent an attack from occurring by incapacitating the individual rather than to assist in the criminal investigation of a suspected attack (Lynch, 2005; McDonald, 2007).
Aradau and van Munster (2007) to call it an example of “precautionary governance through risk” (p. 91). The precautionary rationale triggers the whole process, as the decision to impose control orders originates with the Executive on the basis of suspicion arising from intelligence materials. Relating back to Rumsfeld’s infamous speech, Zedner (2009a) described the orders as falling under the category of known unknowns, where pre-emptive measures are justified on the basis of uncertainty (Ericson, 2007; Zedner, 2009a). Because the apparent terrorist attack has not yet materialised, traditional legal technologies, such as prosecution, are unavailable. In a traditional court of law, any uncertainty the judge and jury might have with regards to a defendant’s guilt should result in a finding of not guilty (Ericson 2007). The precautionary logic, however, uses this uncertainty as the basis upon which to impose restrictions and sanctions. Zedner (2009a) described control orders as institutionalising “uncertainty by enabling the state to impose restrictions upon suspects without exposing intelligence to the public scrutiny attendant upon prosecution” (p. 49). However, Ericson argued that allocating discretion to the administrative branch of government through administrative law is not unreasonable, as it is, in theory at least, well equipped to deal with uncertainty. Whereas previously such derogations from the norm were the exception, some critics argue that a constant state of uncertainty in an era of security appears to have justified counter-law measures taking on a more permanent form (Agamben, 2005; Ericson, 2007; Gross, 2003, 2006; Michaelsen, 2008).

So far, this chapter has demonstrated how the actuarial logic of risk management began to change the criminal justice landscape well before the events of 9/11. The unexpected feeling of vulnerability has lead to highly emotional responses in reaction to terrorism, and thus, governance through fear (Goldsmith, 2008; Sunstein, 2005). Precaution ushered in on the basis of uncertainty thus has potentially troublesome implications for criminal law, according to some (Emerton, 2007; Ericson, 2007; Zedner, 2009a). The prominence of the risk management model in Australian criminal justice is further highlighted by its approach to counter-terrorism (Bronitt & McSherry, 2005). Actuarial techniques are now widely seen as being credible, having reached the same level of proof as is required in court (Zedner, 2009a). But Zedner (2009a) argued that the burden of proof in pre-emptive cases ought to be higher since the resultant restriction or deprivation of liberty is imposed prior to a crime having been committed. Although the risk of crime or terrorism is difficult to calculate (Zedner, 2006), the threat of terrorism has become pervasive and the risk of potentially catastrophic events borne home by losses of life and property in successive signal events in New York, Madrid, Bali, London and Mumbai. The need to be seen to provide security and to be doing something against threats
has driven governments to search for new and often controversial technologies and strategies. Some of these policies were sanctioned through assertions of uncertainty and exceptional risk (Aradau & van Munster, 2009). It is to the justification of these measures in the name of emergency and exception that I now turn.

3.4 The Exception Defi(n)es the Rule of Law

3.4.1 Introduction

Risk and uncertainty also shape the framework around exceptional circumstances requiring recourse to emergency powers. Much of the debate surrounding control orders centres on the derogation from fundamental rights and liberties guaranteed under domestic constitutional or statutory frameworks, or indeed in international treaties such as the ECHR or the ICCPR. The British derogating control order, for instance, requires Parliament to agree to derogation under Article 15 of the ECHR. Article 15 allows for derogation during times of emergency, but requires measures to be proportionate to the emergency without breaching other international obligations (Bonner, 2006). Several British anti-terrorism laws originated within an emergency framework, many of which were related to the situation in Ireland. Intended to be temporary, numerous statutes were eventually permanently adopted into the statute books (Donohue, 2000; C. Walker, 2011). In this sense, it is important to examine the theory behind emergency measures in order to understand some of the underlying rationale and justification behind the introduction of pre-emptive anti-terrorism laws and how legislation can be and has been used to respond to emergencies and exceptional circumstances.

Emergency powers are invoked in times of crisis or emergency, when the ordinary legal framework is considered inadequate to accommodate for a change in circumstances. Declared by the Executive, these powers often include temporary derogations of fundamental rights and a shift in the established balance of power between the pillars of government (Aradau & van Munster, 2009; Bonner, 2006; Johns, 2005; Lazar, 2006). The resultant relaxation or suspension of a state’s legal or constitutional powers is a compromise allowing for the rule of law and democratic values to be upheld, while arming the state with measures suitable to deal with a crisis (Gross & Ní Aoláin, 2006). In some countries, certain emergency powers may authorise the Executive to introduce laws which derogate from its constitutional provisions.

56 See Appendix A
the derogating control order being one such example. In civil law countries, including France and Latin America, the so-called ‘state of siege’ model is used. It aims to anticipate emergencies by pre-emptively introducing wide-ranging laws (Gross & Ní Aoláin, 2006). The common law equivalent is martial law, which sees the suspension of ‘ordinary’ law, temporarily replacing the government with military tribunals (Dicey, 1996). The principle used in England is that either a government or the country’s citizens have the power to maintain public order at whatever cost. Martial law has never been declared in England, which some observers cite as proof that law reigns superior (Dicey, 1996; Gross & Ní Aoláin, 2006). As with the state of siege model, the aim of martial law is to prevent crimes from occurring in the first place, rather than seeking to punish those responsible after an offence has been committed. However, Fleur Johns (2005) warned that such exceptions threaten both justice and self-knowledge, as decisions in extreme circumstances are made on the basis of uncertainty. Indeed, Oren Gross and Fionnuala Ní Aoláin (2006) described the actual concept of emergency as both vague and uncertain, highlighting yet again the characteristics of pre-emptive measures.

### 3.4.2 Emergency Typologies

The term emergency appears to be somewhat ambiguous, both in its scope and necessity. For instance, definitions vary from war to strike situations threatening essential services, some countries choosing to avoid its definition altogether, prompting H.P. Lee (1984) to label the term as an “elastic concept” with no precise definition (p. 4). Australia distinguishes between both war, peacetime and civil emergencies; the legislative authority to deal with emergencies is set out in Section 51 (vi) of the Constitution, which Lee (1984) described as an extraordinary provision, considering its powers entail the capacity to adapt to the intensity of the emergency. Lee (1984) distinguished between two types of emergency classification. The first, the “umbrella-type” approach, classifies different types of crises and emergencies equally. In contrast, the second or “specific-type” approach (p. 129) drafts special legislation to deal with a particular emergency. Specific or special emergency laws still use legislation in response to the emergency, however, ordinary legal norms are considered insufficient to deal with the crisis, thus replacing ordinary law with emergency measures (Gross & Ní Aoláin, 2006). On the other hand, amending existing statutes is often a popular choice. Gross and Ní Aoláin (2006) referred to this model as “Emergency/Ordinary” due to the fact that these measures are

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57 Gross and Ní Aoláin (2006) cite the German Gesetzgebungsnotstand (Art 81(1) GG) as a further example.
ordinary in name only, but introduced in response to an emergency, be it real or perceived. Not all emergencies are dealt with under a different legal framework (Roach, 2008). Some states modify neither constitution nor statutes, conforming to the “Ordinary/Ordinary” (Gross & Ní Aoláin, 2006, p. 88), or business as usual model (i.e. ordinary rules at all times), using police powers under executive authority. This approach allows for no deviation from the ordinary state of affairs and is thus often seen as being rigid and less likely to adapt to a particular emergency. Each model of accommodation offers a degree of flexibility to deal with emergency (Gross & Ní Aoláin, 2006). Despite the ability of emergency powers to threaten the stability of both a nation’s constitutional and legal framework, they are generally considered acceptable if merely amplifying existing legal powers during a particular crisis (Lee, 1984). This principle is enshrined in various constitutions, as well as international conventions, e.g. Article 15 of the ECHR or Article 4 or the ICCPR.

Both the specific and business as usual model conform to constitutional boundaries, unlike the extra-legal measures model, which abandons all legal and constitutional constraints to protect the interests of the state. Indeed, the appropriateness of the use of law is somewhat subject to the type of emergency as well as the model of accommodation preferred by the state at that particular time. There are different interpretations as to the legitimacy of suspending traditional law during emergencies. On the one hand, law has been described as a key component of national security without which security cannot exist. In contrast, Gross and Ní Aoláin, advocate the suspension of law in times of emergencies (i.e. the Ordinary/Emergency model), though stress law ought to be sufficiently flexible to deal with issues within the existing legal framework. To achieve this, Gross and Ní Aoláin argued that constitutional emergency provisions should be outlined using “broad and flexible language” (2006, p. 66). However, such an approach appears vulnerable to abuse, weakening the framework of emergency rule. The interpretation of emergency laws with regards to terrorism, however yet further complicates matters.

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58 See for example the British Prime Minister’s response to the riots in several English cities in August 2011
59 The power of preventive detention, for example, is seen as vital during a war emergency, but not other less serious emergencies (Lee, 1984).
60 Aharon Barak, president of Israeli Supreme Court, H.C. 428/86, Barzilai vs Govt of Israel, 40(3) P.D. 505 at 622 (Barak, P.) quoted on page 143 of Gross & Ní Aoláin (2006)
62 Although constitutional rules may be interpreted using so-called “context based interpretation”, some judges use the so-called “elastic power of interpretation” thus avoiding the need for any new or additional powers (Gross & Ní Aoláin, 2006, p. 72).
3.4.3 The Terrorism Emergency

One of the frequently cited critiques of anti-terrorism legislation, particularly in the advent of 9/11, is that terrorism justifies exceptional laws under the guise of emergency. However, the terrorist threat differs from the traditional threats which were at the forefront at the time emergency legislation was conceived and applied. Most emergency legislation in Britain for instance was conceived to deal with strike situations, as well as instances affecting or threatening essential services.\(^{63}\) Once the monarch had proclaimed a state of emergency, it was in effect for a maximum duration of one month. Any extension thereof was subject to a fresh proclamation (Lee, 1984). While emergencies are traditionally associated with temporal constraints, their expansion to the terrorist arena has seen an extension of their lifespan (Agamben, 2005). The last century has seen several UK anti-terrorism measures and laws moving from exception to norm (Bonner, 1992, 2007; Donohue, 2000; Gross & Ni Aoláin, 2006; Kavanagh, 2010). For instance, the *Prevention of Terrorism (Temporary Provisions) Act 1974* was introduced, as the name suggested, as a temporary measure and subject to renewal every six months, then annually. Laura Donohue (2000) argued that these measures stayed in place because they were seen as being effective. Emergency powers were part of the legal landscape for almost 60 years in Northern Ireland. In light of such developments Britain’s *Emergency Powers Act* was superseded by the *Civil Contingencies Act 2004*, which broadened the definition of emergencies to include terrorism. Section 1(1) defines the term emergency as:

\[
(a) \text{ an event or situation which threatens serious damage to human welfare in a place in the United Kingdom,}
\]

\[
(b) \text{ an event or situation which threatens serious damage to the environment of a place in the United Kingdom, or}
\]

\[
(c) \text{ war, or terrorism, which threatens serious damage to the security of the United Kingdom.}
\]

Still declared by the monarch, but subject to parliamentary approval, the new provisions require the emergency to be imminent, occurring, or past so as to prevent, control or mitigate its effect. The duration of an emergency is still limited to 30 days, but is renewable. Gross and Ní Aoláin (2006) argued that once the state has accepted the existence of terrorism as a threat, it is then “imported into the core of the judicial argument which then becomes the baseline from which legal justifications follow” (p. 279).

\(^{63}\) The key legislation was the *Emergency Powers Act 1920*, later amended by the *EPA 1964*
Several scholars have argued that distinguishing between normalcy and exception has become more challenging in the wake of 9/11 as the exception and its government becomes norm (Ackerman, 2003; Agamben, 2005; Bronitt & McSherry, 2010; Ericson, 2007; Gross, 2003; Gross & Ó Aoláin, 2006; Lynch, et al., 2010; J. Moran, 2007; Welch, 2007). The term emergency usually signifies a temporary event (Boyle, 1982; Gross & Ó Aoláin, 2006). However, as discussed above, emergencies have often been subject to renewal and extension, especially those related to terrorism. 64 Associated with terrorism’s inherent uncertainty is the inability to foresee an end to the threat. Although the war metaphor is frequently used in relation to terrorism, wars in the ‘conventional’ sense have a clear end. In this sense, terrorism fits neither into the traditional perception of an emergency, nor into that of war. Indeed, Johns (2005) argued that turning a state of emergency into the norm makes the distinction between war and peace impossible.

Georgio Agamben (2005) described the state of exception as sitting at the limit between law and politics, an observation which sheds light on some of the fundamental principles which are altered, albeit temporarily, during such an event. While such powers do not necessarily overstep the legal boundaries, Nomi Claire Lazar cogently highlighted that urgency and scale alter the relationship between the principles of justice and order (Lazar, 2005, p. 7). However, Paul Wilkinson, warning of the dangers of suspending liberal rights and governance under the guise of protection, asked “what shall it profit a liberal democracy to be delivered from the stress of factional strife only to be cast under the iron heel of despotism?” (Wilkinson, 1977, p. 122/123). Derogating from the legal framework evokes fears of totalitarianism or authoritarianism, setting a bad example if the state breaks its own laws. 65

Much of the debate on emergency and exception post 9/11 has focused on concessions made to human rights in the name of security. Indeed, Roach (2008, p. 233) argued that the debate is not even about emergencies anymore, but rights of individuals. Gross and Ó Aoláin (2006) believe there is a general acceptance of a trade-off between liberty and security, highlighting the need to strike a proper balance between principles which are in conflict with one

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64 Indeed, there are several examples of abuses and extension of terrorism powers, even pre 9/11. For example, the Criminal Evidence Order (NI) 1988 revoked the right to silence for suspects in Northern Ireland. Although not limited to terrorist cases, it was justified by claiming that the right to silence was being exploited by terrorists. In 1994, extended to whole of UK with Criminal Justice and Public Order Act, Art 34-37, allowing a court to draw adverse inference from a defendant’s silence during questioning or the trial.

65 It also raises questions about the executive power to legislate, the shift in power between the arms of government, and the implications for legal versus political power, as discussed in the previous chapter.
another. However, they highlighted that this balance is not absolute, rather it is “flexible and floating” (Gross & Ní Aoláin, 2006, p. 73). The state seeking to derogate is given wide scope to determine what it considers necessary and indeed, what it considers to be an emergency (Gross & Ní Aoláin, 2001; Michaelsen, 2008). However, in Europe, domestic evaluation should always be supported by European court supervision so as to avoid unwarranted deviations from the ECHR. That being said, Gross and Ní Aoláin (2001) pointed out that the ECHR has not applied the two principal criteria of emergency under Article 15, i.e. exceptional threat and temporal duration, to the situation in Northern Ireland, granting the British government a wide margin of appreciation. Although an emergency can legally justify certain derogations to law and human rights, Christopher Michaelsen (2005b) argued liberal democratic countries including Australia, the UK and France, having played pivotal roles in establishing common human rights standards, have a responsibility to uphold these, no matter how grave a crisis might appear.

3.4.3.1 Proposed Emergency Frameworks

So far, we have traced the development of risk and the increasing prominence of uncertainty in relation to the threat of terrorism. The enormity of a potential terrorist attack and its consequences have led governments to derogate from well established legal norms under the guise of emergency, the exception defying (or defining) the rule of law. Importantly, Roach (2008) reminded us that emergencies post 9/11 are not just about terrorism, but what he called “genuine” emergencies, such as natural disasters and pandemics (p. 229). Major events such as Hurricane Katrina in the US, or bushfires and floods in Australia, should serve as a reminder of the core purpose of emergency legislation and its underlying principles. That being said, terrorism has since created its own emergency typologies. Indeed, several authors have

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66 This metaphor of balance has become ubiquitous post 9/11, even if it has been challenged in much of the criminal law literature (Bronitt & Stellios, 2006; Finnane & Donkin, 2010; Lynch, 2007; Zedner, 2005).
67 “[I]t falls to each Contracting State, with its responsibility for “the life of [its] nation,” to determine whether that life is threatened by a “public emergency” and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. Accordingly, in this matter a wide margin of appreciation should be left to the national authorities” Brannigan & McBride v. United Kingdom, 258 Eur. Ct. H.R. (ser. A) (1993)
68 Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A), note 31, § 207, at 78-79. In A v others, Lord Bingham held that it was the government’s responsibility to assess whether or not the threat faced from terrorism constituted an emergency, not the court’s. Lord Hoffman however found that the threat of terrorism did not constitute and emergency (it is important to note that he came to this decision without having access to any specific intelligence information) (Michaelsen, 2008).
proposed emergency frameworks adapted to the post 9/11 world. For example, Bruce Ackerman advocated a framework allowing for short-term emergency measures, preventing political exploitation of terrorist events as justifying permanent restrictions and human rights derogations (Ackerman, 2003; Johns, 2005). Oren Gross proposed a scaled approach, where only the most extreme cases would justify ‘extra-legal’ measures (Gross, 2003; Johns, 2005). Along the same lines, Lucia Zedner explained that the concept of security faced several challenges, i.e. needing to ensure that the means are consistent with its ends; its measures are inclusive and consistent with equality and fairness; they don’t excessively erode trust; they don’t impinge upon civil liberties without merit; they are proportionate to the risks met (Zedner, 2007a, p. 266). Finally, writing almost a decade prior to 9/11, but after more than two decades of experience of terrorism and counter-terrorism in the UK, David Bonner advocated that governments should act in accordance with the rule of law, including complying with human rights as set out in ECHR (Bonner, 1992). Dealing with suspected terrorists in a criminal process he believed is preferable to detention without trial or internment, due to the finding of guilt of a criminal offence rather than a political cause. He set out six principles to govern the invocation, formulation and use of special powers in response to terrorism (Bonner, 1992, p. 199): 1) terrorism-related special powers should only be resorted to if the ordinary law is unable to deal with the risk; 2) they must be proportionate to the situation; 3) the duration should not exceed what is absolutely necessary; 4) the aim of such measures must be democratic and subject to regular parliamentary supervision and independent judicial oversight; 5) to avoid any ambiguity, the measures should clearly articulate the powers, rights and obligations arising from them; 6) they should be subject to parliamentary supervision and independent judicial oversight, as well as containing adequate safeguards – if these cannot be guaranteed, the measures should either not be implemented or if the risk sufficiently high, risk of abuse must be assumed.
3.5 A Reactive Note on Terminology

Chapter 1 featured a pre-emptive discussion of the term pre-emption. In response to the literature on control orders and other pre-emptive and preventive measures examined in the two subsequent chapters, a follow up is necessary. Given the somewhat disparate and overlapping terms and concepts used in the literature to date, I decided to clarify the terms employed throughout the rest of the research. Reflecting on the literature examined, the apparent shift towards a more precautionary logic is depicted in Figure 3.1 below.

**Figure 3.1 - The Axis of Prevention**

The above axis, referred to as axis of prevention, represents time. A crime is committed in Figure 3.1.a. The criminal justice system is inherently reactive in nature, so it typically intervenes after the commission of the offence. Preventive legislation however gives state the power to intervene prior to a subsequent offence being committed, to do as its name implies, prevent it from re-occurring. For example, it might be used to preventively detain offenders perceived as being particularly dangerous or risky upon their release from prison to prevent recidivism, for example sex offenders. Dershowitz (2006) called this the injury or harm approach to crime control. An important distinction between these and other preventive measures is that they target convicted offenders upon the completion of their served sentence. This then can be described as reactive prevention. At this end of the spectrum, there is greater reliance on evidence, as a crime has already been committed and the individual found guilty. The risk of future offending is calculated based on previous events.

We have established that there are incidents where the intervention takes place prior to the commission of the crime, where having the criminal intent to carry out a crime is a crime in itself. These are known as inchoate offences, such as attempt or conspiracy, or preparatory
offences, illustrated in Figure 3.1.b. Akin to Dershowitz’s dangerous act approach, the actus
reus does not need to have happened, rather, there was evidence of dangerousness or intent,
such as in the case of dangerous driving or attempted murder.

The precautionary logic, however, takes this rationale even further, as no evidence of
dangerousness is required prior to intervening. Pre-emptive or precautionary anti-terrorism
legislation, such as control orders and internment, for example, thus differ not only from the
reactive preventive measures we have just seen, but go even beyond inchoate offences. What
Dershowitz called the dangerous person approach, I call pre-emptive prevention, also referred
to as precautionary prevention,69 illustrated in Figure 3.1.c. It is with this distinction in mind
that the rest of the thesis has been analysed and written.

3.6 Summary

This chapter has focused on law as a technology of governance, risk, and uncertainty, which
ultimately justifies precautionary measures on the basis of exceptional circumstances.
Legislation is a tool of power for government to manage and control its population.
Introducing new laws in the wake of terrorist events often fulfils a symbolic role,
demonstrating the state’s determination to act, thus (re-)establishing trust in the omnipotence
and authority of the state (Lendermann, 2009). However, both academics and practitioners70
have highlighted that the value of symbolism and education is not to be underestimated in
establishing the sense of security in the general population (Lendermann, 2009; Roach, 2002).
Legislation is also the mechanism at the heart of governmental response, and thus an
important “tactic of governmentality” and risk management (Aradau & van Munster, 2009, p.
695). Governmentality and risk provide valuable lenses through which to examine and
contextualise pre-emptive legislation, its interpretation, management and consequences. The
pre-emption paradigm helps ground our understanding not only in relation to anti-terrorism
law, but also the way in which legislation in highly problematic areas is developed and forms

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69 For illustration purposes, pre-emption and precaution are at the same point of the axis. The difference
between the two relates to whether the threat is known or not and believed to be imminent. Given that
the point of the figure is to distinguish between anticipatory and reactive prevention as identified from
the literature, the distinction between pre-emptive and precautionary is thus not made.
70 See Geoff McDonald’s comments during the debate on the Anti-Terrorism Bill (No.2) 2004 in the
Senate Hansard, p.61 (26 July 2004)
part of the overall governmental response to risk and uncertainty, and the extent to which this varies in different situations, times and countries.

Many observers argued that the security paradigm is increasingly being adopted and normalised to a degree never before seen (Agamben, 2005; McCulloch, 2009; McCulloch & Pickering, 2009), changing the role of criminal law along the way (Ericson, 2007). This transition is also evident in other areas of governance, expanding the boundaries of risk and uncertainty, creating hybrids of previously distinct areas of law, affecting the separation of powers, ultimately altering how emergencies and exceptions are conceived and implemented. Agamben stated that administrative governance appears to be increasing at the expense of the rule of law; with management triumphing in the absence of order (Raulff, 2004). Anti-terrorism legislation post 9/11, according to Zedner (2007a), has been heavily influenced by the actuarial model of risk and uncertainty, a reflection of the age of security, leading some to comment that traditional measures of risk have been abandoned in favour of less democratic approaches to the governance of risk (Hudson, 2009). Indeed, Ericson (2007) believed that law defines risk beyond the scientific threshold, thus entering the realm of uncertainty. That being said, the precautionary logic argues that uncertainty is no excuse for inaction and absence of evidence is not the same as absence of risk (De Goede & Randalls, 2009). In light of these developments, the pre-emptive, risk-based focus of recent anti-terrorism legislation has ensured that the governance of counter-terrorism has developed its very own “bubble of governance” (Shearing, 2001, p. 211).

Having reviewed the literature and the theoretical foundation underlying my thesis, the empirical part of this research recounts and analyses evidence to illustrate this theoretical frame at work in various jurisdictions and at different times. The next chapter outlines the interdisciplinary methodology used to determine the characteristics of pre-emptive legislation and its changes over time and place. Subsequently, the first case study explores the governmental rationalities introduced in response to the terrorism emergency in 1970s Northern Ireland.
4 Methodology

4.1 Introduction

Although criminology is inherently interdisciplinary, Zedner believes that the concepts of pre-crime and pre-emption pose “a considerable challenge to existing modes of scholarship [stretching] existing conceptual and methodological resources to the full” (2007a, p. 275). The aim of this research is to identify the characteristics of pre-emption as a legislative tool and to determine whether these are consistent across jurisdictions and whether or not they have changed post 2001. It is important to reiterate that the framework of this thesis is firmly centred on the concept of pre-emption, identifying its characteristics within the legal framework, and how it has influenced the contemporary debate on anti-terrorism law. The research questions guiding this thesis are:

1. What are the characteristics of pre-emption as a legislative tool?
   a. What are its aims?
   b. How and under what circumstances is it used?
   c. Are these principles used and applied (implemented) consistently across jurisdictions?

2. Has anti-terrorism legislation post 9/11 affected the use of pre-emption?
   a. How and under what circumstances was it used previously?
   b. Has there been a noticeable change in reaction to the events of 9/11?

In addition to the theoretical framework around governmentality and risk set out in the previous chapter, this thesis employs a historical tracing process. To be able to comment on the potential evolution of a concept over time, historical analysis is vital, shaping our understanding of what has come before, contextualising contemporary debate. Researchers deploying historical methods have traced the evolution of laws and strategies in relation to anti-terrorism, emergency laws and pre-emption, making significant contributions to our understanding of these concepts (Bonner, 2007; Donohue, 1998; McEvoy, 2001; McSherry, 2005, 2006; Pratt, 1996; Shapiro & Suzan, 2003; Spjut, 1986; C. Walker, 2011). While the two previous chapters have highlighted some historical precedents of pre-emptive strategies, I decided to select internment in Northern Ireland as the main historical comparison. The decision was based on the use in that jurisdiction of measures similar to control orders, as well as the terrorism context in which these were introduced. My interpretation will be shaped by the principles of pre-emption and precaution. The choice to apply an interdisciplinary approach, i.e. combining historical examination with socio-legal analysis, to the examination of the phenomenon was made so as to be able to extend the already well established and
articulate discipline-centric discussions. Combining the rich historical materials with the contemporary legal debates on the purported shift in the criminal justice system contextualizes the debate while at the same time firmly establishing the boundaries of the pre-emptive concept. Choosing other jurisdictions as a way to contextualise this research is not limited to the historical case study. Given that much of the literature has identified control orders as a pre-emptive measure, they form the central focus of analysis in this thesis, examining both the British and Australian schemes. Further expanding the examination to international variations of pre-emptive anti-terrorism developments enriches the debate. It is to this justification that I now turn.

4.2 Comparative Approach

In recent years, globalisation has created an increasing interdependence between nations, facilitating transnational crime opportunities (Howard, Newman, & Pridemore, 2000). Most terrorism today transcends national borders, with many organisations, such as Al-Qaeda, pushing a global agenda. However, even groups with a seemingly local mandate foster international connections, the Irish Republican Army’s (IRA) ties to Libya for training and supply purposes being just one example (Bonner, 2007; Kelsey & Koenig, 1994). The long arm of the law, however, does not always reach across borders. Within the Australian Federation for example, different legislation in the States, such as the outlaw motorcycle gang legislation in South Australia, New South Wales and the Northern Territory, has, according to some observers, lead to the displacement of gangs and their criminal activities to other States (Barnett, 2009).

Considering the global nature of terrorism, different countries’ approaches may well impact on the domestic situation, influencing and even prescribing policy decisions. For this reason, LaFree (2007) believes sharing policy innovations between jurisdictions is constructive. He also called for increased cross-national comparative research, arguing that to have a truly general explanation about a phenomenon we must compare across nations (LaFree, 2007). Terrorism and the legislation introduced to reduce or prevent it is further blurring the lines between international and domestic security (Zedner, 2009a). Not examining terrorism internationally appears nonsensical in Nadelmann’s view, since transnational criminological research necessitates cross-national research (Nadelmann, 1990).

Comparing different countries to each other is not new. Comparative criminology is enjoying a resurgence after being neglected for much of the past two centuries (Howard, et al., 2000).
Some have argued that criminology is inherently comparative: we are continuously comparing trends or explaining and contrasting non-US findings to the dominant American literature (Barberet, 2001). More recently, however, the term comparative has come to signify international comparisons, many studies comparing crime trends between countries (Farrington, 1992; Gartner & Parker, 1990; Kohn, 1987; Pease & Hukkila, 1990; vanDijk, Mayhew, & Killias, 1991). There are significant benefits associated with studying criminal justice issues between jurisdictions (Archer & Gartner, 1984; Bayley, 1999; LaFree, 2007), not least that drawing from the knowledge and expertise of other societies greatly enhances a country’s ability to predict and address changes within its borders (Archer & Gartner, 1984). However, a common problem with international comparisons is the issue of conceptual equivalence, that is, what is considered serious in one country may not be in another (Ali, 1986; vanDijk & Kangaspunta, 2000). Issues relating to different definitions of offences as a side-effect of comparing different criminal justice systems feature regularly in the literature, and due to the variation in the definition of terrorism, will also impact on this research.

Comparing different types of law, such as administrative, civil and criminal, across national borders presents its own challenges. For instance, comparing administrative law needs to account for the differences in national institutions and constitutional values (Bell, 2008). Comparative criminal law also needs to account for sometimes significant differences in seemingly basic principles, such as the principle of legality and principles of criminal liability. Several comparativists (Dubber, 2008; Gordley, 2008; Zekoll, 2008) have pointed out that comparative law and legal history are related, the latter enriching the comprehension of the former. Indeed, it also works the other way, as James Gordley (2008) stated that examining law does not develop in its own national bubble, but is influenced by legal developments elsewhere.

Like Australia and the United Kingdom, a number of other nations responded to September 11 by introducing new or amending existing anti-terrorism legislation. Certain countries, having experienced terrorism or political violence in the past, had already created an extensive legal response, which has, to varying degrees, been tested in the courts. Approaches to counter-terrorism vary considerably between countries and are influenced by several factors. First, the legal system under which a country operates is likely to affect its approach to terrorism. A country’s legal system has its origins in culturally specific ideas and principles accrued over time (Bottomley & Bronitt, 2006). For instance, the idea of civil liberties, such as the right to liberty and security of the person, the right to a fair trial and the rights to free speech have
their origins in liberalism (Bottomley & Bronitt, 2006). As we have seen, these basic human rights are today recognised in law, designed to protect individuals from potential abuses of state power. Australia, the United Kingdom, Canada and United States are examples of common law jurisdictions, which operate an adversarial system where the role of the court is solely that of an impartial referee between parties. In contrast, the other predominant legal system in western democracies is the civil law or inquisitorial system, as found in most of Continental Europe (Chisholm & Nettheim, 2007). The role of the court in an inquisitorial system is to actively establish the facts of a case, often from an early stage in the investigation (Human Rights Watch, 2008; E. A. Martin, 1994).

The second factor influencing a country’s approach to counter-terrorism is how it defines terrorism, if at all. What might appear to be a straightforward and basic concept has proven difficult to define, with no universally accepted definition as yet (Lord Carlile of Berriew QC, 2007). The political construction of what amounts to terrorism remains controversial and subjective; after all, to use a cliché, one country’s terrorist is another’s freedom fighter, or even future president. Despite requiring states to legislate against terrorism, the UN did not agree upon a common definition of what constituted terrorism until October 2004 (Security Council Resolution 1566, United Nations, 2004). Internationally, there is considerable variation in both the definition of terrorism, and the way in which a state defines the associated offences. Both the Australian definitions of terrorist offences and their international counterparts have been described as broad, flexible, unclear and rather vague (Gani, 2008; Lynch, 2006a, 2007; Lynch & McGarrity, 2008; Lynch & Williams, 2006; Security Legislation Review Committee, 2006; C. Walker, 2007b; Zedner, 2009a). As a result, anti-terrorism offences may lack clear legislative intent (Lynch, 2006a), complicating practical applications. The lack of comparable definitions across nations only adds to this ambiguity, potentially impeding coordination between nations. The definition of terrorism, or in some cases its absence, is likely to be influenced by a country’s previous experience dealing with terrorism.

71 All Canadian provinces and territories, apart from Quebec, operate under a common law system. Quebec’s legal tradition is a hybrid of civil and common law. The Criminal Code which contains anti-terrorism legislation applies on a federal level and is based on common law traditions.

72 The Australian definition of a “terrorist act” is found in section 100.1 of the Criminal Code 1995 (Cth) and was introduced by the Security Legislation Amendment (Terrorism) Act 2002. Unlike other countries, the Australian definition is considered accurate enough to safeguard the legal rights of individuals to engage in political protests (Lynch & Williams, 2006).

terrorist act means an action or threat of action where: (a) the action falls within subsection (2) and does not fall within subsection (3); and (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and (c) the action is done or the threat is made with the intention of: (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public.
Many countries have suffered some form of terrorism, including the four jurisdictions selected for this study, including it the Hilton bombings in Sydney, the Troubles in Northern Ireland, the Red Army Faction in Germany and various separatist movements and Algeria-related terrorism in France. However, despite the commonality of having dealt with terrorism, states have adopted very diverse approaches. It is important to highlight at this point that I am not concerned with the actual definition of terrorism, as this topic is beyond the scope of this study.

4.3 Method and Sources

In order to establish whether or not the use and implementation of pre-emptive anti-terrorism legislation changed as a result of the events of September 11 2001, studies featuring both historical and contemporary measures must be conducted, so as to determine whether the aims and circumstances under which they were/are used have changed, both over time and between jurisdictions. As previously discussed, the historical example chosen is internment in Northern Ireland. Having examined the rationale behind cross-jurisdictional research, my research features multiple comparisons, contrasting legal responses and provisions across a number of jurisdictions. First, since much of the Australian response to counter-terrorism is based on the British example (Bronitt, 2008; Lynch, 2005), I will be comparing the Australian control order to its British parent. This, in turn, will provide a deeper understanding of the underlying mechanisms of the legislation and how they work in practice. Australia and the UK, however, are not the only jurisdictions to introduce preventive legislative measures. My second cross-jurisdictional comparison will focus on France and Germany, distinguishing between measures introduced pre and post 9/11. France has long supported the pre-emptive approach in its response to terrorism. Its neighbour Germany, on the other hand, has only recently introduced a provision with pre-emptive elements, weary of overstepping historically significant boundaries protecting civil liberties. Contrasting multiple jurisdictions across common law and civil systems helps to determine what factors influence a country’s legal response to terrorism, in particular the use, or non-use, of pre-emption. It is argued that interdisciplinary and cross-jurisdictional approaches ground more informed conclusions about how the concept of pre-emption has been applied in anti-terrorism law across time and place.

As already stated, much of this thesis focuses on the control orders introduced into British and Australian law in 2005. The first part of their examination centres on an analysis of the

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73 For a discussion of the history of various incidences of terrorism, see Martin (2006)
statutory provisions underpinning control orders in both countries, namely the *Prevention of Terrorism Act 2005* (PTA 2005) and the *Anti-terrorism (No. 2) Act 2005*. I then proceed to conduct two in-depth case studies of the two control orders issued in Australia. Using available court transcripts and reasons for judgment, I pay particular attention to the debates around pre-emption and precaution and associated issues and principles being affected as a result. Given the larger number of control orders issued in the United Kingdom (N=48), the UK analysis was divided into three parts. Available data was entered into a spreadsheet allowing for the production of basic descriptive statistics. Part two examines the legal challenges brought against the control order regime, focusing on those with underlying pre-emptive decisions. The final section focuses on the annual reports produced by the UK’s independent reviewer of anti-terrorism law, Lord Carlile. Again, the attention is focused on any references made to the pre-emptive principles identified in the literature. Given that the current British government has recently announced the end of the control order scheme, I examine their proposed replacement, the Terrorism Prevention Investigation Measures (TPIMs). Both the preceding review by Lord Macdonald, as well as the proposed changes announced prior to July 2011 are examined within the theoretical framework set out above.

In summary, the research questions are addressed and investigated using the following complementary and overlapping methods:

1. A detailed historical analysis of the emergence and use of pre-emptive anti-terrorism legislation, including internment in Northern Ireland, as well as control orders in Australia and the UK in order to examine them as a technology for control within the framework set up in Chapter 3, i.e. governmentality, risk and emergency;

2. A comparative analysis of legal mechanisms in France and Germany to answer question about whether pre-emption is affected by legal systems and the extent to which pre-emption is a universal trend.

In order to do so, primary sources, such as parliamentary and committee reports from Australia, the UK, France and Germany formed the basis of the documentary analysis conducted. Other sources included parliamentary Hansards, newspaper articles and archival materials. Due to the time elapsed since internment was last used in Northern Ireland, access to digital copies of public records held by the Public Records of Northern Ireland (PRONI)

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74 The UK Freedom of Information Act provides for public records to be released to the public after a period of 30 years, unless they are deemed particularly sensitive, in which case, access denial can be extended.
provided invaluable insight into previously confidential ministerial communiqués, allowing greater understanding of the underlying aims of governmental action than provided for in the statutes, Hansards and contemporary media reports.
5 Internment in Northern Ireland: An Example of Pre 9/11 Pre-emptive Anti-Terrorism Legislation

“History does not just provide a much-needed grounding for the contemporary debate on the future [...] it also offers a largely unexploited inventory of policy experiments and potential alternatives to the current regime”

Paoli, Greenfield & Reuter (2009, p. 250)

5.1 Introduction

As already highlighted in Chapter 2, liberal states have long employed various security strategies which, although grounded in legal form, did not conform to the standards and principles developed in criminal law. Moreover, we have seen that emergency powers can be invoked in exceptional circumstances allowing for temporary derogations from the well established criminal safeguards, with civil liberties being suspended in many a democratic society during times of war and emergency. Internment is one such example. The practice of internment dates back centuries, generating and indeed fuelling many legal and political debates along the way (Bonner, 2006). David Lowry defined internment as “an extrajudicial deprivation of liberty by executive action”, in essence, detention with neither charge nor trial (Lowry, 1976, p. 261). Moreover, Charles Townshend (1983) considered “arrest on reasonable suspicion” to be another principle of internment (p. 63). Internment has been used relatively sparingly, leading some to view it as a more symbolic tool (Bonner, 2006). Indeed, Bonner (2007) believes governments prefer the legitimacy of a criminal prosecution approach over internment, as imposing punishment or detention after a finding of guilt in a criminal trial is more readily accepted. The practice has consistently attracted criticism from academics and politicians alike. Winston Churchill, for instance, described it as “in the highest degree odious” calling it the foundation of all totalitarian governments (Bonner, 2006, p. 48). In addition to the violations of civil liberties, much of the condemnation against the practice stems from the assessment of it being counterproductive (Bonner, 2007; Boyle, Hadden, & Hillyard, 1980; Dickson, 2009; Ip, 2007; LaFree, et al., 2009; Lowry, 1976; McEvoy, 2001; Spjut, 1986; Sullivan, 1990; Townshend, 1983; C. Walker, 2011).

The use of internment featured frequently where a criminal charge could not be laid due to insufficient evidence (Lowry, 1976). It was used against spies and saboteurs, and during both World Wars against enemy aliens (Bonner, 2007; Finnane & Donkin, 2010). In addition to using
During their withdrawals from the colonies in Cyprus, Malaya and Palestine, the British used it against its own citizens during the First World War (Bonner, 2007). During that period, internment was used to crack down on Irish nationalists, due to their “hostile origins or associations” (Bonner, 2007, p. 48; McConville, 2003, p. 454). Over 2500 ‘Irish rebels’ were interned in 1916 under Regulation 14b of the Defence of the Realm Act (DORA) (McConville, 2003). More recently, internment was invoked during the first Gulf War to detain deportees until it was safe to return them to their home state (Bonner, 2006). However, for the purposes of this research I have chosen to focus on internment in Northern Ireland in the 1970s. The reasons for this are firstly, to help illustrate the pre-emptive rationale of the practice in relation to its use against a terrorist threat; and secondly, as an important comparison of rationalities over time and in relation to a different terrorist threat in one of the jurisdictions selected for comparison, i.e. the United Kingdom. Finally, internment shares many similarities with the modern-day equivalent that is the British control order regime, thus laying the historical foundations for further examination of contemporary measures. Moreover, the decision to focus on internment rather than other pre-emptive measures, such as exclusion orders under the Prevention of Terrorism (Temporary Provisions) Acts 1974-89, was made in order to examine the issues of detention and derogation. The aim of this chapter is thus to ground the debate with historical reasoning (Finnane & Donkin, 2010) while simultaneously addressing some of the ahistoricism in criminology.

The principle issue of contention was the issue of conscription, which had never been imposed in Ireland (Townshend, 1983). The idea was eventually abandoned, but created a regrouping of the nationalist movement, culminating in the Easter uprising in April 1916. Alleged Sinn Féin connections to Germany and an intercepted shipment of German arms formed the basis of allegations of hostile associations. For a more in depth discussion of the events leading up to the Easter uprising in 1916, see Townshend, Chapter 6, and McConville, Chapter 9.

Had these individuals been interned in England, as British citizens they would have been entitled to a trial by jury. However, as they were arrested in Ireland, they had to be tried there, without a jury (McConville, 2003).

According to Bonner (2007), the provisions contained within regulation 14b of the Defence of the Realm Act (DORA) introduced in 1915 resemble the modern day control order provisions: “Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith, or from time to time, either to remain in, or to proceed to and reside in, such place as may be specified in the order, and to comply with such directions as to reporting to the police, restriction of movement, and otherwise as may be specified in the order, or to be interned in such place as may be specified in the order” (2007, p. 53)
5.2 A Brief History of Internment in Northern Ireland

The Emerald Isle is no stranger to internment. Despite governments regularly deploring its use, it has been in regular use during times of emergency even prior to the partition of Northern Ireland in 1921 (Bonner, 2007; Dickson, 2009; Lowry, 1976; McEvoy, 2001). McEvoy (2001) went as far as to describe the internment of suspected terrorists as one of Britain’s favoured tactics to deal with the enemy. Due to its origins targeting advocates of an independent Ireland, the use of internment in Ireland has, as Lowry described it, a “perhaps disproportionate impact upon the psyche of Irishmen today” (1976, p. 268).

Internment in Northern Ireland was first introduced by the Minister for Home Affairs in 1922 under emergency legislation, the Civil Authorities (Special Powers) Acts (Northern Ireland) 1922 (SPA). Regulation 12(1) gave the Minister the power to intern individuals “suspected of acting or having acted or being about to act in a manner prejudicial to the preservation of the peace and the maintenance of order in Northern Ireland” (McEvoy, 2001, p. 210; Spjut, 1986, p. 713). In addition to internment, the act also increased powers of arrest and detention (Donohue, 1998). Originally, its implementation was intended to be temporary, with a maximum duration of one year (Gross & Ní Aoláin, 2006). However, the SPA was renewed annually for the first five years, extended for a further five in 1928, before eventually being made permanent in 1933 (Donohue, 1998; Gross & Ní Aoláin, 2006; Spjut, 1986).

In 1936, the National Council for Civil Liberties found that the SPA was both unjustified and misused to further Unionist domination (Lowry, 1976; National Council for Civil Liberties, 1936). The suppression of the Unionists’ political opponents, the Republicans, drove them to extremism as their movements increasingly had to go underground (Lowry, 1976). After a renewed IRA campaign in the 1950s, the Northern Irish government yet again introduced internment on July 4th 1957. Within eight months, 131 individuals had been interned, rising to a total of 206 by March 1959, all of whom were released (McEvoy, 2001). The SPA was described as a broad, repressive, and draconian statute by some observers, who could not understand how a democracy could stand for an act derogating from common law principles to be used every decade and remain in force until 1972 (Lowry, 1976).

78 For an overview and background to the conflict in Northern Ireland see Lowry, page 264 onwards, and McEvoy, pages 9-15.
79 There appears to be a disparity in the exact dates of use 1920/1-24; 1931-35; 1938/9-45; and 1956-61.
5.3 Internment in the 1970s

The decision to reintroduce internment in the 1970s, however, differed from previous incarnations due to the preceding civil rights campaign (Lowry, 1976; Spjut, 1986). Violence had erupted in the wake of civil rights grievances by the minority Catholic population, who demanded equality, protesting for political and social reform (Lowry, 1976; Spjut, 1986; Sullivan, 1990). The original Catholic civil rights campaign in the late Sixties started out peaceful, but was met with a violent response (Bonner, 2007; Sullivan, 1990). Writing in 1976, Lowry highlighted that, contrary to popular belief, the renewed outbreak of violence around the turn of the decade was due to repression and intimidation by the government, not the IRA. That being said, the Unionist government’s response fanned the flames and recruitment for the Provisional IRA (PIRA), which split from the IRA to take up armed defence of Catholic communities in an increasingly sectarian conflict. Faced with the possible re-introduction of internment, concerns over the quality of the available intelligence on prospective targets were raised by the General Officer Commanding Northern Ireland (GOC), who thus advised against it. Despite both the army and the British government’s reluctance to reintroduce internment, the removal of large numbers of paramilitaries was considered worth the “political gamble” (McEvoy, 2001, p. 210). Both the Northern Irish and British government justified re-introducing internment as preserving law and order in response to terrorist action due to the failure of the criminal process to do so (Bonner, 2007; Lowry, 1976). Bonner’s more recent research conducted in the National Archives indicates that internment was not re-introduced on security grounds as stated as the official reason, but was in fact motivated by political reasons, including reassuring the Ulster majority and avoiding the introduction of direct rule (Bonner, 2006).

On August 9 1971 Brian Faulkner, the Northern Ireland Prime Minister, re-introduced internment, also known as Operation Demetrius. He proceeded to intern 342 persons that same day (Bonner, 2007; Lowry, 1976; McEvoy, 2001; Spjut, 1986). Again, SPA Regulation 12 provided the legal framework for its justification and introduction. In September 1971, the British Home Secretary, Reginald Maudling, stated that the aim of the internment policy was “to hold in safety, where they can do no further harm, active members of the IRA and, secondly, to obtain more information about their activities, their conspiracy and organisation, to help the security forces in their job of protecting the public as a whole”80 (Spjut, 1986, p. 715). Indeed, the British government claimed to have successfully achieved that aim, citing that around 47 per cent of the initial first day internees were active IRA members (Bonner, 80 H.C. Deb., Vol. 823, col. 8 (22 September 1971)
Internment in the 1970s (2007; Spjut, 1986). Lowry’s assessment of the success rate was less flattering, citing that only four IRA activists from the middle ranks were interned during the first three months, the rest being civil rights activists and intellectuals (Lowry, 1976). The success of the operation was somewhat contradicted by non-official accounts, which are discussed later in this chapter. A further stated objective of both internment and detention was to prevent individuals suspected of terrorist involvement from re-engaging in paramilitary activities upon release (Spjut, 1986). Although some individuals were only suspected of marginal involvement, Spjut contended that the aim of detaining the marginal players was to raise suspicions of disloyalty, eventually leading to rejection by the PIRA.

5.3.1 Internment Procedure

5.3.1.1 Arrest

The way in which individuals were arrested was considered especially brutal (McEvoy, 2001, p. 211). Arrests were made by the British Army and carried out in a very overt manner in front of members of the communities from which these individuals were taken, most of whom were Catholics/Republicans (McEvoy, 2001). Between August 9 and December 14, 1971, 1576 people were arrested and 934 released (Lowry, 1976). Allegations of ill-treatment by the security forces on the ground began to surface. The security forces progressively abandoned their peace-keeping role for a counter-insurgency strategy (Boyle, et al., 1980; Lowry, 1976). Whereas the British Army had intervened in 1969 in the role of peace-keeper, it now went into the offensive against the IRA, thus further alienating the Catholic community and strengthening the support for the IRA (Boyle, et al., 1980; Lowry, 1976). These military tactics increasingly led many politicians and observers alike to question the legitimacy of internment (McEvoy, 2001). The official line was that individuals were selected on the basis of intelligence which pointed to their involvement in paramilitary organisations. Many arrests were made on the basis of either testimony of Special Branch Officers or informants, others on speculation alone, causing many innocent civilians to get interned (Lowry, 1976). According to some observers, the Army’s lack of community rapport within the Catholic communities was partly responsible for the lack of intelligence (Lowry, 1976). This lack of focus led Lowry to describe this as the “revolving door” aspect of internment, highlighting governmental inefficiency (Lowry, 1976, p. 274). Indeed, many internees were later found to be innocent or only marginal players (Diplock, 1972, para 32; McEvoy, 2001). Former Secretary of State for

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81 British troops were brought in to curtail the escalating violence in 1969 (Sullivan, 1990)
Northern Ireland William Whitelaw, in an interview with Robert Spjut in 1984, went on to say that internment could only be justified if you “have really good intelligence” (Spjut, 1986, p. 729) admitting it was not sufficiently good at the time (McEvoy, 2001, p. 211).

One hypothesis for the disparity between Loyalist and Republican arrests\(^\text{82}\) suggests it may have resulted from the Royal Ulster Constabulary’s (RUC)\(^\text{83}\) increased mobility and presence in unionist areas, allowing for better intelligence, thus facilitating prosecutions rather than internment against Loyalists (Spjut, 1986). Indeed, Boyle, Hadden and Hillyard (1980) reported that the Army used internment in Republican areas, whereas the RUC focused on policing Loyalist areas, thus employing more traditional criminal justice routes to deal with unrest. Viscount Whitelaw offered yet a further explanation, suggesting there were different starting points between Loyalists and Republicans with regard to police practice; Loyalists were considered loyal and friendly until proven otherwise, with the opposite applying to Republicans (Spjut, 1986). This assertion also goes somewhat against the above statement of easier intelligence gathering, as it was not deemed necessary for the most part (Spjut, 1986). The RUC’s sectarian bias against the Catholics was also of notable importance, exaggerating IRA activities in bad intelligence and accentuating the tolerance of Loyalist paramilitaries (Spjut, 1986). Spjut stated that if this was indeed the case, “then the high number of Internment Orders issued by the Northern Ireland Government reflects biased, sectarian judgments, rather than simply bad operational assessments. It is not that Catholics were interned because they were Catholics, but because the RUC Special Branch associated the minority community with the I.R.A., they interpreted what evidence they found as evidence of subversion”, i.e. confirmation bias (Spjut, 1986, p. 737). Calls for the law to be applied equally were dismissed, the British government justifying its bias against detaining more Loyalists as not wanting to provoke yet further violence from Loyalist groups (Bonner, 2007; McEvoy, 2001; Spjut, 1986). In addition to the disparities targeting arrests along sectarian boundaries, the politically charged nature of these arrests caused further controversies in detention practices.

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\(^{82}\) See Spjut’s Appendix on page 740 for statistics

\(^{83}\) The RUC was Northern Ireland’s police force until 2000. Much of its mandate was related to counter-insurgency. A review by the Independent Commission on Policing for Northern Ireland chaired by Lord Patten, established as part of the Good Friday Agreement in 1998, paved the way for the new Police Service of Northern Ireland (PSNI) in 2001. For a detailed overview of the changes post Patten, see Hillyard & Tomlinson (2000).
5.3.1.2 Detention and Treatment of Internees

Detaining individuals suspected of paramilitary involvement without trial resulted in deprivation of liberty with no legal recourse for an indefinite period of time. While control orders have at the time of writing never resulted in the deprivation of liberty as defined by Article 5 of the ECHR, it is important to examine the effect of such a measure and its pre-emptive qualities. In Northern Ireland, significant issues arose in relation to the institution in which internees were detained, and under what conditions given that these individuals were, at the time of detention, merely suspected of paramilitary involvement, i.e. they had not been tried or convicted. Ultimately, the treatment of internees further contributed to the growing condemnation of the practice of internment. While some institutions were purpose-built, others were conventional prisons, which still housed ‘common’ prisoners.84 Internees were segregated and subject to administrative detention, with interrogation following arrest (Gross & Ní Aoláin, 2006; McEvoy, 2001). The notion of prisoner ill-treatment is widely documented (Boyle, et al., 1980; Compton, 1971; Gross & Ní Aoláin, 2006; Lowry, 1976; McEvoy, 2001; O Tuathail, 1972; Spjut, 1986). The cases brought before the ECHR in the mid-1970s resulted in several successful claims of internees winning damages, some of which are described in more detail below.

Lowry described how “emotionally charged situations” and “a lack of effective restraints imposed by the rules of evidence” contributed to the intentional abuse of internees, meaning that they were aware that nothing could be done to rectify this situation (Lowry, 1976, p. 282). In some cases, unreliable evidence was backed up by signed statements of admission by the internees which were forcibly obtained after maltreatment (Lowry, 1976). Inadequate and inhumane treatment of internees yet further aggravated the feelings of discontent. The “counter-productive, alienating” methods used were described as being “of doubtful utility”, eventually leading to “deleterious side-effects” (Lowry, 1976, p. 284). A senior psychologist employed by the British government called the treatment of prisoners “singularly stupid and unimaginative” before going on to describing interrogation techniques used as “blunt, medieval and extremely inefficient technique[s]” (Lowry, 1976, p. 284).

In reaction to the maltreatment, some of the internees decided to take a stand and go on hunger strike. Hunger strikes have long been a means of prisoner protest and political weapon

84 Internees were held at the now infamous Maze prison, also known as Long Kesh, an old RAF base turned into a high security male prison, which closed in 2000 after Good Friday Agreement; at Crumlin Road prison in Belfast, Magilligan camp, and even on a prison ship called the Maidstone in Belfast Lough (McEvoy, 2001)
in the Irish struggle even prior to internment (McConville, 2003; McEvoy, 2001). The aim of the strikers in 1972 was to gain political status for all IRA members imprisoned. Forty internees were among the strikers at Long Kesh prison alone. As part of the IRA's demands for agreeing to a cease fire, in June 1972, the Secretary of State for Northern Ireland William Whitelaw granted any prisoner related to the Troubles, as well as the internees, Special Category Status but not political status (McEvoy, 2001). Among other things, internees were allowed to wear their own clothes in place of a prison uniform, as well as granting various other privileges. The prison conditions of internees were akin to prisoner of war conditions, guarded by British army troops and segregated from other prisoners and ensuring certain standards set out in the Geneva Convention (McEvoy, 2001).

However, the flip side of this differential treatment perpetuated the perception within the Catholic community that internees were ‘prisoners of war’, helping to further “radicalize” victims, their families and the community at large (Lowry, 1976, p. 276). As some had predicted prior to its implementation, the operation backfired, creating more outrage and hostility and even greater support for the IRA, even recruitment in prisons, which in turn increased insurgency levels (Dickson, 2009; McEvoy, 2001; Spjut, 1986).

### 5.3.2 Sectarian Bias

One of the main reasons why internment was counterproductive was its alienation of the Catholic minority (Lowry, 1976). Figure 5.1 below illustrates the disparity between the Loyalist and Republican internment. Even at the height of Loyalist activity, only 70 Loyalists were detained at any one time (May 1974); compared to almost 913 Republicans in March 1972, averaging about 550, more than ten times the average Loyalist inmates (McEvoy, 2001; Spjut, 1986). In total, 2060 suspected Republicans were interned between 1971 and 1975, compared to 109 suspected Loyalists (McEvoy, 2001). McEvoy called this a “clear partisan approach to political violence” (McEvoy, 2001, p. 212).
The British government explained this disparity as relating to the greater harm inflicted by Republicans. Table 5.1 examines the associated statistics by comparing the number of fatalities at the hands of Republicans and Loyalists, and comparing them to the mean ratio of internees respectively. Although Republicans were responsible for 70% more fatalities over the entire internment period (709 compared to 423), the numbers indicate a clear disparity in the proportion of internees and fatalities. While it is true to say that Republican fatalities were greater than those at the hands of Loyalists during the first three years of internment, they declined steadily over time, even falling marginally below Loyalist levels in 1974 and 1975. This development was not however reflected in the internment ratio. During the first two years of internment a direct ration could not be calculated due to the lack of interned Loyalists. Even when the fatality ratio was declining, the internment ratio kept increasing, with Republicans outnumbering Loyalists 75:1 in 1975.

Adapted from Spjut (1986), p.740
Table 5.1 - Ratio of Fatalities and Internees by Affiliation, 1971-1975
(adapted from McEvoy, 2001, p. 213 and Spjut, 1986, p. 740)

<table>
<thead>
<tr>
<th></th>
<th>Fatalities at the hands of</th>
<th>Associated mean ratio</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Republicans</td>
<td>Loyalists</td>
<td>Fatalities</td>
</tr>
<tr>
<td>1971</td>
<td>126</td>
<td>21</td>
<td>6 : 1</td>
</tr>
<tr>
<td>1972</td>
<td>255</td>
<td>103</td>
<td>2.5 : 1</td>
</tr>
<tr>
<td>1973</td>
<td>128</td>
<td>80</td>
<td>1.6 : 1</td>
</tr>
<tr>
<td>1974</td>
<td>98</td>
<td>104</td>
<td>0.9 : 1</td>
</tr>
<tr>
<td>1975</td>
<td>102</td>
<td>115</td>
<td>0.9 : 1</td>
</tr>
<tr>
<td>Total</td>
<td>709</td>
<td>423</td>
<td>1.7 : 1</td>
</tr>
</tbody>
</table>

² denotes the mean number of Republicans interned in years where no Loyalists were interned
b based on figures between 1973-1975

Fears about released internees returning to terrorist activities were exaggerated in a local newspaper which quoted allegedly exaggerated figures stating that between 25-33 per cent had resumed service with the PIRA (Spjut, 1986). Official statistics determined that of the 2169 internees, only 108 (5%) were ever charged with terrorism offences.⁸⁵ ‘Recidivism’ also to some extent implies one was involved in it in the first place, which is contestable. Of the 800 released internees between 1972-73, only ten were later charged with offences, three of these had the charges withdrawn (Spjut, 1986, p. 718). Internees generally had few avenues of appeal available to them. Some were released following appeals to the Advisory Committee, which despite comprising a judge, had limited impact on the final decision to release.

⁸⁵ H.C. Deb., Vol. 902, c179W (9 December 1975)
5.4 Evidence and Process

One of the central elements of internment was the detention without charge under Regulation 12 of the SPA. The internee was kept in the dark as to the allegations against them on the grounds of national security, making the mounting of a defence in front of a Review Committee virtually impossible. During internment, the detainees’ advisors had access to all of the same material the Executive did, but individuals’ rights to a fair trial were trumped by concerns over national security (Bonner, 2006). As previously mentioned, many were arrested on the basis of unsound intelligence. No rules of evidence were applied (Lowry, 1976). Lowry illustrated several cases where unreliable evidence was produced to intern individuals. In one case, there was no evidence at all. Relying on unsworn and often uncorroborated evidence should have raised some serious questions as to its admissibility, especially since hearsay evidence is inadmissible at common law (Lowry, 1976). Lowry stated that internment on the basis of such evidence “can at best be considered tenuous, but that a person be deprived of his liberty on the basis of such evidence is wholly unacceptable in any civilized society.” Acceptance of such breaches was described as “regrettable” (Lowry, 1976, p. 305). However, the Lord Chancellor in *Liversidge v Anderson* acknowledged the necessity of having to admit confidential information as evidence during times of emergency on the grounds of national security. Lord Maughan found that the Home Secretary made such decisions in good faith and was accountable to Parliament, not the court (Lowry, 1976).

Internees were excluded from parts of the hearing, thus undermining the procedural safeguards guaranteeing a fair trial. Describing the situation as Kafkaesque, Lowry further stated “it is folly to dispense with these time-honoured safeguards without adequate replacements when liberty is at stake, as the law and the legal system is then, quite properly, brought into disrepute” (p. 306). Perhaps unsurprisingly, even lawyers described these hearings as a farce and ineffective. Interestingly, they went on to describe a presumption of guilt, as opposed to the principle of being presumed innocent until proven otherwise (Lowry, 1976).

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86 [1942] A.C. 206
5.5 Amendments to Internment Procedure

Following the resignation of the Northern Ireland Cabinet after months of unrest in reaction to internment, direct rule was imposed in March 1972. The timing also coincided with the peak in the number of individuals interned at that time, rising to 913 (Spjut, 1986, p. 740). The British government was, in principle, in favour of ending internment once it assumed control, but was keen to preserve the option if needed on the basis of national security, i.e. where they were certain of the terrorist involvement of individuals. The Northern Ireland Secretary of State (NISS) went further to state that it would end as soon as no longer needed, “as soon as the security situation permits” (Spjut, 1986, p. 717). The Secretary of State promised to personally review the case of each internee, resulting in the release of 377 people within two months (Lowry, 1976). Looking for alternatives to internment, the British government introduced the Detention of Terrorists (Northern Ireland) Order 1972, effectively revoking Regulation 12, the previous legal basis for internment orders.

5.5.1.1 Detention of Terrorists (NI) Order 1972

The internment process was eventually amended in late 1972 when the Detention of Terrorists (Northern Ireland) Order 1972 replaced the SPA, introducing quasi-judicial elements. It was expanded to involve two stages: a Detention of Terrorists Order (DTO) authorised the Minister of Home Affairs to issue an Interim Custody Order (ICO) allowing for detention up to 28 days for persons “suspected of having been concerned in the commission or attempted commission of any act of terrorism, or in the direction, organisation or training of persons for the purpose of terrorism.” During that period a legally trained, independent Commissioner would make inquiries as to the individual’s involvement in committing or attempting to commit either an act of terrorism or directing, organising or training of people with a view to committing a terrorist act; as well as ensuring his detention was necessary to protect the public (Lowry, 1976; McEvoy, 2001). Although the Minister for Home Affairs could refer to the Advisory Committee, he was not bound by their recommendations (McEvoy, 2001). If deemed necessary, a detention order was issued. Due to the general hostility to internment, the word

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87 Bloody Sunday on January 30 1972 resulted in 14 deaths at the hand of the British Army, resulting in rising support for the IRA/PIRA
88 He did, however, order the internment of 21 new individuals (Lowry, 1976)
89 SI 1972/1632 (N.I. 15)
90 The definition of terrorism used at the time was “the use of violence for political ends and includes any use of violence for the purpose of putting the public or any section of the public in fear” (Article 2(2), in Lowry, 1976, p. 293).
was removed completely and instead replaced with detention, which Lowry described as “an obvious attempt to sanitize the continued use of internment” (Lowry, 1976, p. 293).

Despite the government’s assertion that detention of terrorist orders (DTO) were notably different from internment, some argued that the aim of the new detention regime was identical. Parliamentary debates\(^9\) highlighted that the government’s priority was to protect “the innocent population against acts of terrorism, devising a new, but, so far as we were able, fair system to deal with the situation” (Spjut, 1986, p. 719). As with internment, Spjut believed that detaining someone on an ICO would taint them. He also believed that they were issued in response to political pressures, explaining the numerous innocent detainees, i.e. those based on poor quality or faulty intelligence, leading to them being described as “hostages” by some MPs due to their minimal risk of re-engaging in paramilitary activities and their staggered release to provide the appearance of a gradual phasing out of detention (Spjut, 1986). Indeed, Spjut even went as far as commenting that “the proper purpose of detention, prevention of serious, violent crimes, appears to have been a formal consideration” (Spjut, 1986, p. 731).

Lowry highlighted that initially the Detention of Terrorists Order Act did not make any reference to the amount or quality of evidence required to ensure the public’s safety. The Northern Ireland Secretary of State later specified guidelines for issuing Interim custody orders (ICO), requiring a minimum of six traces of intelligence ranging from direct evidence of terrorist involvement in a specific act to association with known terrorists (Spjut, 1986). Frequently the numbers were made up with circumstantial evidence. Commissioners also worked to a higher standard of proof than the NISS, needing to be satisfied that there was an involvement in terrorism as opposed to it appearing that a person might be involved in terrorism, the latter allowing for greater flexibility (Spjut, 1986). Detention on the basis of suspicion alone was however also seen as being necessary to protect the public from a further terrorist attack (Spjut, 1986).

**Review Procedure**

Under the SPA, the internee could challenge the administrative decision to intern to an Advisory Committee, comprising one judge and two laymen (Bonner, 2007). The suspect was entitled to a copy of his detention order, providing what Lowry described as “a less than satisfactory review mechanism” (1976, p. 294). The internee had no legal right to appear before or be legally represented in front of the Advisory Committee. Not a single person (at

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\(^9\) H.C. Deb., Vol. 848, col. 47 (11 December 1972)
the time of his writing in 1976) was released due to a judicial review under the Special Powers Act, instead being dependent on the Advisory Committee. But that committee had an advisory role only, meaning it could recommend but not order releases (Dickson, 2009); recommendations which the Executive often chose to ignore (Lowry, 1976). Lowry went as far as to state that the role of the Advisory Committee was to appease public opinion. The Advisory Committee enjoyed little support even from Republicans, whom it was supposedly designed to protect. Ultimately, it only secured 69 releases after reviewing close to 600 or 74% of cases (Bonner, 2007).

Reviews under the DTO involved an evaluation of the executive-issued ICO by both a Commissioner and Appeal Tribunal, in essence, making it a quasi-judicial process (Bonner, 2007). Unlike its predecessor, releases could be ordered, either by the quasi-judicial commissioner or by the Home Secretary himself (Bonner, 2007). Cases were heard by commissioners, who were meant to be removed from political pressures, administering purely legal criteria (Spjut, 1986). It is important to highlight that the members of the Appeal Tribunal as well as the Commissioner were appointed by the Home Secretary. Detainees had the right to appeal within 21 days. While the new procedures entitled the internees to be informed of the case against them as long as this did not interfere with security concerns, Bonner (Bonner, 2007) highlighted the similarities with contemporary control order proceedings with cases being heard in private, and involving closed sessions. Non-standard evidence was admissible, the burden of proof being “a very high degree of probability” (McEvoy, 2001, p. 214) and witnesses’ identity was protected (McEvoy, 2001). Between November 1972 and September 1973, the new Commissioners reviewed close to 600 cases, half of them relating to the ICOs made, the rest comprising former internments or detentions. 126 cases resulted in the release of the individual, the rest were given detention orders.

Bonner (2007) found that 166 interim custody orders were sought under the Detention of Terrorists Order Act, 128 (77%) of which were converted into detention orders, and 94 individuals (57%) were released in a three month period ending February 1 1973. Despite the ICO’s duration of 28 days, by April 1973 the average detention period was six weeks, 42 days, yet further increasing in subsequent months, which according to Spjut may have been at least in part due to Loyalists requesting adjournments, until reaching six months by the end of 1974 (Spjut, 1986). One of the effects of the DTO might also have been a significant decrease in the number of releases made by commissioners (Spjut, 1986). The quality of the required evidence

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92 His words were “a sop to public opinion” (p. 288)
93 Both the Tribunal members and the Commissioner had extensive legal experience (Bonner, 2007)
Amendments to Internment Procedure

for detention may have been affected by Loyalists pressuring for increasing numbers (Spjut, 1986). Indeed, Spjut (p. 722) stated that 39% of cases heard in the November 1972 were released, compared to only 29% over the whole of 1973.

5.5.2 Diplock Report

Many concerns relating to the situation in Northern Ireland arose from “incompatible principles” (Boyle, et al., 1980, p. 88), and the criminal justice system being ill equipped to handle politically motivated violence (Diplock, 1972; McEvoy, 2001). A jurist highlighted that despite the initial preventive aim of internment, its execution was largely punitive (Lowry, 1976). Internment did not alter the rule of law, rather “detention offered a temporary substitute” for it (McEvoy, 2001, p. 223). In the case that sufficient evidence could be gathered against an internee, the preferred route would be prosecution (McEvoy, 2001). Despite the latter assertion, neither party was willing to abandon internment if the security situation would suffer as a result (McEvoy, 2001). In October 1972, seven months after the imposition of direct rule, the British government established a Commission on legal procedures to deal with terrorist activities in Northern Ireland, to recommend more effective measures than internment to deal with terrorist organisations and individuals involved in planning and committing terrorist acts (Bonner, 2007; Diplock, 1972).

The Diplock Report, named after the Committee’s chair Lord Diplock, was submitted to Parliament in December 1972. The Report identified three issues affecting the successful prosecution of suspected terrorists in criminal procedures: witness and juror intimidation; the admissibility of confessions; and jury bias (Boyle, et al., 1980). In its summary of conclusions, the Committee found that the main obstacle to criminal prosecution of terrorist suspects was the intimidation of potential witnesses, which in their opinion could not be addressed by making changes to the conduct of the trial, the rules of evidence, or the onus of proof. Due to the proliferation of witness intimidation, an extra-judicial process imposed by the Executive was, in their opinion, unavoidable. The Committee did, however, recognise that while the extra-judicial detention process did provide safeguards, it would never appear as legitimate as those available to a criminal defendant; which is why it wanted to amend criminal procedure in a way that would allow some cases to be heard in a court of law rather than detention. The Committee’s recommendations aimed to modify the criminal justice system to deal with and facilitate the conviction of terrorist suspects by addressing the admissibility of evidence (Boyle, et al., 1980; McEvoy, 2001). Confessions should be admissible as evidence unless obtained
under torture or other inhumane treatment. The central recommendation of the Report was that for the duration of the emergency, scheduled offences\(^94\) should be tried in jury-less courts, presided over by a single High Court judge,\(^95\) with the usual appeal rights in place. In addition to jury-less courts, the Committee recommended expanding both military and police powers to stop, question, search, cease, arrest and detain individuals suspected of having been involved in, or having information about, offences (Diplock, 1972, paragraphs 42-50; McEvoy, 2001). Bail for scheduled offences should be denied unless granted by the High Court under stringent terms and conditions. Moreover, in firearms or explosives cases, the onus of proof should be altered to require the defendant to prove their ignorance of said possession on the balance of probabilities.

The essence of detention without trial is a lack of sufficient evidence for criminal prosecution (Lowry, 1976). However, the Diplock Report rejected the notion that the rules of evidence should apply in the same way for scheduled offences as in a criminal trial (Lowry, 1976). In the committee’s view, some of the intelligence was so convincing that anyone with any common sense would find that person guilty in a court of law, even if it was based on statements from witnesses who were unable to be questioned by the defence or even be questioned by the judge (Diplock, 1972, para 28; Lowry, 1976, p. 295). The recommendation put forward in the report was that “the Commissioner and Appeal Tribunal should continue to intern on the basis of hearsay, uncorroborated evidence, evidence not subject to cross-examination, in camera evidence with the identity of the witnesses undisclosed, and the reception of evidence with the internee and his lawyer excluded from proceedings” (Diplock, 1972, paras 32 & 33). Somewhat contradictory to their earlier assertion of reliability and persuasiveness, the report acknowledged that some of the intelligence was “inadequate and inaccurate”, finding that many internees were actually either innocent or marginal players at the most (Diplock, 1972, para 32; McEvoy, 2001). Yet despite these shortcomings, the Diplock Report found that this did not amount to arbitrary imprisonment by the Executive (Lowry, 1976). That being said, it suggested that lessons had been learnt and that such errors, although inevitable on occasion, were thus less likely to be repeated (Lowry, 1976).

In response to the recommendations contained in the report, the *Northern Ireland (Emergency Provisions) Act 1973* was introduced. Various changes were introduced, including alteration of the burden of proof, abolishing trial by jury; with the aim of facilitating the prosecution of terrorists (Boyle, et al., 1980; Lowry, 1976; Spjut, 1986). The first jury-less courts, known as

\(^94\) Terrorism-related offences such as murder, GBH, explosives and firearms offences.
\(^95\) Or County Court Judge
Diplock Courts, were introduced in August 1973. Although the aim of these changes was to address some of the criticisms raised with the internment system, they attracted a large amount of criticism of their own. Diplock courts were intended to be temporary, but were not abolished until over twenty years later. The reliance on Diplock courts increased with decreasing numbers of internees. In the end, between 1973 and 1994, over 10,000 defendants were tried without a jury (McEvoy, 2001). Diplock courts have proven divisive. On the one hand, Boyle, Hadden and Hillyard (1980) described them as the only practical way to phase out internment, and ultimately preferable to detention without trial. On the other, a lawyer involved in a review of a hearing process commented that “these procedures would be unthinkable in any system in the Western world”, especially in light of guaranteeing the right to a fair trial (Lowry, 1976, p. 297). Interviews with lawyers at the time indicated a strong sense of a biased system against internees, making a mockery of the appeal process (Lowry, 1976). Indeed, the quasi-judicial process introduced to alleviate concerns around internment began to attract growing criticism of its own.

5.5.3 Gardiner Report

Mounting concern over internment practices was addressed after Harold Wilson’s Labour government came into power in October 1974. Shortly thereafter, a committee headed by Lord Gardiner was established to examine provisions that were capable of dealing with the terrorism situation in Northern Ireland, whilst being consistent with human rights and civil liberties provisions. Moreover, it was tasked to evaluate the implementation of the Northern Ireland (Emergency Provisions) Act 1973 introduced in response to the Diplock report. In essence, the report published in late January 1975 found that the British government had consistently acted within the ECHR and respected civil liberties, leading observers to label it as unsatisfactory, disappointing, even farcical (Lowry, 1976; McEvoy, 2001). Lowry described the Gardiner Report as failing to examine the root causes of terrorism in the Province, as well as recognizing that denying self-determination might lead to political violence, nor did it attempt to propose any potential recommendations in an effort to try and end the conflict.

The Gardiner Report recommended retaining the Diplock courts in terrorism cases, but repealing the admission of written statements as evidence (Gardiner, 1975). Certain practices, such as the use of hearsay evidence, though admitted to, were justified as having applied a sufficient standard of proof, i.e. ‘a very high degree of probability’ (Lowry, 1976, p. 310). Although the report acknowledged the severity and consequences of detention, it found that
the level of violence in the Province at the time, as well as the unforeseeable end to it, prevented them from recommending the end of internment (Gardiner, 1975). Moreover, the government should make the decision about who to detain; but this should be used in restraint and only in extreme circumstances for the minimum time necessary (Gardiner, 1975; Lowry, 1976). Again, the need to protect the public from such individuals was highlighted as the justification for detention via extra-judicial process (Lowry, 1976). Even though the report recommended introducing a Detention Advisory Board to safeguard against arbitrary abuse, the internee was still denied the right to counsel (Lowry, 1976). Lowry highlighted the Report’s acknowledgement of this deprivation, which it justified by saying that this method, compared to the adversarial quasi-judicial method, increased the chances of getting the truth. The new system was even further removed from the adversarial tradition, introducing quasi-judicial practices which, according to McEvoy (2001) and Lowry (1976, p. 313), bear no resemblance to common law procedures.

However, the report did acknowledge some shortcomings in the way the British government handled the situation in Northern Ireland. For instance, it found that internment had "brought the law into contempt", and created backlash (Gardiner, 1975, p. 43; McEvoy, 2001, p. 216). Moreover, it admitted that introducing Special Category Status for internees was a “serious mistake” (McEvoy, 2001, p. 228), recommending the end of Special Category Status for prisoners. It was eventually phased out in March 1976 (Boyle, et al., 1980). With regard to emergency powers, paragraph 21 stated that

“The continued existence of emergency powers should be limited both in scope and duration. Though there are times when they are necessary for the preservation of human life, they can, if prolonged, damage the fabric of the community, and they do not provide lasting solutions. A solution to the problems of Northern Ireland should be worked out in political terms, and must include further measures to promote social justice between classes and communities. Much has been done to improve social conditions in recent years, but much remains to be done... Consideration should be given to the enactment of a Bill of Rights. Measures of social reform may not produce immediate results in the reduction of violence. In Northern Ireland memories are long, and past oppression serves to colour present experience; but a more united community is the only real answer to the dilemma of maintaining peace while preserving liberty.”
The mounting criticism of the British handling of the situation in Northern Ireland culminated in its decision to abandon internment.

5.6 Abolition

The British government eventually acknowledged that the levels of violence had escalated since the introduction of internment. Many scholars and politicians have since criticised internment, describing it as everything from a complete disaster to a debacle. After a gradual phasing out, internment was eventually abolished in December 1975 (Bonner, 2007). Its legal basis, however, remained in the books until 1998.

Lowry did not believe the British move away from internment was due to ethics, morals or indeed legal issues, but that it had more to do with its ineffectiveness and the escalation of violence (Lowry, 1976). In fact, there are several examples in the literature of the backlash created by internment (Bonner, 2007; LaFree, et al., 2009; Spjut, 1986). LaFree and Dugan empirically tested events following various strategies implemented by the British Government in response to the Troubles in Northern Ireland. Based on their analysis of twenty-three years of data in Northern Ireland they found more evidence suggesting such interventions, including internment, resulted in a so-called backlash effect (where interventions increase incidents of terrorism) as opposed to having the desired deterrent effect (LaFree, et al., 2009).

A further implication of internment was the diminished credibility of the Judiciary, due to its entanglement in divisive political affairs. In this regard, Lowry (1976) contended that the reasonableness of executive action was not sufficiently scrutinised, thus failing “to protect the public from arbitrary abuse of emergency internment powers” (p. 326). The European Court of Human Rights was asked to adjudicate on several of the issues relating to the protection of human rights during an emergency in the case of Ireland v United Kingdom. Indeed, the controversial interrogation measures used by the British forces were found to amount to inhuman and degrading treatment, thus violating Article 3 of the ECHR; however, it was ruled

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96 Secretary of State for Northern Ireland Merlyn Rees H.C. Deb., Vol. 901, cc1908-9 (4 December 1975): “I should also point out that since detention was introduced the level of violence has been consistently higher than before, and that there is no direct correlation. Last year I personally detained a large number of men—I think about 400—under interim custody orders. That was done not because I believed that detention would end the violence, but because it undoubtedly dampens down any great escalation of violence. We might have to return to it again. This year more than 1,260 people have gone through the courts. I believe that that is the method that we should use, rather than of detention.”

that they fell short of torture (Bonner, 1978). As for the avenues of appeal available to internees, the European Court decided that given the lack of an independent and binding avenue of appeal, the deprivation of liberty exercised under one of the three statutes authorising internment was not covered by Article 5 of the ECHR. While the declaration of an emergency was not contested, Bonner highlighted that the issue at stake in *Ireland v UK* was whether internment was “strictly required by the exigencies of the Ulster situation” (Bonner, 1978, p. 904).

Finally, there were several indications that internment was used as a political bargaining chip on both sides. For instance, the nationalist Social Democratic and Labour Party (SDLP) refused to resume political talks about a settlement until internment had ended (Spjut, 1986). There was also speculation that British reluctance to negotiate and its handling of internment was a reflection of accommodating Unionist demands (Bonner, 2007; McEvoy, 2001). For example, detainee releases were staggered due to the concern that a release en masse would provoke a strong Protestant reaction (Spjut, 1986).

The severity of internment and its inherent discrimination led to fervent reactions, both from the community singled out by the British Army, as well as politicians, eventually resulting in the abolition of the practice. The control order regime in the UK, on the other hand, though controversial, neither had the same political leverage as internment, nor did it ever compromise the role of the Judiciary to the same extent. In fact, unlike internment, many of the most significant changes to the control order regime were brought about via legal challenges. Nevertheless, several characteristics of internment bear similarities to the control order regime. The following section identifies the pre-emptive characteristics of internment, before moving on to the detailed analysis of control orders in Chapters 6 and 7.

### 5.7 The Pre-emptive Characteristics of Internment

This chapter has examined the pre-emptive rationalities underlying internment in Northern Ireland between 1971 and 1975. Internment differs from other frequently mentioned historical antecedents such as pre-trial detention or indeterminate sentencing in that internees are not detained whilst awaiting charge and trial, nor do they get sentenced (Lowry, 1976). The reason for this is that internment sits externally to the criminal justice process as an administrative measure introduced to deal with a perceived emergency. Internment in Northern Ireland was introduced under emergency legislation in the wake of escalating violence following civil rights
protests by the Catholic minority in the province. Declaring a state of emergency justified severe measures, such as detention on executive recommendation to protect the public and preserve order. Emergency legislation also provided the foundation for a more military driven counter-insurgency approach, giving the army greater powers to arrest and detain. However, despite the Gardiner Report reiterating that emergency powers should be temporary, internment lasted for close to four and a half years. The situation in Northern Ireland is different from most other emergencies due to the prolonged nature of the crisis. Ulster was governed by emergency rule for over 35 years in the last instance before finally getting back to ‘normal’ in 2007, thus constituting a clear example of the exception becoming the norm.

There have been multiple statutes introduced in reaction to terrorism in the UK which started out as a temporary provision, but ended up in the statute books permanently. Probably the most well known of these is the Prevention of Terrorism (Temporary Provisions) Act 1974 introduced in response to the Birmingham pub bombings. 99

A common feature of such legislation appears to have been the speed at which these acts were passed in parliament. 100 Internment was criticised for its hasty reintroduction (Spjut, 1986), as was the PTA 1974, raising questions as to the lack of “meaningful debate”, especially given the potential consequences of these measures (Gross & Ní Aoláin, 2006, p. 72). However, the state of emergency in Northern Ireland was not contested, 101 thus legitimising rapid administrative, executive and parliamentary action in the name of national security.

Criticism has also been voiced at the role of internment for its role in diminishing the credibility of the Judiciary. The initial establishment of a non-judicial advisory committee to oversee the review process was widely criticised for serving to appease public opinion rather than the internees. The subsequent amendments to criminal procedure introduced in the wake of the Diplock Report enabled some cases to be dealt with by a court of law rather than by way of detention. This could be interpreted as an attempt at legitimising a controversial mechanism by means of introducing new governmental strategies to reduce public outcry and the

98 Part VII of the Terrorism Act 2000 (UK) contained temporary provisions (subject to annual renewal) to combat terrorism in Northern Ireland. The government introduced the Terrorism (Northern Ireland) Act 2006 to extend these provisions until July 2007, when they were repealed as part of the security normalisation programme (Statistics and Research Branch, 2011). On a related note, the Terrorism (Northern Ireland) Bill added control order-related offences set out in s 9 of the PTA 2005 to its list of scheduled offences, meaning that these may have been tried in Diplock courts in Northern Ireland. 99 Amended in 1975 and 1983, it was subsequently re-enacted in 1984 and made permanent fifteen years after its introduction in 1989. Only a year later it was replaced by the Terrorism Act 2000. 100 The 118 page Anti-Terrorism, Crime and Security Bill, introduced after 7/7, was pushed through parliament in 16 hours (Gross & Ní Aoláin, 2006). 101 Ireland v the United Kingdom (1976) YB Eur.Conv.on Human Rights 512 (Eur.Comm. of Human Rights) (Report of the Commission).
resulting violence. However, the introduction of jury-less trials into the British system moved its judicial process to resemble the inquisitorial system. Further evidence of this shift was the lack of a right to counsel.

The role of the Executive in issuing interment orders was further supported by the reliance on intelligence information, which formed both the basis of arrest, and was relied upon in the case against internees. Even after the Diplock Report had highlighted serious shortcomings with regard to the reliability of intelligence information, it continued to form the basis of subsequent trials in front of Diplock courts.

The aims of Internment Orders, Detention Orders and Interim Custody Orders were to “prevent persons suspected of involvement in politically motivated, serious, violent crime from remaining at large” (Spjut, 1986, p. 738), i.e. incapacitation, as well as to gather intelligence on ongoing or future operations from internees. Spjut highlighted that internment, though intended to act as a “regime of preventive restraint”, was never administered as such. Two issues arose: can preventive detention without a finding of guilt be construed as preventive, and how much were internment and its internees used for political ends? The first question revives some of the same arguments as in previous chapters, such as even if the intent may have been preventive, its execution may be interpreted as being punitive. This subsequently had a knock-on effect on the political situation. For instance, McEvoy (2001) argued that prisons were used to contain paramilitary actors pending a political solution. Similarly, both Bonner and Spjut have argued that internees were political pawns used to bring about a political settlement.

Faced with escalating violence, the British government realised its internment strategy was failing to have the desired effect. Growing criticism of the practice saw the government introduce legislative amendments containing important changes in terminology in an effort to remove the negative connotations associated with internment, which was subsequently referred to as detention.

Returning to the pre-emption rationale, McEvoy (2001) referred to internment as a reactive containment strategy. While the government may have introduced internment in reaction to escalating violence in a bid to contain it, I would argue that most strategies are introduced in reaction to a particular situation or event. It thus becomes important to examine whether or not the strategy in question aims to prevent future occurrences of said event. Given that a large proportion of internees were never charged with any offences, one might conclude that the rationale for internment was largely pre-emptive, a strategy which enjoyed only marginal
success at targeting potential terrorists. Had these individuals been arrested and detained on the basis of reliable evidence as opposed to often unreliable intelligence, prosecution would have been a viable alternative. By casting the net as wide as it did, the strategy of internment aimed at preventing violence appears to have achieved the opposite through its biased implementation.

5.8 Summary

Internment has been widely criticised and condemned, both in terms of its human rights violations and the subsequent escalation of violence. Lowry did not rule out the future use of internment in the UK “during periods of political strife and societal unrest”; in fact he went as far as confidently predicting its future use in Britain (Lowry, 1976, p. 314). While Bonner (2006) cogently argued that responding to security threats by detention without charge in cases with no evidence and on the basis of potential threat risks destabilises the very foundations of liberal societies, internment would not be the last time the British government resorted to including similar legislation in the books (Bonner 2006). McSherry (2006) pointed out that the existence of historical exceptions does not justify them. Internment may have been removed from the books in 1998, but the control order scheme introduced in 2005 bears remarkable similarities. Indeed, the analysis of internment as a historical precedent has highlighted several parallels with the contemporary control order regime. These can be summarised as follows:

1. The emergency becomes the justification for extraordinary measures;
2. Legislation is rushed through parliament without proper debate due to the emergency;
3. The role of the Judiciary becomes blurred, even compromised;
4. Development of new legal tools of control, such as Diplock Courts;
5. Reliance on intelligence, rather than evidence;
6. Focus on prevention;
7. Continual adaptation of mechanism and/or terminology in reaction to critique.

Having identified the characteristics of a pre-emptive anti-terrorism measure via a historical case study, I now turn to examining the contemporary measure. The following two chapters provide a detailed analysis of the statutory provisions giving rise to the control order scheme in both the UK and Australia, as well as a comprehensive examination of their implementation in both jurisdictions.
6 Control Orders in the Books

6.1 Introduction

While the previous chapter explored historical pre-emptive legislative strategies via the example of internment, this chapter returns to the contemporary example of control orders. Having selected control orders as the primary technology through which to examine pre-emptive legislation, the aim of this chapter is to conduct a statutory analysis of the legislation providing their legal foundation. I begin by providing a brief account of the developments immediately preceding the introduction of the control order regime in the United Kingdom, before providing an overview of the provisions contained within the Prevention of Terrorism Act (PTA) 2005, describing the two types of control orders and the procedure involved in issuing them. The same procedure is then repeated for the Australian Anti-Terrorism Act (No. 2) 2005, highlighting similarities and divergences between the two statutory instruments, before concluding with an examination of the underlying theoretical framework.

As the previous chapter has indicated, the United Kingdom has a long history of dealing with terrorism through law, be it administrative or criminal, both reactively and pre-emptively. In the wake of September 11, Parliament hastily introduced further legislation, the Anti-Terrorism, Crime and Security Act 2001 (ATCSA) (S. Macdonald, 2007). Its most controversial provision enabled the Home Secretary to detain foreign nationals suspected of terrorism, indefinitely and without charge or trial. Appeals, only able to be taken on decisions on points of law, were limited to a closed Special Immigration Appeals Commission (SIAC). Other powers included granting the police and security services, the power to request disclosure of personal records by public bodies, including schools, hospitals, and inland revenue, in terrorism and criminal investigations; freezing of assets of terrorist suspects by both law enforcement agencies and the Treasury; introducing new offences related to chemical, nuclear or biological weapons; requiring transport carriers to disclose passenger information; communication service providers to retain and make available their data; and finally, obliging financial institutions to flag any suspected terrorist financing to law enforcement agencies. However, a committee of Law Lords in A and others v Secretary of State for the Home Department found that Part IV of the ATCSA 2001, i.e. the power to indefinitely detain foreign nationals suspected of posing a terrorist threat without trial, was incompatible with

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102 See for example Shah (2005) for a more in depth analysis of the ATCSA 2001
103 Including foreign agencies
the European Convention on Human Rights.\textsuperscript{105} The Law Lords found the powers to be discriminatory against foreign nationals, and a disproportionate response to the level of threat\textsuperscript{106} (S. Macdonald, 2007). Within three months of the judgment, the government passed the Prevention of Terrorism Act (PTA) 2005, replacing the unlawful detention\textsuperscript{107} with a two-tiered control order regime in March 2005. Unlike the previous measures, however, control orders are not limited to foreign nationals. The Home Secretary described them as a mechanism to contain and disrupt individuals who cannot be prosecuted or deported.\textsuperscript{108} Originally, like many British anti-terrorism laws, the PTA was intended to be a temporary measure due for review a year after its introduction. However, in response to the London bombings in July of that year, the Home Secretary renewed the PTA at the same time as introducing the Terrorism Act 2006. The PTA has been renewed annually ever since.

To briefly recap, the aim of control orders is to protect the general public from a risk of terrorism by imposing obligations on individuals who are suspected of involvement in terrorist-related activities so as to restrict or prevent these individuals from further involvement in said activities.\textsuperscript{109} Control orders are technically civil measures, although a breach of an obligation constitutes a criminal offence, punishable with up to five years imprisonment. They are issued by a court at the request of the Home Secretary. The burden of proof for the non-derogating control order is not the traditional civil one of on the balance of probabilities, but an even lesser standard of reasonable ground for suspicion (see Appendix B).

A few months after their inception in the UK, Australia also introduced control orders as part of its extensive new anti-terrorism legislation. However, the British and Australian provisions differ significantly on the severity of restrictions, principally due to the Australian scheme not providing for detention of the individual. The next section examines the British legislation with its provision for both derogating and non-derogating varieties of control orders.

\textsuperscript{105} For an in-depth overview of the history and run up to A (FC) and others (FC) v Secretary of State for the Home Department [2004] UKHL 56, see Bonner (2006) pages 53-59.
\textsuperscript{106} H.C. Deb., Vol. 430, col. 305 (26 January 2005)
\textsuperscript{107} The PTA 2005 repealed s 21 to s 32 of the ATCSA 2001, repealed s 62(15) & (16) and Sch. 7 para 30 of the Nationality, Immigration and Asylum Act 2002, as well as amending several other statutes, including the Terrorism Act 2000.
\textsuperscript{108} H.C. Deb., Vol. 430, col. 307 (26 January 2005)
\textsuperscript{109} PTA, s 1 (1) & (3)
6.2  British Control Orders – The Origin of Two Species

There are two types of control orders set out in the Prevention of Terrorism Act (PTA) 2005, namely the derogating and the non-derogating order. The distinction by derogation pertains to the UK’s obligations as a signatory of the European Convention on Human Rights (ECHR), whereby Article 5 prohibits the detention of an individual without due process of law. Prior to a control order of either type being made, the Home Secretary is required to liaise with the police to determine whether there is sufficient evidence against that individual to be used for the purposes of prosecution.110 Throughout the duration of the control order, the police are required to continually review the individual’s conduct with a view of prosecution.111 I briefly outline the difference between the two species, beginning with the non-derogating order, as this is the only type which has been issued to date.

6.2.1  The Non-Derogating Control Order

A non-derogating control order severely restricts an individual’s liberty by imposing a range of conditions on a person suspected of involvement in terrorism. Section 1(3) states:

\[\text{The obligations that may be imposed by a control order made against an individual are any obligations that the Secretary of State or (as the case may be) the court considers necessary for purposes connected with preventing or restricting involvement by that individual in terrorism-related activity.}\]

In practice, obligations translate to restrictions on the controlee’s belongings, activities, ways of earning a living, association, place of residence and who is allowed to enter it, imposition of curfews, travel restrictions (including surrendering his or her passport), and having to report at particular times and places, to name but a few. A list of the restrictions as listed in Section 4 of the PTA is included in Appendix C. Section 4 is intended to act as a guideline only and is by no means an extensive list. For instance, whether or not the controlee is required to be electronically tagged is at the Home Secretary’s discretion.

110 S 8(2)
111 S 8(4)
As for the alleged involvement in terrorism-related activity, it not only covers the more commonly assumed stages of an offence, i.e. commission, preparation or instigation,\textsuperscript{112} but any conduct facilitating, intending to facilitate or encouraging either of those stages, as well as assisting individuals who are or are suspected of being involved in any terrorism-related activity.\textsuperscript{113} Examples of such offences include writing, publishing or distributing material glorifying terrorism; publicly advocating or preaching, and encouraging others to commit terrorist acts.\textsuperscript{114}

6.2.1.1 Issuance of NDCO

Section 2 (1) states that a non-derogating control order (NDCO) can be issued by the Home Secretary if he/she

(a) has reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity; and

(b) considers that it is necessary, for purposes connected with protecting members of the public from a risk of terrorism, to make a control order imposing obligations on that individual.

A non-derogating control order is in effect for twelve months, and can be renewed for the duration for which the Home Secretary (HS) believes s 2(1) still applies.\textsuperscript{115} Once a NDCO has been issued, it needs to be approved by a High Court judge within seven days.\textsuperscript{116} The court’s function is to determine whether the grounds on which the HS had put forward the proposal are “obviously flawed” (s 3(2)(a)). If it considers the proposal viable, a hearing must be set up. However, the individual in question is not required/permitted to be present in court (\textit{ex parte}), nor notified of the application being made, nor given the chance to represent himself.\textsuperscript{117} If the court finds flaws in the HS’s reasoning, or the obligations proposed, the order or that particular obligation must be overturned, otherwise, the order must be confirmed.\textsuperscript{118} Upon confirmation, the individual in question is notified of the order made against him.\textsuperscript{119} As for what constitutes flaws in the HS’s reasoning, the PTA sets out that “the principles applicable on an application

\textsuperscript{112} S 1(9)(a)
\textsuperscript{113} S 1(9)(b)-(d) respectively
\textsuperscript{114} Subsequently, the \textit{Terrorism Act 2006} criminalised directly or indirectly to encouraging the commission, preparation, or instigation of acts of terrorism or to disseminate terrorist publications.
\textsuperscript{115} Ibid, s 2(4) & (6)
\textsuperscript{116} Ibid, s 3(1)(a) & 3(4)
\textsuperscript{117} Ibid, s 3(5)(a), (b) and (c) respectively
\textsuperscript{118} Ibid, s 3(6)
\textsuperscript{119} Ibid, s 3(9)
for judicial review” apply,\textsuperscript{120} i.e. illegality, procedural impropriety and irrationality, the so-called Diplock Trilogy (Bonner, 2006). In other words, the court has the power to overturn the use of executive powers if they violate basic judicial principles such as due process in a particular case.

Obligations set out in the original NDCO may be modified, both at the suggestion of the controlee, or the HS.\textsuperscript{121} The HS may also decide to revoke a NDCO.\textsuperscript{122} Interestingly, s2(9) highlights that all the imposed obligations do not have to relate to preventing the event for which the individual came under suspicion in the first place – in effect, giving the Home Secretary somewhat of a carte blanche to impose additional restrictions.

As previously stated, although the control order is a civil measure, any breach of obligation leaves the controlee open for criminal prosecution. Section 9(1) states:

\begin{enumerate}
  \item A person who, without reasonable excuse, contravenes an obligation imposed on him by a control order is guilty of an offence.
\end{enumerate}

Further, more specific breaches are outlined in subsequent sections of the PTA, such as re-entering the United Kingdom after the expiry of an order,\textsuperscript{123} not reporting to a specified person,\textsuperscript{124} or obstructing a designated person from entering his house.\textsuperscript{125} If the controlee is found guilty, he faces imprisonment for up to five years and/or a fine.\textsuperscript{126}

\section*{6.2.2 The Derogating Control Order}
In contrast to the NDCO, the derogating control order (DCO) is a custodial measure, which deprives the individual of his or her liberty. It is called derogating as this provision imposes a serious restriction on human rights and would require the UK to opt out of, or derogate, from Article 5 of the European Convention on Human Rights (ECHR) which states that “a government cannot deprive any person of their liberty without due process of law”, except in an emergency, as stated in Article 15(1):

\begin{itemize}
  \item Ibid, s3(11)
  \item S 7(1)
  \item S 7(2)
  \item S 9(2)(b)
  \item S 9(2)(d)
  \item S 9(3)
  \item S 9(4)(a)
\end{itemize}
In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

6.2.2.1 Issuance of DCO

If the Home Secretary applies for a DCO to be made, the court must immediately hold a preliminary meeting to determine whether derogating obligations are to be imposed. Even when derogating from established principles, the preliminary hearing can be held without the individual in question, without him or her being aware of the application made, and with no representation in court. The court can approve the DCO against the individual if it believes the following apply:

(a) that there is material which (if not disproved) is capable of being relied on by the court as establishing that the individual is or has been involved in terrorism-related activity;
(b) that there are reasonable grounds for believing that the imposition of obligations on that individual is necessary for purposes connected with protecting members of the public from a risk of terrorism;
(c) that the risk arises out of, or is associated with, a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the Human Rights Convention; and
(d) that the obligations that there are reasonable grounds for believing should be imposed on the individual are or include derogating obligations of a description set out for the purposes of the designated derogation in the designation order.

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127 S 4(1)(a)
128 S 4(3)
Upon agreement of the necessity of the derogation, obligations considered necessary are imposed and a full hearing is called,\textsuperscript{129} where the order is either confirmed or revoked.\textsuperscript{130} If confirmed, modifications to the obligations can be made.\textsuperscript{131} The court needs to be satisfied of the following conditions prior to confirmation:\textsuperscript{132}

\begin{quote}
(a) it is satisfied, on the balance of probabilities, that the controlled person is an individual who is or has been involved in terrorism-related activity;
(b) it considers that the imposition of obligations on the controlled person is necessary for purposes connected with protecting members of the public from a risk of terrorism;
(c) it appears to the court that the risk is one arising out of, or is associated with, a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the Human Rights Convention; and
(d) the obligations to be imposed by the order or (as the case may be) by the order as modified are or include derogating obligations of a description set out for the purposes of the designated derogation in the designation order.
\end{quote}

The individual in question may be arrested and detained by a police constable once the Home Secretary has applied for a DCO to be made if he/she believes the detention to be necessary so as to be available to be informed of the order made against him.\textsuperscript{133} He may be detained for up to 48 hours initially, extendable by another period of 48 hours, 96 hours in total maximum.\textsuperscript{134}

The duration of a DCO is half that of a NDCO, 6 months. It is, however, renewable “on as many occasions as the court thinks fit”\textsuperscript{135} as long as the risk to the public is still great enough to warrant such measures to protect them from a terrorism-related activity. That being said, section 4(11) also provides for an extension of the duration of a DCO in cases where court

\textsuperscript{129} S 4(1)(b)
\textsuperscript{130} S 4(5)
\textsuperscript{131} S 4(6)
\textsuperscript{132} S 4(7)
\textsuperscript{133} S 5(1)
\textsuperscript{134} S 5 (3) & (4)
\textsuperscript{135} S 4(10)
proceedings might extend beyond the end date of an order to avoid liberating the individual prior to re-imprisoning him again upon renewal.

If a derogating control order is to be served, the Home Secretary must bring a draft before both Houses of Parliament for approval\(^{136}\) within forty days of it being served. If it is not approved, the DCO is void after 40 days. In effect, this means that an individual may be ‘legally’ detained for 42 days prior to his release, even if no DCO gets issued. Rights for suspects established under the Terrorism Act 2000 apply, i.e. being able to contact a lawyer and informing someone of their detention. Even in DCO cases, suspects are not required to be informed of the charges against them, nor to be present at the preliminary hearings.

DCOs have, at the time of writing, never been issued or sought, leading some observers to see them as more of a symbolic concern (Zedner, 2007b). However, given Britain’s use of internment to deal with terrorism in Northern Ireland, the fact that such a provision was reintroduced into the statute books suggests that their use cannot be completely ruled out.

### 6.2.3 Reporting Requirements

The Home Secretary is required to submit a quarterly report on the exercise of control orders to Parliament. In addition, the PTA provided for the appointment of a reviewer of the Act. The Independent Reviewer of Terrorism Legislation, a position occupied by Lord Carlile of Berriew QC until February 2011,\(^{137}\) is required to submit annual reports on the use of control orders, i.e. the implications for operation and the extent to which control order powers have been used, to the Home Secretary, who then lays it before Parliament. These reports ensure a form of political accountability (Lynch, 2005). Lord Carlile’s reports are further examined in the next chapter pertaining to control order implementation.

### 6.2.4 Appeal Process

A controlee may appeal if their NDCO is renewed, or his obligations are amended without notification. Section 10(1)(b) actually states “an obligation imposed by such an order has been modified without the consent of the controlled person” but I would assume most controlees don’t actually consent to any of these restrictions being imposed on them (without due

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\(^{136}\) S 6(3) & (5)

\(^{137}\) Lord Carlile was succeeded by David Anderson Q.C. on 21 February 2011
process). The function of the court in such cases is identical to the initial hearing, where it has to determine any flaws in the Home Secretary’s reasoning and to prevent the controlee from engaging in terrorism-related activities.\textsuperscript{138} Should his or her reasoning be found to be flawed, the court has the power to a) quash the renewal; b) quash one or more obligations imposed by the order; or c) give directions to the Home Secretary to revoke the order or to modify its obligations.\textsuperscript{139} Otherwise, the appeal must be dismissed. Finally, section 11(1) states that control order decisions can only be questioned in court or on appeal from court.

6.2.5 Special Immigration Appeals Commission (SIAC)

As we have seen, control orders were introduced after the immigration-based approach of detaining foreign nationals was deemed incompatible with human rights provisions. This development plays a significant role in explaining certain procedural incongruities with control orders, such as secret evidence and Special Advocates, which are not contained in the statutory provision. The initial perception that the threat came from foreign sources explains the original immigration focus of the ATCSA (Bonner, 2006). There was only a reluctant recognition of a potential domestic threat prior to the London bombings, which is why the Home Secretary considered detention for British citizens to be a disproportionate response to the perceived emergency (Bonner, 2006). The House of Lords later found that if no such measure was required to deal with domestic suspects, it was disproportionate to apply such measures to foreign suspects (Bonner, 2006; S. Macdonald, 2007; Shah, 2005). When the Home Secretary initially proposed an amendment to the trial ATCSA process to include Special Advocates and a lowering of the standard of proof to the civil one, it was initially rejected by Cabinet (Pierce, 2004). No such reservations seem to have prevailed in response to the PTA.\textsuperscript{140}

In order to address some of the procedural weaknesses inherent in the control order regime, Special Advocates\textsuperscript{141} modelled on the Special Immigration Appeals Commission were introduced (Bonner, 2007; International Commission of Jurists, 2009).

The Special Immigration Appeals Commission (SIAC) was established in 1997 by the Special Immigration Appeals Commission Act 1997 to deal with the contending issues of procedural fairness and national security issues in cases where the Home Secretary has decided to deport,

\begin{itemize}
\item\textsuperscript{138} S 10(4) & (5)
\item\textsuperscript{139} S 10(7)
\item\textsuperscript{140} In fact, Bonner highlighted that questions relating to appropriate safeguards in emergencies were exploited inappropriately in the run up to elections.
\item\textsuperscript{141} Special advocates are regulated by the Civil Procedure (Amendment No 2) Rules 2005.
\end{itemize}
or exclude an individual from the UK thought to pose a threat to the general public. The SIAC panel consists of three members, a judge, a legally trained member (or former member) of the Asylum & Immigration Tribunal, and an individual with knowledge of national security issues. Although SIAC hearings are technically held in an open court, the judge may decide to hear evidence in closed sessions. Most cases are heard confidentially, but the appellants may choose to be named. In cases where the Home Secretary refuses to disclose his evidence to the appellant or his legal representative for national security reasons, a Special Advocate is appointed to represent the appellant. He or she is vetted and acts on behalf of the appellant, making submissions and cross-examining any witnesses.

Due to the ATCSA 2001 focus on deporting foreign suspects, an appeal process to the Special Immigration Appeals Tribunal was introduced, subsequently amending the tribunal’s operation (Smith, 2007). Although control order cases are heard by the High Court, the sensitive nature of the supporting materials has led to SIAC procedures being adopted by the High Court, incorporating measures of non-disclosure of sensitive information, closed proceedings and the appointment of Special Advocates (Bonner, 2007; Ip, 2007; C. Walker, 2011). The use of Special Advocates in control order proceedings has, according to Walker, been controversial not least due to their mandated limited interaction with the suspect prior to hearing the sensitive evidence. Bonner (2007) highlighted that even though their appointment is discretionary, only material disclosed to a Special Advocate on behalf of the appellant can be relied upon, making their appointment a formality. However, once they have seen the closed material, they are prohibited from any further contact with the appellant or their legal representation. The transferral of SIAC rules to the High Court also means it is no longer obligated to adhere to the same rules of evidence of a traditional court of law, be it criminal or civil (Bonner, 2007), leading the former Shadow Home Secretary to describe the process as “Kafkaesque”.

142 Chahal v UK (1996) 23 E.H.R.R. 413; A and Others v Secretary of State for the Home Department [2005] UKHL 71
143 For an overview of the role of special advocates, see the report of the Constitutional Affairs Committee (2005)
145 H.C. Deb., Vol. 430, col. 310 (26 January 2005)
6.2.6 Subsequent Amendments

Since the introduction of the PTA in 2005, two new acts have been introduced, both slightly amending the control order regime. Firstly, the Terrorism Act 2006 created new preparatory terrorism offences, including encouragement of terrorism (s1), dissemination of terrorist publications (s2), preparation of terrorist acts (s5) and training for terrorism (s6). The creation of these new offences enabled individuals who might otherwise have been subject to a control order to be charged and prosecuted in criminal proceedings. The Counter-Terrorism Act 2008 amended the PTA by inserting sections 7A to 7C, facilitating the process of searching controlees and their premises as contained within their control order provisions; as well as clarifying that rather than the Executive believing a controlee’s associates are involved in terrorism, the controlee themself needs to be aware of their involvement to qualify.

In summary then, the British control order system, despite not yet having resorted to derogations under emergency provisions, is not only a hybrid between the civil and the criminal systems, but also incorporated proceedings based on immigration administration, which have a significant effect on the issuance of control orders. Before examining some of the practical issues created by the statutory framework, the next section examines the Australian adaptation of the control order scheme.

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146 S 78
147 S 79 - applies retrospectively
6.3 Australian Adaptation of Control Orders

The Australian system of control orders was introduced as part of the Anti-Terrorism Act (No. 2) 2005,\(^{148}\) imposing a variety of obligations, prohibitions and restrictions on a person\(^{149}\) suspected of posing a terrorist threat for up to twelve months at a time. The object of the act is to protect the public from a terrorist act.\(^{150}\) Since Australia is not accountable to the ECHR, unlike its British predecessor there is only one type of control order, but it involves a two-stage process of interim and confirmed control orders, both of which are examined in turn.

6.3.1 The Interim Control Order

In circumstances where the Australian Federal Police (AFP) either

\[(a)\text{ considers on reasonable grounds that the order in the terms to be} \]
\[\text{requested would substantially assist in preventing a terrorist act; or} \]

\[(b)\text{ suspects on reasonable grounds that the person has provided training to,} \]
\[\text{or received training from, a listed terrorist organisation,}^{151}\]

a senior member of the AFP requests the Attorney General’s (AG) written consent to apply for an interim control order (ICO) to be made against a suspect. Making the request, the AFP must include a prepared draft of the ICO, on what grounds the order is sought, including any arguments against making such an order.\(^{152}\) Furthermore, each obligation needs to be justified, listing any known reasons against imposing such restrictions.\(^{153}\) Also, any previous requests for control orders or preventative detention orders, or detention under State preventative detention laws of any kind against the suspect and their outcomes, as well as previous revocation requests must be disclosed.\(^{154}\) Previous requests or orders do not preclude the

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\(^{148}\) The same act also introduced preventative detention orders, stop and search powers, amended sedition offences and made changes to ASIO powers and financial reporting obligations, amongst other things

\(^{149}\) For adults; and up to three months for people aged 16-18

\(^{150}\) 104.1

\(^{151}\) 104.2 (2) - What is or is not considered a terrorist organisation in Australia is determined by the Attorney General based on intelligence, or a court might decide it is. So in determining the prerequisite for a control order to be issued on the basis of training with a terrorist organisation, the AG is involved both at the supporting the issuance of a control order, as well as the conditions giving rise to it.

\(^{152}\) 104.2 (3)(a)(b)

\(^{153}\) 104.2 (3)(c)

\(^{154}\) 104.2 (3) (d)
individual from being issued a new iCO. The final inclusions relate to a suspect’s age and a summary of the reasons for making the order. However, the summary is exempt from disclosing any information likely to prejudice national security, as set out in the National Security Information (Criminal and Civil Proceedings) Act 2004 (NSIA). The NSIA was set up to prevent sensitive information being disclosed in federal criminal and civil proceedings, except if this would seriously interfere with the administration of justice. Individuals are not completely excluded from knowing the case against them, but information is limited due to the impact of the NSIA.

Conditional to judicial approval, the AG can grant the iCO, requesting that certain amendments be made. Subject to the AG’s consent, the AFP requests an issuing court’s approval, providing the same documents, which are either sworn or affirmed, as well as a copy of the AG’s consent.

Prior to the issuing of a iCO, the court satisfies itself that the AFP followed the proper procedure outlined above, and receives and considers any further information it deems necessary to make the decision. Section 104.4(1) states that an iCO is issued if

(c) the court is satisfied on the balance of probabilities:

(i) that making the order would substantially assist in preventing a terrorist act; or

(ii) that the person has provided training to, or received training from, a listed terrorist organisation; and

(d) the court is satisfied on the balance of probabilities that 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 purpose of protecting the public from a terrorist act.

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155 104.5
156 iCOs cannot be sought for persons under the age of 16.
157 104.2 (3A)
158 S 3(1) – the term “seriously” is not further defined in the act.
159 104.2 (4)
160 The definition of an issuing court was inserted into s.100.1(1) of the Criminal Code 1995 by the Anti-Terrorism (No. 2 Act) 2005 and refers to (a) the Federal Court of Australia; or (b) the Family Court of Australia; or (c) the Federal Magistrates Court.
161 104.3
162 104.4 (1)
The court must consider the impact of the order on the individual, both financial and personal, determining if it is reasonably necessary, appropriate and adapted.\textsuperscript{163} It is not bound by the AFP’s obligations and can decide not to impose certain restrictions.\textsuperscript{164}

An iCO must adhere to the following elements:\textsuperscript{165}

\begin{itemize}
  \item[(a)] state that the court is satisfied of the matters mentioned in paragraphs 104.4(1)(c) and (d); and
  \item[(b)] specify the name of the person to whom the order relates; and
  \item[(c)] specify all of the obligations, prohibitions and restrictions mentioned in subsection (3) that are to be imposed on the person by the order; and
  \item[(d)] state that the order does not begin to be in force until it is served personally on the person; and
  \item[(e)] specify a day on which the person may attend the court for the court to:
    \begin{itemize}
      \item[(i)] confirm (with or without variation) the interim control order; or
      \item[(ii)] declare the interim control order to be void; or
      \item[(iii)] revoke the interim control order; and
    \end{itemize}
  \item[(f)] specify the period during which the confirmed control order is to be in force, which must not end more than 12 months after the day on which the interim control order is made;\textsuperscript{166} and
  \item[(g)] state that the person’s lawyer may attend a specified place in order to obtain a copy of the interim control order; and
  \item[(h)] set out a summary of the grounds on which the order is made.\textsuperscript{167}
\end{itemize}

A controlee must be served at least 48 hours before the date of commencement.

\textsuperscript{163} 104.4 (2)
\textsuperscript{164} 104.4 (3)
\textsuperscript{165} 104.5
\textsuperscript{166} The maximum duration for a 16-18 year old is 3 months (104.28(2). S104.5(2) specifies that successive COs can be made against the same person
\textsuperscript{167} Subject to National Security exclusions in the NSIA 2004
6.3.1.1 Obligations
The obligations set out in s. 104.5(3) are very similar to those in the UK NDCOs, including restrictions on travel, remaining in certain locations during certain times of the day, being electronically tagged, limiting the association with certain individuals, strict communication rules, consenting to having their photograph and fingerprints taken. The person may also need to participate in counselling or education programs. A comprehensive list of obligations can be found in Appendix D. Access to legal representation is not affected unless the person's lawyer is listed as one of the individuals with whom contact is prohibited in the obligations.

In urgent circumstances, the senior AFP member may approach the court directly via telephone, fax, e-mail or other electronic means to issue an iCO. An urgent request may also be made in person. In addition to the standard iCO procedure, bar the AG's approval, the AFP member must state the reasons for the urgency of the order. The AG's consent must, however, be obtained within 4 hours of making the request to the court; otherwise the order is void. The court can issue an urgent iCO electronically, by the same means as listed above, or in person.

Once an iCO has been made, the AFP are required to personally serve the iCO to the person in question, informing them of the duration of the order and the conditions contained therein, as well as his rights and subsequent procedures, making sure the person has understood.

6.3.2 The Confirmed Control Order
No later than 48 hours before the date specified in the iCO as the confirmation date in court, the issuing AFP member needs to decide whether or not to confirm the order. Should the AFP member wish to confirm, such notification, along with the obligations and their justifications, and any other relevant information are to be served personally to the individual in question.

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168 For the duration of the order only – these are to be destroyed as soon as the order is no longer in effect.
169 A person may chose not to participate in counseling or education (s104.5(6))
170 The prerequisites of believing the substantial assistance in preventing a terrorist attack or suspicion of terrorist training set out in s104.2(2) still apply.
171 104.10 – at which point both the court and the controlee, if already informed of the order, need to be informed of its secession.
172 104.12. If either the subject or the issuing court is based in Queensland, the Queensland public interest monitor must be issued with a copy of the order (ss (5))
173 Failure of the officer to adhere to this provision does not affect the validity of the iCO (104.12(4))
174 QLD cases to include Queensland public interest monitor
Again, if prejudicial to National Security or it endangers a current operation, such information is exempt under the NSIA 2004. Lawyers of the controlee may also be present for the confirmation to obtain a copy of the order. If the order is not confirmed by the AFP member, the order becomes void and amended accordingly, before being personally transmitted to the person in question.\textsuperscript{175}

If an iCO is to be confirmed, supplementary evidence may be heard not only by the senior AFP member and his/her colleagues, but the individual in question or his/her representatives may also make submissions to the court. All new evidence must be considered, along with the original iCO request. For the order to be confirmed, the court has to be satisfied “on the balance of probabilities that the order was properly served on the person in relation to whom the order is made”\textsuperscript{176}. The court may declare the iCO void if no valid grounds for issuance were found, revoke an iCO if it is not convinced on the balance of probabilities that the order would substantially assist in preventing a terrorist attack or that the individual received terrorist training, amend obligation(s), or confirm the order as is. The person in question need not be present in court for the order to be confirmed;\textsuperscript{177} as long as the person in question is represented by either their lawyer or, if in Queensland, the public interest monitor.\textsuperscript{178} If an iCO has been declared void, the order is considered never to have been in force.\textsuperscript{179} However, if the iCO is confirmed, it ceases to be an interim order,\textsuperscript{180} instead becoming a confirmed control order (cCO).

The issuing court follows the same procedure for a cCO as with the iCO, issuing an order which:

\begin{itemize}
\item[(a)] states that the court is satisfied of the matters mentioned in paragraphs 104.4(1)(c) and (d); and
\item[(b)] specifies the name of the person to whom the order relates; and
\item[(c)] specifies all of the obligations, prohibitions and restriction mentioned in subsection 104.5(3) that are to be imposed on the person by the order; and
\item[(d)] specifies the period during which the order is to be in force, which must not end more than 12 months after the day on which the interim control order was made;\textsuperscript{181}
\end{itemize}

\textsuperscript{175} 104.12(4)  
\textsuperscript{176} 104.14 (4)(b)  
\textsuperscript{177} 104.14 (4)  
\textsuperscript{178} See White (2007) for an overview of the importance of the Public Interest Monitor in Queensland  
\textsuperscript{179} 104.15(1)  
\textsuperscript{180} The iCO at that point ceases to be in force (104.15(3)(a))  
\textsuperscript{181} Again, the maximum duration of a cCO for 16-18 year olds is 3 months
(e) states that the person’s lawyer may attend a specified place in order to obtain a copy of the confirmed control order.

The AFP must personally serve either the revocation of the iCO or the cCO directly to the person in question. A person may have successive cCOs issued against them.\(^{182}\) As is the case in the UK, contravening obligations of a control order is punishable by five years imprisonment.\(^{183}\)

### 6.3.3 Appeal Process

A person subject to a cCO can apply for its revocation or variation at any point after it has been issued by outlining the reasons in writing to the AFP Commissioner.\(^{184}\) As above, the AFP, the controlee and/or their representative(s) may provide further evidence or support. The AFP Commissioner can do the same, by applying to the court to either vary or remove conditions of the order, or to revoke it altogether. He must inform the controlee in writing of the application to do so and the reasons for which he is doing so. Again, the usual individuals\(^{185}\) are able to provide further evidence or submissions. Any additional obligations must be justified by having reasonable grounds for believing they would aid in preventing a terrorist attack.\(^{186}\) The AFP Commissioner needs to present the court with the justification thereof, including any known facts which might go against this imposition, along with any previous applications relating to the case. Furthermore, he also needs to provide the controlee with the same reasoning and documents. Again, the usual National Security exemptions apply, and the usual people are able to provide further evidence.

The court can either revoke a cCO, vary the conditions within, or dismiss the application made by the person in question or the AFP with immediate effect if it is satisfied that making the order would substantially assist in preventing a terrorist attack or that the person has provided or received terrorist training (104.4(1)(c)), or indeed is not satisfied that the conditions are reasonably necessary, appropriate for the purpose of protecting the public (s104.4(1)(d)). The threshold is on the balance of probabilities. The impact of any additional obligations on a person’s personal and financial circumstances need to be considered by the court prior to introducing the change.\(^{187}\) Any changes to or revocations of the cCO must be served to the

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182 104.18
183 104.27
184 And the Queensland public interest monitor if applicable
185 104.19 (3)
186 104.23(1)
187 104.24(2)
controlee as soon as practicable and in person by a member of the AFP, taking care to ensure the information has been understood by the person in question.  

A controlee’s lawyer can obtain a copy of the confirmed order, but is not entitled to be shown or provided copies of any other documents. As with the iCO, photographs and fingerprints taken as part of the order are only used to ensure compliance with the order and must be destroyed as soon as the order ceases to be in force. Non-compliance is a punishable offence.  

6.3.4 Safeguards

The Attorney-General is required to present an annual report on the operation of control orders to Parliament, including the number of iCOs and cCOs made, revoked or varied, as well as any related complaints made.

The statute contains a sunset provision, stating that any control order in force ten years after the Act’s commencement date ceases to be valid, and that no new orders can be issued after that date.

Given the states and territories referred much of their statutory power with regard to terrorism to the Commonwealth after 2001, an agreement set out a review of these laws after five years (Jaggers, 2008). The Report of the Security Legislation Review Committee (2006), also referred to as the Sheller Committee, reiterated the necessity to legislate outside of the criminal law, while still striking a balance between protecting the community and human rights. It did, however, note that changes introduced in Part 5.3 of the Criminal Code appear to have had a disproportionate effect by increasing executive power. The Sheller Committee did not include Divisions 104 and 105 in its report, as these had only been introduced recently. Control orders were scheduled for their own COAG (Council of Australian Governments) review to begin in December 2010. Findings of this review were not available at the time of writing.

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188 104.26(4) states that not complying with this requirement does not affect the validity of the order
189 104.21
190 104.22(3) Imprisonment for 2 years
191 As soon as practicable after June 30, to both Houses of Parliament
192 104.32
193 For instance, with regard to proscribing organisations, the Committee was concerned that the process to determine said prohibition did not provide individuals with sufficient advance warning that a particular organisation was being considered. Moreover, the Committee worried that s. 102.8 association with terrorist organisation breaches the fundamental right of association. See also Hogg (2008).
Finally, the Committee recommended the appointment of an Independent National Security Monitor, failing that, a further independent review should be conducted within three years. The Independent National Security Legislation Monitor Act 2010 created the role in response to recommendations by the Sheller Committee, the Parliamentary Joint Committee and the Clarke Inquiry (Clarke QC, 2008; Parliamentary Joint Committee on Intelligence and Security, 2006; Security Legislation Review Committee, 2006).

While it might be the intention of the government and indeed the monitor’s intention to provide an impartial overview of how anti-terrorism laws are being implemented and applied, Lynch and McGarrity (2009) highlighted that his role is very much a reactive one, and that parliamentary aforesight in creating such laws might even reduce the need for such an office in the first place. Indeed, Lord Carlile’s role as the UK’s independent reviewer was fraught with controversy as to his independence and objectivity of the matters in hand. Although the role of the incumbent Bret Walker SC is far more clearly set out in terms of the legislation, the wording of the statute raises some controversial issues as to the true independence of the monitor from the government. For instance, his reports, rather than being presented to Parliament from the outset, are subject to the Prime Minister’s approval. That being said, the Australian role, unlike the UK’s, does not purport to independence in the job description, potentially overstating such concerns here.

Some have argued that the judicial supervisory role in making control orders is the most significant safeguard of the scheme (McDonald, 2007). Other features cited include the order not commencing until personally served; the AFP’s obligation to explain the order to the individual; the ability to apply for a variation or revocation of the order; the ability of the individual to obtain a copy of the order including a summary of the grounds upon which the order was made; the court’s obligation to consider the person’s circumstances for each obligation imposed; and that the normal judicial review process applies (McDonald, 2007, p. 108). It is clear from the above analysis that there are some significant differences between the British and Australian control order schemes. The following section examines these variations in more detail.
6.4 Comparison of UK and Australian Control Orders

Having established that the Australian control order system, though based on the British model, contains some significant differences, the aim of this section is to compare and contrast the two statutory provisions drawing on the theoretical framework set out in the earlier chapters. With the overarching research question pertaining to pre-emption, much of the analysis employs the terminology set out in Chapter 4 so as to differentiate between different gradients of prevention.

The underlying purpose of both statutes is that these obligations protect the public from a terrorist attack. The wording of the aim of the relevant acts reveals some interesting differences between the two approaches. For instance, the aim of the PTA 2005, to prevent or restrict further involvement demonstrates a clear preventive intent. However, determining whether or not it falls on the pre-emptive or reactive prevention side is more difficult due to the wording that precedes it. Control orders are to be made against individuals involved in terrorism-related activity, bypassing suspicion/allegation, apparently having determined their prior involvement. Indeed, the further involvement would support this assumption. This would indicate that British control orders are reactively preventive. The DCO wording in s 4(7)(a), i.e. the court needs to be satisfied on the balance of probabilities that the controlee is or has been involved in terrorism-related activity, certainly backs up the reactively preventive theory. However, in NDCO cases, the Home Secretary only needs reasonable grounds for suspecting involvement, swinging the pendulum back towards a more pre-emptive focus. Indeed, the lower burden of proof and lack of sufficient evidence to prosecute any such alleged involvement creates an interesting juxtaposition between the statutory wording and the practical application of UK control orders, which will be further explored in Chapter 7.

In comparison, the Australian statute requires the senior AFP member to have reasonable grounds either that the order would substantially assist in preventing a terrorist act or that the individual in question has provided training to, or received training from, a listed terrorist organisation. The first condition implies that the involvement in terrorist-related activity is but a mere suspicion at that point in time, since more certain allegations would be expected to result in prosecution under one of the many new anti-terrorism laws. Thus, if issued on the first premise alone, it would be true to state that it would fall under pre-emptive prevention. The second requirement, however, implies some form of past conduct, making it reactively preventive. In this sense, Australian control orders may not necessarily be pre-emptive measures at all.
The role of the police in requesting control orders also differs between jurisdictions. In the UK, the police are consulted throughout about whether or not sufficient evidence exists to prosecute an individual. Moreover, continual monitoring is in place to gather evidence in support of prosecution, which appears to be a rather futile exercise when the individual is under the kind of strict obligations specifically designed to prevent him from engaging in further conduct. The actual control order, however, is requested by the Home Secretary. The AFP plays a much more active part in determining against whom they wish to issue an ICO, although the Attorney-General’s consent is required prior to the application being put before the courts. The Australian statute provides for a potentially more objective/balanced portrayal of reasons to issue a control order, considering counter-arguments are also required. Whether or not this is implemented in practice is a different matter, and is examined further in the next chapter. Also, this does not mean the British Home Secretary might not include such considerations, even if not required to do so according to the statute. Both the UK and Australia decided to set the burden of proof for seeking a control order to on reasonable grounds.

The power to decide whether or not to issue an order ultimately lies with the Judiciary. Court proceedings again vary by jurisdiction. Both systems have a preliminary/interim and confirmation hearing, however the Australian control order changes status once confirmed. The burden of proof for NDCOs in British courts remains unaltered; their Australian counterparts however require judges to be satisfied on the balance of probabilities. It is important to note that the higher standard would be required in a DCO confirmation hearing.

Whereas the UK’s procedures are ex parte, the Australian two-tiered approach of interim and confirmed orders allows for the person in question, or controlee, to either be present and/or represented at the confirmation hearing. Moreover, they are provided with a summary of the grounds for issuance, and the opportunity to provide evidence in their defence, something controlees before British judges are not privy to.

Because of the PTA forerunner’s association with immigration law, control order proceedings in the UK have appropriated certain practices from the SIAC hearings. Closed hearings and Special Advocates are used in an effort to address some of the procedural shortcomings associated with national security concerns. Similar concerns are circumvented in Australia, the National Security Information (Criminal and Civil Proceedings) Act 2004 ensuring restrictions on disclosing sensitive evidence or intelligence to both the controlee and/or the general public are upheld.
Given the controversial nature of the control order regime, human rights concerns were bound to come up, especially given its forerunner’s record. Different concerns arise within the two jurisdictions, chiefly relating to the length of the curfew and the interpretation of house arrest. However, the UK introduced its own Human Rights Act in 1998, and is subject to the European Convention of Human Rights (ECHR). Australia has no Bill of Rights at the Commonwealth level, instead relying on the Constitution for guidance in such matters.\footnote{This lack of an additional oversight mechanism has drawn heavy criticism, despite Australia being a signatory to the International Covenant on Civil and Political Rights (ICCPR) (International Commission of Jurists, 2009; Jaggers, 2008; Michaelsen, 2005b).}

The person in question is notified of the control order against him or her only after it has been approved by the UK court. In Australia, the iCO only comes into force once personally served on them by a member of the AFP.

A final point to highlight is the statutory grounds for the court refusing to issue a control order. In Australia, if the court disagrees that one or both of the necessary prerequisite conditions applies, or it believes the conditions are not reasonably necessary or adapted to achieve the aim, it can refuse issuance. In the UK, if the court finds that the Home Secretary’s decision to make the control order was obviously flawed, it is obliged to quash the order. The same principle applies to flawed obligations. Modifications of the sometimes very restrictive obligations are permitted and are able to be instigated at the controlee or Home Secretary’s request in the UK. In Australia, the same applies, however judges may make alterations a condition for approval.

6.5 Summary

While the British control order provisions have incorporated a more judicial approach compared to the internment regime in Northern Ireland, or indeed previous executive measures (C. Walker, 2011), they do not provide the same oversight or indeed procedural safeguards as the Australian regime. A summary of the main similarities and disparities between the two jurisdictions’ control order regime is summarised in Table 6.1 below.

\footnote{The terrorism debate has to some extent accelerated the debate whether or not Australia needs a Bill of Rights, see for instance Williams (2004) and Saul (2007) for a more general account of administrative law on human rights.}
<table>
<thead>
<tr>
<th>United Kingdom (NDCO)</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Statutory Authority</strong></td>
<td>Prevention of Terrorism Act 2005 (PTA)</td>
</tr>
<tr>
<td><strong>Aim</strong></td>
<td>Provides for the making against individuals involved in terrorism-related activity of orders imposing obligations on them for purposes connected with preventing or restricting their further involvement in such activity.</td>
</tr>
<tr>
<td><strong>Purpose</strong></td>
<td>To protect members of the public from a risk of terrorism.</td>
</tr>
<tr>
<td><strong>Type of measure</strong></td>
<td>Civil</td>
</tr>
<tr>
<td><strong>Intended Duration</strong></td>
<td>Temporary, original sunset clause - 2006 Renewed annually</td>
</tr>
<tr>
<td><strong>Originates with</strong></td>
<td>Home Secretary (on police advice)</td>
</tr>
<tr>
<td><strong>Grounds for issuance</strong></td>
<td>Suspected involvement in terrorist activity; obligations necessary to protect the public from terrorism</td>
</tr>
<tr>
<td><strong>Burden of proof for issue</strong></td>
<td>Reasonable grounds for suspecting terrorist involvement</td>
</tr>
<tr>
<td><strong>Approval</strong></td>
<td>High Court (Administrative Court- branch of HC)</td>
</tr>
<tr>
<td><strong>Burden of proof for approval</strong></td>
<td>Reasonable grounds for suspecting</td>
</tr>
<tr>
<td><strong>Confidentiality</strong></td>
<td>Closed hearings Individuals can choose to remain anonymous</td>
</tr>
<tr>
<td><strong>Presence of controlee</strong></td>
<td>Ex parte</td>
</tr>
<tr>
<td><strong>United Kingdom</strong> (NDCO)</td>
<td><strong>Australia</strong></td>
</tr>
<tr>
<td>--------------------------</td>
<td>--------------</td>
</tr>
<tr>
<td><strong>Notification of proceedings</strong></td>
<td>Upon confirmation of order</td>
</tr>
<tr>
<td><strong>Representation/presence in court</strong></td>
<td>No</td>
</tr>
<tr>
<td><strong>Defence Evidence heard</strong></td>
<td>No</td>
</tr>
<tr>
<td><strong>Maximum length</strong></td>
<td>12 months, renewable</td>
</tr>
<tr>
<td><strong>Reasons for refusal</strong></td>
<td>Obvious flaws in Home Secretary’s reasoning, i.e. procedural</td>
</tr>
<tr>
<td><strong>Modifications to obligations</strong></td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Either at HS or controlee’s request</td>
</tr>
<tr>
<td><strong>Breach of obligations</strong></td>
<td>Criminal prosecution</td>
</tr>
<tr>
<td><strong>Maximum sentence</strong></td>
<td>Up to 5 years imprisonment and/or a fine</td>
</tr>
<tr>
<td><strong>Reporting requirements</strong></td>
<td>Quarterly and annual reports to Parliament by Independent Reviewer of T</td>
</tr>
<tr>
<td><strong>Curfews issued</strong></td>
<td>Up to 18 hours, later found to amount to house arrest</td>
</tr>
<tr>
<td><strong>Average duration of curfew</strong></td>
<td>11.7 hours*</td>
</tr>
<tr>
<td><strong>Number issued to date</strong></td>
<td>48</td>
</tr>
</tbody>
</table>

*Figures only available for 2007-2010

The use of closed hearings and Special Advocates has laid the foundations for anti-terrorism cases being turned into inquisitorial tribunals. Indeed, Bonner (2007) argued that SIAC might eventually turn into a court specialising in national security issues. While no derogating control orders have been issued, thus technically not depriving individuals of their liberty in a way that internment did, important concerns have nonetheless been raised. Also, the number of control orders issued since their introduction in 2005 is far smaller than the number of individuals who were detained under internment provisions in the 1970s. At the time of writing, 48 individuals were subjected to a non-derogating control order in the UK, compared to only two in Australia. It is to the application of the above statutes I now turn.
7 Control Orders in Action

7.1 Introduction

The statutory analysis of the respective legislative foundations for the control order regime in both countries has highlighted different approaches. While the British provisions are more executive-driven, their Australian counterparts provide for greater judicial input. Moreover, the Australian statute incorporates both a reactively preventive and pre-emptive rationale. It is perhaps not surprising then that the differences in approach are also reflected in the practical application of the control order scheme. Probably the most obvious difference is the number of control orders issued. The British implementation of the scheme is examined in part 7.3 of this chapter. Given that there have only been two Australian control order cases, this chapter begins with an examination of Jack Thomas and David Hicks’ control orders. The aim of this chapter is to examine the reasoning behind the issuance of the orders and the interpretation of the statute, focusing on arguments made in relation to the issues identified in the literature as being related to the pre-emptive rationale. I begin this chapter with the Thomas case, which is particularly interesting considering a legal challenge to the validity of the control order scheme resulted in his control order never being confirmed. In contrast, the Hicks case illustrates the control order process from beginning to the end.

7.2 Australian Control Order Cases

7.2.1 The Jack Thomas Case

Joseph “Jack” Thomas\textsuperscript{195} was originally acquitted of two counts of providing support to a terrorist organization, but found guilty of intentionally receiving funds from a terrorist organization and being in possession of a falsified Australian passport by a Victorian Supreme Court in February 2006.\textsuperscript{196} Apparently unaware he had done anything wrong, Thomas made self-inculpatory statements during an interview with Australian Federal Police (AFP) officers in Pakistan in March 2003, which were later relied upon as evidence by the prosecution. Thomas appealed on the grounds that the interview evidence should not have been admissible. On

\textsuperscript{195} Thomas was called “Jihad Jack” by the media
\textsuperscript{196} \textit{DPP (Cth) v Thomas} (Sentence) [2006] VSC 120 (31 March 2006)
See Lynch (2006b) for a more detailed analysis of the issues raised in that case.
August 18 2006 his ground for appeal was upheld and his two convictions quashed. However, less than ten days later, control order proceedings commenced.

7.2.1.1 The Interim Control Order

On August 27 2006, the Federal Magistrates Court of Australia in Canberra ordered Australia’s first interim control order to be issued against Jack Thomas. The order set out that the AFP Manager of Domestic Terrorism, Ramzi Jabbour, had applied for the order to be made in accordance with s104.4. After considering the information, the court stated it was satisfied on the balance of probabilities that the order would substantially assist in the prevention of a terrorist attack, and that Thomas had received training from a listed terrorist organizations. Furthermore, it was satisfied on the balance of probabilities that each obligation was reasonably necessary, appropriate and adapted to protect the public.

The obligations, prohibitions and restrictions imposed under the iCO were that Thomas:

- remain at his home between midnight and 5am each day;
- report to one of three named Victoria Police Stations, three times a week on specific days within a 12 hour window;
- have his fingerprints taken within 24 hours of the iCO being issued, and, if requested, during the above reporting duties;
- not leave the country without written AFP consent;
- have nothing to do with explosives, weapons and combat skills, whether in document form (incl. electronic copies), physically or by communication; especially communicating his knowledge to individuals known to belong to an organization on the list of terrorist organizations, as well as not passing on the names and details of individuals known to be associated;
- not communicate or associate with specifically listed/named individuals, or anyone he knows to be a member of a listed terrorist organization.

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197 R v Thomas (2006) 14 VR 475
198 Jabbour v Thomas [2006] FMCA 1286
199 Contained in Schedule 1 of the iCO
200 Unless the AFP is notified in advance of a different address
201 Unless otherwise agreed in writing with the AFP
202 Schedule 3 contains a list of terrorist organizations, listed people were determined by the Department of Foreign Affairs and Trade
• limit the following communication devices to one AFP approved service/device within 48 hours of the iCO being served:
  o mobile phone, phone card, SIM card or account, landline phone service, VOIP service, internet service provider and e-mail account;
• have no access to satellite phones or public telephones;
• surrender all firearms and ammunition to police within 48 hours of the iCO being served.

The iCO also contained a summary list of the grounds on which the order was made, listed in Schedule 2 in Appendix E. The first reason was Thomas’ admission in his voluntary interview with AFP officers of receiving weapons and explosives training with Al-Qaeda in 2001. Because of his acquired knowledge, Thomas was considered “an available resource that can be tapped into to commit terrorist acts.” Also, his training with Al-Qaeda could serve as a potential source of inspiration and training to aspiring extremists. The third reason opens with the simple statement “Mr Thomas is vulnerable”, proceeding to assume he may be susceptible to certain beliefs which may have been exploited by his acquaintances, which included known extremists, some of whom he allegedly knew through his wife. This reasoning would appear to attempt to pre-empt potentially dangerous associations with persons known to foster extremist beliefs. However, as some of the people suspected to be a bad influence were related to his family, the order would likely affect his day to day life. The statement relating to his vulnerability provides no insight as to whether it meant he was psychologically vulnerable or simply vulnerable to beliefs which go contrary to Australian/Western values. Finally, the obligations were imposed to protect the public and substantially assist in the prevention of a terrorist attack by preventing Thomas from passing on his knowledge and skills to others.

203 Voice over internet protocol, e.g. Skype
204 A public telephone could be used in an emergency
7.2.1.2 Reasons for Judgment

The available transcript is an edited and revised version of the ex tempore judgment. Federal Magistrate Mowbray concurred that iCOs should be made ex parte.

Evidence in form of an interview conducted by the AFP with Thomas in Pakistan, though ruled inadmissible at the previous criminal trial, was ruled admissible in this case due to the civil interlocutory nature of the iCO hearing. The ‘evidence’ consisted of descriptions of various meetings between Thomas and Al-Qaeda operatives in both Pakistan and Afghanistan, from whom he also received some financial support, mainly living expenses. In one meeting Thomas was allegedly advised that bin Laden asked for an Australian to carry out operations in Australia. In a subsequent meeting Thomas was paid $3500 and a ticket to Australia with instructions, amongst other things, to identify suitable military installations. He had arranged to have his passport altered in an attempt to disguise the length of his stay in Pakistan. The AFP also included statements by informants who stated that they had contact with Thomas in Al-Qaeda training camps in Afghanistan. Several points of evidence based on the case of Jack Roche were then presented in support of the Al-Qaeda modus operandi (MO) to recruit Australians. None of the points presented in the transcript make any direct reference to connections between Roche and Thomas, serving to illustrate the Al-Qaeda MO rather than providing evidence of support against Thomas. Moreover, point 33 of the judgement highlighted that recruitment is said to be deceptive in that it purported to be only about following the “peaceful teachings of Islam” (p. 7). One could argue that this point would serve to support the assertion that the recruits did not enter into such training with the intent to wage jihad on the West. Despite these discretionary judgements, Mowbray concluded Jabbour’s summary of ‘evidence’ to be “substantially correct” (at 12, p. 3). Highlighting Jabbour’s credibility, Mowbray reiterated the main points against Thomas, i.e. that he had not only trained with Al-Qaeda and stayed in their houses, but that he had also gained credibility with senior ranking members, who allegedly confided in him, disclosing future operations. Jabbour went on to highlight Al-Qaeda’s intentions against the West, as well as making strong assertions as to the intent of Al-Qaeda with regards to Thomas’ role, which in a criminal trial would likely be dismissed as speculation. Also, Al-Qaeda had subsequently been listed as a

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205 A judgment made straight after the hearing
206 A provisional judgment
207 The term evidence is used in the Reasons for Judgment under ‘Consideration’ on page 3 and is based on the affidavit and oral statements by Jabbour, as well as the recorded AFP interview. It is important to note that while the events listed in support of the AFP’s case are described as being factual, caution should be taken to interpret them as allegations only.
208 Jack Roche was convicted of involvement in an Al Qaida plot to bomb the Israeli embassy in Canberra in 2000, for which he was sentenced to nine years in prison in 2004.
terrorist organization, thus making any association an offence. Although Thomas denied being a member of Al-Qaeda, because of his apparent lack of renunciation of sympathy towards their cause, Jabbour considered him a potential resource to help with future attacks. This view was also shared by Mowbray, stating “[O]n this evidence there are good reasons to believe that the respondent having received training with Al-Qaeda is now an available resource that can be tapped to assist commit terrorist acts on behalf of Al-Qaeda or related terrorist cells.” (at 42, p. 9). Mowbray considered Thomas’ admission of training with Al-Qaeda as satisfying one of the conditions for issuance of a control order.

Mowbray acknowledged his obligation to consider Thomas’ personal circumstances, but admitted he did not know much about him other than that he was unemployed, probably due to his recent release from prison, and that he was a practising Muslim. He did, however, state that the original nine obligations sought against Thomas “would amount to significant limitations on the respondent’s freedom” (at 50, p. 10), yet believed they were reasonably necessary, with two exceptions. Mowbray dismissed an obligation sought by the AFP to impose specified religious and psychological/psychiatric counselling. Although he acknowledged that Thomas might pose a terrorist threat as a result of extreme religious views, he concluded that he has “virtually no evidence justifying religious counselling, neither in general not specifically with the named persons” (at 54, p. 11). Furthermore, the obligation of 50 listed people with whom not to have contact was originally 300 pages long, which Mowbray dismissed as not being reasonably appropriate or adapted for the purpose of protecting the public from a terrorist act, inviting Jabbour to make it so.

The order stipulated that a copy of the sealed order be served to Thomas within 48 hours. The date for the confirmation hearing was set for September 1 2006, within four days of the iCO. Effectively, this gave Thomas two days notice to prepare a case against the issuance of the iCO. An electronic transcript of the proceedings would be made available to his legal team “when available”. The Applicant, Ramzi Jabbour, had 24 hours to propose edits to the transcript, which would be made available to the public after the Court’s edits. Neither Thomas nor his legal representatives were in court on the day the iCO was issued.

209 Obligations 9(a) and (b), to which the transcript gives no further insight.
210 It was served in person to Thomas on August 30 2006
7.2.1.3 The Non-Confirmed Control Order

On September 21 2006, three weeks after the date set to confirm the control order, the Federal Magistrates Court of Australia in Melbourne was called upon to determine whether to confirm the iCO or whether the case should be transferred to the Federal Court of Australia. Thomas argued that the confirmation hearing should not be heard in the same court that issued the iCO. The issue arose as a result of confusion resulting from the wording within Division 104, namely “an issuing court”, “the issuing court” and “the court”. However, Phipps FM asserted that: “[t]he intent of the provisions is clear. The court which makes the interim control order must be the court that determines whether the control order should be confirmed”.

Subsequently, Thomas sought to challenge the constitutional validity of the control order schedule as set out in Division 104 of the Criminal Code 1995 (Cth) in the High Court of Australia. Although the statute stipulates the confirmation of the iCO within a reasonable timeframe, in this case, the parties had agreed that the iCO would extend until the constitutional challenge had been heard (Lynch, 2008). The confirmation hearing was eventually adjourned until June 29 2007, at Thomas’ request. However, his interim control order was never confirmed.

7.2.1.4 Thomas v Mowbray

In February 2007, Thomas sought to quash his iCO arguing that Division 104 of the Criminal Code 1995 (Cth) was invalid. He made several constitutional challenges to the validity of the control order regime, including that it confers non-judicial power on a federal court, it was not supported by one or more express or implied heads of legislative power under the Constitution, and the judicial power conferred by Division 104 was exercised contrary to constitutional provisions. In a 5:2 majority ruling, the High Court ruled that interim control orders were...

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211 Jabbour v Thomas (No.3) [2006] FMCA 1425
212 At 8, p. 2 of Reasons for Judgment
213 The AFP did not proceed with confirming the control order (Lynch, 2008)
214 Thomas v Mowbray [2007] HCA 33
215 Other issues addressed included Thomas arguing that the Constitutional defence power only applied to foreign nations. However, it was found to extend to measures guarding against internal threats. He also argued that s.51(vi) used the words “naval and military defence”, implying a national emergency or war, instead focusing on a terrorist act, the definition of which does not refer to military threats or responses (Bennett, 2007). Given that the central aim of a control order is to protect from a terrorist act, this did not apply. The judges almost unanimously disagreed. As for the external affairs powers, Thomas argued that the UN’s resolution 1373, obligating states “to take necessary steps to prevent the commission of terrorist acts”, did not amount to Australia being obliged to introduce the control order.
This is a significant case for several reasons, not least for its importance with respect to Australia’s anti-terrorism laws, but also its contemplation of the implications of preventive justice (Lynch, 2008). It is with the latter focus in mind this case is analysed here.  

Thomas’ counsel contended that issuing control orders is antithetical to the judicial function, and should be carried out by the Executive only. He also argued that the courts were only able to impose deprivation or restrictions on liberty in response to determining criminal guilt. In other words, the Judiciary’s role is to rule on infractions already committed rather than on the basis of what might be done at some point in the future.

With regard to past infractions, the statutory basis for Australian control orders provides for issuance on a purely pre-emptive basis, in reaction to past conduct, or a combination thereof.

In the interlocutory hearing, Federal Magistrate Mowbray admitted Thomas’ earlier statement of having trained with certain terrorist organizations, even though this evidence was ruled inadmissible in the previous court case. This decision proved problematic for two of the judges in this case. Kirby J, for instance, argued that the reactive element to issue a control order, i.e. training with a terrorist organization, was mentioned as one of the reasons for issuance; but as it could not be considered an established fact, he argued Mowbray made his final decision on the belief that the order would assist in preventing an attack. On the other hand, Callinan J found that past conduct was not only considered, but that it provided the norms to make control orders:

*The court, in applying the Code looks to, and makes a determination about past conduct, for example, relevant training, and, in moulding the order has regard to both the prospective conduct of the subject of it in relation to future terrorist activities, and also possibly of others. Past and prospective conduct, well capable of being the subject of evidence, provide norms or standards for the making of orders of the kind made here.*

Callinan J at 597

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217 For a more detailed discussion of the constitutional issues raised, see Lynch & Reilly (2007), Lynch (2008), and Dyzenhaus & Thwaites (2007)

218 Gleeson CJ, p. 8 in 17

219 Kirby J at 311
The majority found that restrictions or deprivation of liberty punitive in character can only be determined in reaction to criminal guilt. This is similar to Gummow J’s finding in *Fardon*, namely that in all but exceptional cases, detaining someone against their will is only permissible upon finding of criminal guilt for past actions.\textsuperscript{220} Exceptions to the rule in the form of executive detention under mental health law, wartime internment or quarantine, though mentioned in the trial, were dismissed by Gleeson CJ on the basis that control orders do not constitute detention, but “preventive restraints on liberty by judicial order.”\textsuperscript{221} Similarly, Gummow J and Crennan J found that control orders were more akin to preventative restraints than detention.\textsuperscript{222} Gleeson CJ quoted William Blackstone (1769, p. 248) as highlighting that in preventive cases, the obligations are to be interpreted as “a caution against the repetition of the offence, [rather] than any immediate pain or punishment.”\textsuperscript{223} In short, control orders were not considered punishment, rather a form of preventive restraints against future conduct.

Both Gleeson CJ and Callinan J highlighted that control orders were not the first instance where the Judiciary has been asked to consider future conduct. They cited bail and apprehended violence orders as familiar examples of the judicial exercise of power creating obligations restricting someone’s liberty, the latter exhibiting particular similarities with control orders.\textsuperscript{224}

\begin{quote}
*The power to restrict or interfere with a person’s liberty on the basis of what that person might do in the future, rather than on the basis of a judicial determination of what the person has done, which involves interfering with legal rights, and creating new legal obligations, rather than resolving a dispute about existing rights and obligations, is in truth a power that has been, and is, exercised by courts in a variety of circumstances. It is not intrinsically a power that may be exercised only legislatively, or only administratively.*

Gleeson CJ at 15
\end{quote}

\textsuperscript{220} *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 612
\textsuperscript{221} Gleeson CJ p.9 at 18
\textsuperscript{222} Gummow J and Crennan J at p.41 at 116
\textsuperscript{223} Gleeson CJ, p.7 at 16
\textsuperscript{224} ibid
Kirby J dismissed the historical analogies, e.g. binding over orders, presented by the Commonwealth, arguing they were clearly distinguishable from control orders. His reasoning included that other orders are a) a direct result of past conduct of the individual; b) intended to protect a particular person at risk from that individual as opposed to protecting the public; and c) aim to prevent what that individual might do, as opposed to what he and/or third parties may do. Thus Kirby J concluded that the provisions contained in Division 104 were both unique and exceptional, and attempted to break new legislative ground. By contrast, Gummow J and Crennan J found although historical examples were not always accurate analogies to control orders, “[t]he matters of legal history relied upon do support a notion of protection of public peace by preventive measures imposed by court order, but falling short of detention in the custody of the State”.

Indeed, the notion of protecting the community became a central point of debate in determining whether or not the statutory obligation of future-orientated decision-making by judges interfered with the role of the Judiciary. Hayne J argued that the very notion of asking the courts to consider future events interfered not only with the separation of powers, but also the tradition of open and adversarial characteristics of court proceedings:

> For the most part courts are concerned to decide between conflicting accounts of past events. When courts are required to predict the future, as they are in some cases, the prediction will usually be assisted by, and determined having regard to, expert evidence of a kind that the competing parties to the litigation can be expected to adduce if the point in issue is challenged. Intelligence information, gathered by government agencies, presents radically different problems. Rarely, if ever, would it be information about which expert evidence, independent of the relevant government agency, could be adduced. In cases where it could not be tested in that way (and such cases would be the norm rather than the exception) the court, and any party against whose interests the information was to be provided, would be left with little practical choice except to act upon the view that was proffered by the relevant agency.

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225 Kirby J p122 at 331
226 Gummow J and Crennan J at p 42 at 121
These difficulties are important, but not just because any solutions to them may not sit easily with common forms of curial procedure. They are important because, to the extent that federal courts are left with no practical choice except to act upon a view proffered by the Executive, the appearance of institutional impartiality and the maintenance of public confidence in the courts are both damaged.

Hayne J at 511-512

He went on to highlight an important distinction between the executive and judicial approaches to protecting the public, namely that the Executive’s decisions are frequently influenced by confidential intelligence material. Such material was not only inadmissible in court, but the subjective judgments required to assess vague and fragmented intelligence required judgments of a very different nature from those ordinarily made in court.227 Hayne J contended that control orders pass this decision to the courts to decide, but with no standards to help guide their decisions, resulting in the court applying “its own idiosyncratic notion as to what is just”.228

Hayne J argued that the underlying aim of protecting the public from a terrorist act was problematic for several reasons:

“It is a criterion that seeks to require federal courts to decide whether and how a particular order against a named person will achieve or tend to achieve a future consequence: by contributing to whatever may be the steps taken by the Executive, through police, security, and other agencies, to protect the public from a terrorist act. It is a criterion that would require a federal court to consider future consequences the occurrence of which depends upon work done by police and intelligence services that is not known and cannot be known or predicted by the court.”

Hayne J at 476

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227 Hayne J at 510
228 Hayne J at 516
However, the majority supported the Judiciary’s role in deciding on public protection, highlighting that this function was not alien to the Judiciary. Callinan J went as far as saying (at 595):

*Protection of the public is frequently an important, sometimes the most important of the considerations in the selection of an appropriate sentence of a criminal. That too is necessarily both a balancing and a predictive exercise.*

Gleeson CJ held that powers such as those inherent in Division 104 were not new to the judicial function, and thus not exclusively administrative. He went on to reiterate a point he had made in the *Fardon* case, that impartial judicial exercise is not only preferable to an exclusive executive prerogative of such powers, but also in line with our legal history.

Callinan J further rebutted Hayne’s argument, highlighting the judicial nature of proceedings inherent in Division 104:

*Division 104 makes and implies the usual indicia of the exercise of judicial power: evidence, the right to legal representation, cross-examination, a generally open hearing (subject to a qualification with respect to some sensitive intelligence material), addresses, evaluation of the evidence, the ascertainment and application of the law to the found facts, and in all other respects as well, the application of orthodox judicial technique to the making of a decision which may be the subject of an appeal on either or both fact and law. This is not the way that any arm of the Executive conventionally operates. Risks to democracy and to the freedoms of citizens are matters of which courts are likely to have a higher consciousness. That the material upon which the courts may be forced by the exigencies to rely, may be incomplete, fragmentary and conflicting does not deprive the process which the Code requires them to undertake of its judicial character, or mean that the issues are not justiciable. If courts could only decide cases in which the materials were complete and the facts not in conflict, there would be little work for them to do and many controversies left unquelled. The necessity and obligation to decide on what is available is well settled.*

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229 Gummow Crennan p39 at 109
230 Gleeson CJ p 8 at 17
231 At 599
In the end, the interim control order process was approved by the majority (with Kirby and Hayne JJ dissenting), thus securing the control order scheme (Lynch, 2008). Moreover, the High Court by this decision opined that it is constitutionally valid to impose a control order on someone cleared of charges, in the interests of protecting the public.

As for the outcome of the Thomas case, in December 2006, the Court of Appeal ordered a re-trial on the two counts for which he was first convicted based on an interview given to the Australian Broadcasting Company (ABC). In August 2007 a majority ruling of 5:2 in the High Court determined that issuing control orders, as provided for in Subdivision B, is indeed valid and rejected his appeal. At this point, Thomas’ iCO was still in place and unconfirmed, eleven months after it was issued. Since his re-trial at the Supreme Court was not set to commence until February 2008, Thomas agreed to follow similar obligations to those in his iCO until the trial’s conclusion. In return, the AFP agreed not seek another control order. Thomas was eventually cleared of all terrorism-related charges, but found guilty of falsifying his passport on October 23, 2008.\(^{232}\)

\(^{232}\) *R v Thomas (No 4) [2008] VSCA 107*
7.2.1.5 Summary
The Thomas case reveals the inherent complexity of pre-emption and its application within the traditional legal framework. The principal points of contention weave a rich tapestry of legal doctrines dating back decades, even centuries. This case was the first, and thus far, only case to challenge the Australian anti-terrorism control order regime. Of interest to this research are the issues relating to the separation of powers and the sanctioning of anticipated conduct. As Andrew Lynch has commented, the case examines the role of the Judiciary in response to executive decisions made in light of the threat of terrorism, i.e. whether it upholds the traditional review function or whether it becomes an active participant in developing feasible procedures of preventive justice (Lynch, 2008).

Thomas argued that the Judiciary is usually called upon to adjudicate reactively on past infractions; any pre-emptive action is the domain of the Executive. Although Thomas tried to argue that the overarching aim of protecting the public is one only the Executive can consider, it was found to be consistent with judicial functions. As Lynch (2008) pointed out, it is important to examine this question in the context of executive detention of aliens or state courts issuing preventive detention of dangerous offenders. He succinctly clarified the question as “whether a federal court (as opposed to a state court or the Commonwealth Executive) could deprive a citizen (as opposed to an alien) of their liberty, stopping short of full detention, absent any earlier finding of criminal guilt whatsoever” (Lynch, 2008, p. 1201). The Commonwealth of Australia argued that anti-terrorism laws with the aim of protecting the public from an attack should be recognized as an additional exception (Bennett, 2007).

As for ruling on the past, Hayne J’s dissenting opinion highlighted that the traditional adversarial system was concerned with adjudicating differing views of past events. Since the iCO hearing is ex parte, this process is undermined, as the person in question is unable to contest the evidence presented against him. The role of a judge, certainly in the interim hearing, thus acquires a more inquisitorial role, examining the evidence presented by the police. Hayne J also questioned the role and reliability of the intelligence material presented, as it did not stand up to the traditional standards of evidence. In cases where courts are required to take future conduct into consideration, Hayne J argued that such decisions were usually supported by expert evidence, again of a higher and more rigorous nature than the intelligence relied upon in terrorist cases. Accepting intelligence material as substantially correct and subsequently issuing control orders on the basis of the credibility of the senior AFP agent making the case exemplifies Hayne J’s concerns about undermining institutional
impartiality. However, it has to be said that Mowbray FM did exercise judicial discretion with regard to the obligations sought in the original iCO. Rather than accepting Jabbour’s proposed obligations without question, Mowbray modified the obligations, removing the controversial provision for religious and psychological counselling, as well as the originally rather excessive list of people whom Thomas was prohibited from contacting. Thus, the Federal Magistrate exercised his judicial discretion during the interim hearing, ensuring judicial oversight of the control order scheme.

Despite Hayne and Kirby JJ’s dissent, Thomas’ arguments relating to the incompatibility with federal judicial power, such as the ex parte nature of the iCO, the threshold of burden of proof, and the court enforcing its own orders were dismissed as not constituting novel proceedings, since examples of each already existed outside of the terrorism context. References to historical antecedents abound, their applicability and parallels to control orders were contested among the High Court judges. The Fardon case was cited as upholding the power to make interim detention orders against currently imprisoned sex offenders considered dangerous. As previously highlighted, interim detention orders against convicted offenders are examples of reactive prevention, and thus present different considerations to making similar orders on anticipated as opposed to past actions. Indeed, in Fardon the High Court was unable to answer whether pre-emptive detention is in fact judicial in nature (Lynch, 2008).

As for the determination of guilt, control orders, being civil in nature, do not require a finding of guilt. In the High Court, the majority found that since the orders neither involved punishment nor were intended to be punitive, Thomas’ arguments relating to the Judiciary imposing detention without a finding of guilt should be dismissed. The notion of imposing restrictions on the basis of past or anticipated conduct is central to the issuance of control orders, not least due to the wording of the grounds for issuance. As discussed in the previous chapter, Australian control orders can be issued if one or both of the necessary conditions, i.e. assisting in the prevention of an attack or the person has trained with a listed organisation, are fulfilled. In Thomas’ case, Mowbray FM, admitting the contested interview evidence of having trained with Al-Qaeda and Jabbour’s confirmation thereof, made it clear that the second condition had been fulfilled; this evidence also formed the basis for his assumption that Thomas might pose a danger in the future, thus satisfying the first condition of potential

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233 An example of an ex parte hearing are apprehended violence orders. Nicholas v R (1998) 193 CLR 173 established that Parliament can alter rules of both evidence and procedure, including the burden of proof without violating Chapter III (Bennett)

234 Fardon v Attorney-General (Qld) (2004) 223 CLR 575

235 A point contested by Hayne J, who argued that despite Thomas’ admission, this was not an established fact
anticipated future offending. Would the pre-emptive first requirement be met without the reactive second requirement? I recall Kirby J’s finding that the second element is not a necessary pre-requisite for issuance. A jury with access to the same information (evidence) acquitted him in the criminal trial with a higher burden of proof; yet it is considered sufficient in a civil trial with a lower threshold (Lynch, 2008). However, Thomas was not charged with receiving training from a listed organisation, an offence under s.102.5 of the Criminal Code (Cth). The inadmissibility of the controversial AFP interview may have determined the decision not to prosecute on that charge. The lower level of proof in the civil control order procedure, however, may have provided the ideal platform for the AFP to react to an offence which was not prosecutable in a criminal court, in which case, his control order would most definitely constitute an example of reactive prevention. On the other hand, Thomas may not have been able to be charged with the s 102.5 offence, as he allegedly trained with Al-Qaeda prior to the law’s existence, pre 9/11. One might argue then, that Thomas’ control order was not just reactively preventive, but an attempt at retrospectively sanctioning behaviour currently defined as criminal.
7.2.2 The David Hicks Case

Safe in the knowledge that the Australian control order system was not unconstitutional, a second control order was ordered sixteen months after Thomas’ iCO, this time against an Australian returning from Guantanamo Bay. David Matthew Hicks is an Australian who was sent to Guantanamo Bay after being captured in Afghanistan and sold to US Special Forces by the Northern Alliance in December 2001. He was held in Guantanamo between January 2002 and 2007. Hicks’ detention by the US predated the Howard Government’s anti-terrorism legislation, meaning that if Hicks had been returned to Australia at that point, he could not have been prosecuted for any offences (Australian Associated Press, 2007; Lasry, 2007).

Hicks’ case was eventually brought before the newly created Military Commission at Guantanamo in August 2004, where he was charged with conspiracy, murder and aiding the enemy. However, his trial was delayed after the Military Commission was found to be unconstitutional and in violation of international law. After President Bush ensured the constitutionality of the Military Commission with the introduction of a new act, Hicks was eventually charged with a new, retrospective offence, providing material support to terrorism, to which he pleaded guilty as part of a plea bargain, receiving a seven year sentence (having already spent six years and three months in prison). He was eventually returned to Australia in May 2007, where he served out the remainder of his sentence in Yatala Prison in Adelaide.

Hicks (2010) has since stated that he did not train with Al-Qaeda or any other terrorist group; nor did he engage in or plan any acts of terrorism during his time abroad. He also denied ever having confessed to supporting terrorism (Hicks, 2010).

7.2.2.1 The Interim Control Order

On December 21 2007 the Federal Magistrates Court of Australia approved an iCO be issued against David Hicks. After considering the information supplied by the AFP the court stated it was satisfied on the balance of probabilities that the order would substantially assist in the prevention of a terrorist attack, and that Hicks had received training from a listed terrorist organization. Furthermore, it was satisfied on the balance of probabilities that each obligation was reasonably necessary, appropriate and adapted to protect the public. Indeed, the majority

236 A departure from the usual US military judicial system
238 Military Commissions Act 2006 (US)
239 For a detailed summary review of the decisions leading up to the control order, see Lasry (2007)
of conditions in the iCO were almost identical to that issued against Thomas. However, one important difference emerged, namely that Hicks was, at the time of issuance, in custody in Yatala Prison and the obligations would only come into force upon his release.

The obligations, prohibitions and restrictions imposed under Hicks’ iCO were for him to:

- remain at a specified address between midnight and 6am each day;
- report to a member of South Australia (SA) Police, three times a week on specific days within a 16 hour window;
- have his fingerprints taken within 24 hours of his release from prison, and, if requested, during the above reporting duties;
- not leave the country without written AFP consent;
- have nothing to do with explosives, weapons, combat skills or military tactics, whether in document form (incl. electronic copies), physically or by communication; especially communicating his knowledge to individuals known to belong to an organization on the list of terrorist organizations, as well as not passing on the names and details of individuals known to be associated;
- not communicate or associate with anyone he knows to be a member of a listed terrorist organization;
- limit the following communication devices to one AFP approved service/devices:
  - mobile phone, phone card, SIM card or account, landline phone service, VOIP service, internet service provider and e-mail account;
  - have no access to satellite phones or public telephones;
- surrender all firearms and ammunition; commercial, military, homemade or improvised explosive devices or accessories immediately.

The reasons for issuing the iCO for David Hicks were grounded in his having trained with two listed terrorist organizations over an approximately twelve month period in 2000/2001 in Pakistan and Afghanistan. Several of his training courses are listed in Schedule 2 in Appendix F.

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240 There was no mention of the summary of grounds on which the order was made, but it was included in Schedule 2
241 Contained in Schedule 1 of the iCO
242 With provision to request an amendment to the address for specific reasons from the AFP
243 Unless otherwise agreed in writing with the AFP
244 Schedule 3 contains a list of terrorist organizations, listed people were determined by the Department of Foreign Affairs and Trade
245 A public telephone could be used in an emergency
246 Lashkar-e-Tayyiba (LeT) and Al Qaida
This knowledge allegedly provides both him and others with the ability to carry out a terrorist attack, as well as potentially serving as a source for other extremists. The iCO stated that the obligations set out in the control order were conceived to protect the public, reintegrate Hicks into Australian society and culture, protect him from being manipulated, and prevent his knowledge from helping others to commit terrorist acts.

In the Reasons for Judgment, Federal Magistrate Donald acknowledged the ex parte practice in such applications. Hicks was informed of the proceedings in advance and although not present himself, his legal representatives were. Issues concerning the age of some of the evidence relied upon were raised, although Hicks did not seek to provide any evidence to the contrary at the iCO hearing. Donald FM highlighted that the purpose of the hearing was not about punishment, simply about whether or not restrictions should be made on Hicks. He went on to say that:

“The matters are to be considered on what could be described as a prospective basis – what is to occur in the future so that the public is protected from a terrorist act”

Donald FM, Reasons for judgment, point 5

In his considerations, Donald FM highlighted “that even if there is a reasonably small chance of such a terrorist act occurring, nevertheless a control order could substantially assist in preventing such act. Accordingly, it is submitted, an interim control order should be made” (at 25). He went on to state that he initially had doubts as to whether Hicks posed a danger to Australia or the Australian community. However, letters sent by Hicks to his family whilst in the Middle East expressing certain views were included in Jabbour’s affidavit, which, in conjunction with his training, helped persuade Donald that Hicks posed a risk. Excerpts of some of these letters were included; the most incriminatory sentence is probably the following:

“Myself as a practicing Muslim with military experience can go to help in any of these conflicts” (at 27).

Although Hicks’ legal team argued that the sentiments of those letters were outdated, the judge did not have any materials to support this assertion, and thus was satisfied that Hicks posed a risk of either participating in or training others to carry out an attack. Donald FM went on to say that even if he was wrong about that assertion, that Hicks’ training was still sufficient
to issue the control order, dismissing the argument that the organizations became listed only after Hicks had completed training. Finally, Donald commented on not being able to fully assess the order’s impact on Hicks as no evidence was produced by him or on his behalf.

As for the terms of the iCO, Donald argued the restrictions on movement made Hicks less likely to be able to travel to remote locations to train others. Hicks objected only to one obligation contained within the order, namely the frequency at which he was required to report to police, calling three times a week “unduly onerous” (at 38). Donald stated that he would be willing to consider an alternative if presented to him at the next hearing. The fingerprinting requirement was justified as a means to be able to verify Hicks’ identity. The rationale for the other obligations are self-explanatory. Some of these were based on past behaviour, such as having already provided training himself, preventing promulgation of such knowledge, whereas others simply facilitated the AFP’s job of detecting any violations of the order.

The confirmation hearing was set for February 18 2008, 58 days after the iCO was issued. Hicks was given until February 4 (44 days) to file any evidence in his defence; Jabbour a further ten days to submit further evidence to both the court and Hicks. David Hicks was released from Yatala Prison on December 29 2007.

7.2.2.2 The Confirmed Control Order

The confirmation hearing went ahead as scheduled in the same court under the same magistrate. Hicks himself was not present but was represented in court. The cCO set out that Jabbour elected to confirm the order and after considering all the information received, the court was satisfied on the balance of probabilities both of the substantial assistance towards the prevention of a terrorist act and having trained with a listed terrorist organization warranting the imposed obligations, prohibitions and restrictions; all of which were considered reasonably necessary, appropriate and adapted to protect the public. The cCO was to expire on 21 December 2008, a year after the iCO was sought.

The cCO contained some “relatively minor” amendments to the original obligations set out in the iCO:

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247 The AFP provides the Respondent Cabcharge vouchers to fulfill reporting requirements, hence he is left with no financial impact of having to report.

248 Term used by the AFP to describe the variation between the iCO and cCO (at 5 in Reasons for Judgment).
• Curfew: reduced from six hours to four hours (between 1.00 am and 5.00 am)
• Residential requirement: extended to the whole of Australia (no longer restricted to South Australia)
• Reporting requirements: report to AFP as well as SA Police, twice a week (rather than 3 times), during the majority of the time he was under the curfew (18h 45min window, as opposed to the original 16 hours)
• Fingerprinting: required to provide to AFP as well as SA Police if requested during reporting duties

In the reasons for judgment, Donald FM stated that the adjournment was to give Hicks the opportunity to mount a defence and provide evidence. However, he chose not to file any affidavits, nor did he accept a further adjournment. Hicks had originally argued that the reporting requirements were unreasonable. Although the AFP served further affidavits saying they were unable to offer alternative monitoring allowing the number of times per week to be reduced, the cCO compromised between the three times sought by the AFP, and the one considered reasonable by Hicks. These affidavits were the only additional evidence brought in this case. Donald highlighted in several places in his judgment that Hicks could have offered further evidence to the effect that he no longer presented a risk or that his views had changed, but he did not. As such, Donald made his decision based on the evidence before him. Hicks later stated that he did not contest the order because he was mentally unprepared to speak in court after years of solitary confinement and torture at Guantanamo; also wanting to focus on quietly reintegrating into society and getting on with his life (Hicks, 2010). He had also been advised not to object to the order, only if a renewal was sought in the future.

In his considerations, Donald again reiterated his previous finding of being satisfied on the balance of probabilities that making a control order would substantially assist in the prevention of a terrorist act and that Hicks had, if nothing else, trained with a terrorist organisation. The training combined with some of the views expressed in letters provided him with sufficient grounds for concern that Hicks might be a danger.

The amendments to the obligations were described as being “less onerous than those previously sought” in the iCO. As for the reporting requirement, Jabbour filed evidence stating that no “technology based alternative for ensuring the presence of the Respondent at the
specified premises” (at 46) existed. However, the AFP did admit to having the ability to verify Hicks’ presence at his residence and at other times, but did not disclose any further details to the court. Given this evidence, Donald reduced the reporting requirements to twice a week, stating this was “more reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act” (at 47).

While the majority of considerations were identical to those listed in the iCO, there was still no clarification as to whether Hicks objected to the restriction of not being able to leave the country. Given that most other points explicitly mention Hicks not objecting, this might be a point of further examination. The control order was thus confirmed on the same grounds which gave rise to the iCO two months previously. Access to documents filed was made available to the media.

7.2.2.3 The Effect of the Control Order

Whilst subjective, Hicks’ personal account provides a unique insight into how these restrictions and obligations were perceived by an individual subject to a control order, and the effects they might have had. He described his biweekly reporting requirements as making life difficult, never being able to go away for weekends or holidays with family (Hicks, 2010). Reporting to police consisted of signing a piece of paper - his file was not in the police computer system because he had never actually been charged with a crime. According to Hicks “[t]he local police thought the whole thing was ridiculous” (Hicks, 2010, p. 400). Although Hicks acknowledged that there was some flexibility in his obligations, making changes proved “impractical and made my life very difficult” (Hicks, 2010, p. 401). On the occasions he did put in written requests to the AFP to stay at his father’s residence or to go away, the turnaround times to receive approval were lengthy and often only approved at the last minute. Perhaps even more disrupting was the AFP’s inability to provide him with an approved computer for the entire length of his control order, meaning he was unable to go online or have access to the one approved e-mail account contained within his provisions. Hicks summed up his control order as follows:

249 Presumably through surveillance
250 Point 57 states that at the iCO hearing Hicks had objected to making affidavits available to non-parties. This was not listed in the iCO judgments or considerations. However, no such application was made by either party during the confirmation hearing, which would indicate the AFP’s detailed reasons for imposing a control order on Hicks are available to be examined.
“Overall, the control order had a significantly negative impact on my mental health. I was still effectively in custody; it was an extension of my trauma and interfered with my psychological rehabilitation...The control order was a complete waste of valuable resources and manpower, and totally unnecessary”

Hicks (2010, p. 401)

7.2.2.4 Summary

David Hicks’ case contributes several interesting facts in the examination of pre-emption. Firstly, his control order was issued to coincide with his release from prison. Ignoring the debate about whether or not he should have been incarcerated in Australia after his release from Guantanamo, Hicks served the full sentence imposed by the US Military Commission. The issuing of a control order upon his release can therefore not be considered as a condition for early release or parole of any kind. Indeed, Federal Magistrate Donald said as much when declaring it a prospective protection of the public.

As for the issuing procedure, although ex parte, Hicks’ legal representatives were present at the interim hearing. More importantly, as with Thomas, the magistrate exercised his judicial discretion to amend the AFP-suggested obligations to better suit the controlee. Although the reduction in the reporting requirement was initiated by Hicks’ legal team, the reduction in the curfew hours and the residential extension to the whole of Australia originated with Donald FM.

Hicks’ personal account provides valuable, albeit subjective insight into how the control order affected his life. Since the AFP were unable to provide him with or approve access to a computer which he was entitled to under the control order, a restriction essentially became a deprivation. It would appear that the control order lived up to its name, exerting control over his actions and his life. Despite the relatively short curfew requirement, in combination with the other obligations Hicks felt he was still in custody. In this sense, control orders, although non-punitive in theory, appear to evoke a sense of punishment and detention in those subject to them.
7.2.3 Australia Summary

Although there have only been two control orders in Australia to date, both cases provide valuable insight into the rationale for issuance, as well as its implementation. In Jack Thomas’ case, the iCO, intended to be in force for a minimal amount of time, was never actually confirmed due to his challenge first of the issuing court, then the regime as a whole. David Hicks case, on the other hand, perfectly illustrates the control order process from start to finish.

Both Thomas and Hicks had allegedly participated in training with proscribed organisations prior to 9/11. However, these groups were proscribed only after the alleged training had taken place, leaving the government with no legal recourse to prosecute retrospectively. Containing both a pre-emptive and reactive condition for issuance, both control orders were justified on the basis that Thomas and Hicks had trained with proscribed organisations. The reactive element makes up one of the two conditions for issuing a control order, and in both cases, this condition has been relied upon to justify the first, and thus as grounds to issue the control order. So although it might not be a prerequisite, the reactive element has served as the foundation for both Australian cases. In light of these cases, Australian control order implementations stand firmly in the reactive prevention category, therefore invalidating accounts of them being described as pre-emptive. While it is true to state that the control order aims to prevent future behaviour in a bid to protect the public, its issuance was based on past conduct. However, Lynch (2008) highlighted that while judicial work has both predictive and protective elements to it, control orders cannot be compared to other preventive orders currently in use because they extend to individuals who have not been convicted of any previous crimes. That being said, much of the discussion about anticipated conduct in Thomas v Mowbray, especially the historical tracing of previous measures, focused on measures which deprive individuals of their liberty. Control orders, certainly in Australia, don’t go that far, their effects being limited to restrictions on liberty and requirements to report to police.

Despite arguments that the Australian control order regime is not equipped with the same legal safeguards and standards as the United Kingdom against which to challenge the regime due to its lack of a bill of rights, as well as having fewer avenues for independent oversight (Jaggers, 2008), the judicial independence exercised in both cases so far indicates that this role is being fulfilled by the courts. That is, it is evident that judicial discretion was exercised by the federal magistrates in each case; in addition, the High Court has performed an appellate

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For Thomas, see Hayne J at 485
function. The following section examines the role of the British Judiciary in applying and modifying the non-derogating control order scheme, as well as analysing the additional safeguard provided by the Independent Reviewer of Anti-terrorism Legislation. However, I begin by identifying trends over time in the application of the 48 NDCOs issued to date.
7.3 UK Control Order Application

7.3.1 Trends

Unlike Australia, the United Kingdom has made greater use of the control order scheme, issuing them to 48 individuals, as opposed to two. Each order issued to date was of the non-derogating variety. Moreover, all control orders have been directed at males with suspected links to international terrorism, despite the scheme’s applicability to domestic terrorism (Carlile of Berriew, 2006). The average age of controlees at the time of issue, where known (N=26) was 31.3 years old, ranging from 18 to 48.\textsuperscript{252} At the time of writing (June 2011), nine control orders remain in force, all of them against British citizens (Travis, 2011b).

Figure 7.1 shows the number of control orders issued each month since their inception. The initial peak of eleven has not been attained since. The highest number issued subsequently was six in both November 2005 and April 2008. The initial eleven control orders issued on the day the PTA was introduced were given to individuals affected by the now invalid Anti-terrorism, Crime and Security Act 2001 (ATCSA). The provision for the Home Secretary to issue NDCOs to individuals subject to a certificate issued under the ATCSA was contained within the PTA, s 3(1)(c). However, this could only occur between the PTA’s assent and its coming into force three days later.

\textbf{Figure 7.1 - Number of Control Orders issued in Britain since 2005}

\textsuperscript{252} Where the age was indicated as being between two ages, a half value was created to enable calculation of age
The annual distribution of newly issued control orders has not been uniformly spread. Figure 7.2 highlights that almost 40 per cent of all control orders were issued within the first year of the scheme’s introduction. The two subsequent years saw the proportion decrease by almost half, to 20 per cent and 7 per cent respectively. The proportion increased again in 2008, seeing almost a fifth of all control orders issued. The downward trend indicated by the 3 point moving average trend line continued in 2009, before dropping off to only two new orders issued in the last two years of the scheme. The calculation is based on 46 cases for which the year of issuance was known. The two missing cases were issued between 2009 and 2011, but have not been included in the figure below. The change in government in May 2010 to a Coalition opposed to control orders should also be taken into account.

Figure 7.2 – Proportion of Control Orders issued by Year between 2005-2011 (N=46)
Control orders are meant to apply to both foreign and British citizens alike. Not all cases specified the nationality of the controlee.\(^{253}\)

Figure 7.3 shows that just over half (54.2\%) were foreign nationals, and a quarter were British citizens.\(^{254}\) All 26 foreign nationals had previously claimed asylum in the United Kingdom. Their countries of origin included Iraq, Algeria, Libya, Ethiopia, Iran, Jordan and Tunisia.\(^{255}\)

**Figure 7.3 - Controlees by Nationality**

<table>
<thead>
<tr>
<th>Number of NDCOs</th>
<th>Per cent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreign nationals</td>
<td>26</td>
</tr>
<tr>
<td>British citizens</td>
<td>14</td>
</tr>
<tr>
<td>Unspecified</td>
<td>8</td>
</tr>
<tr>
<td>Total</td>
<td>48</td>
</tr>
</tbody>
</table>

As for the distribution of control orders by nationality over time, Figure 7.4 highlights that the majority of control orders issued in the first year of the scheme (89\%) were issued to foreign nationals, compared to less than 6 per cent to British controlees. The disproportionate trend was reversed in 2006 (33\% vs 67\%), before seeing all of the 2007 orders issued to British nationals. Foreign nationals outnumbered domestic nationals 7:1 in 2008. The following year, the nationality of only one of the six controlees was disclosed. In fact, nationalities were unavailable in the majority of the control order cases from 2009 onwards.

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\(^{253}\) Most of those were issued in 2009
\(^{254}\) British citizens with dual citizenship were classified as British for the purposes of this research
\(^{255}\) Respective numbers: 8,7,6,1,1,1,1.
The available data, though limited, provided some insight into whether or not the controlees had any previous arrests to their name, or whether they had been previously detained. This information was classified into terrorism related, terrorism arrest but no charge, and non-terrorism related. Of those known (N=22), two-thirds (68%) had either been previously arrested or detained on terrorism related charges in either the UK or abroad. Two of these men had had their request for asylum in the UK refused on at least one previous occasion. Indeed, 12 of the 15 men were foreign nationals. Six of the controlees (LL, HH, NN, JJ, KK and AF), four of whom were Iraqi, one Iranian and one British national, were arrested on terrorism related offences, but were not charged. Finally, one individual, a British national (AL), had a previous conviction for fraud and robbery, as well as drug possession.

It is interesting to note that the six individuals who had not been charged with terrorism offences following their arrest, along with GG, were issued with the longest curfew, namely 18 hours. This curfew was later reduced to 14 hours following a challenge in court (see below), only to be increased to 16 hours in at least two of the cases (NN and AF). The first British citizen to be served with a control order, MB, was neither subject to a curfew, nor electronic

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256 An Iraqi national with previous terrorism related antecedents
tagging. He was also allowed to work normal hours (Carlile of Berriew, 2006). It has been difficult to piece together a comprehensive picture of which individual was given what curfew, and subsequently keeping up with any amendments. Table 7.1, derived from the Carlile report, highlights the average curfew length per annum. Most of the annual variation is no more than two hours from the overall average of 12 hours, which is almost three times that of the Australian average of 4.5 hours.

Table 7.1 - Average Curfew Length per annum 2006-2010

<table>
<thead>
<tr>
<th></th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td>Curfew (hours)</td>
<td>13.6</td>
<td>10</td>
<td>13.3</td>
<td>12</td>
<td>11.9</td>
<td>12.16</td>
</tr>
</tbody>
</table>
Summary of Control Order Statistics

These figures were accurate as of 10 December 2010, and were taken from Lord Carlile’s 6th Report:

- 8 people were subject to a control order on 10 December 2010
- 48 people have ever been subject to a control order
- 40 individuals had been at some point, but were no longer, subject to a control order. Of these:
  - 10 individuals were served with notices of intention to deport and either held in custody or granted bail. 6 have now been deported
  - 4 individuals’ orders were not renewed as the assessment of the necessity of the control orders had changed.
  - 12 individuals had their control orders revoked as the assessment of the necessity of the control order changed.
  - 3 individuals had their orders revoked as it was concluded that the disclosure of information required as a result of the House of Lords judgment in AF & Others could not be made because of the damage this would cause to the public interest
  - 3 other individuals had their control orders revoked on direction of the court.
  - 2 individuals had their control order quashed by the High Court (one of whom was one of the individuals who absconded – he subsequently turned himself in to the police).
  - 1 individual absconded after the Court of Appeal confirmed the quashing of his order but before a new order could be served.
  - 5 orders expired after they absconded (control orders last for 12 months)
- 7 individuals have absconded in total
7.3.2 Legal Challenges

Control orders originate with the Executive. However, there are two inbuilt safeguards in the control order regime, judicial review and the necessity for annual renewal based on the Independent Reviewer of Terrorism’s annual reports and recommendations (Bonner 2006). The aim of the following section is to provide a brief overview of some of the most pertinent and influential court challenges arising in response to the scheme. Given the greater number of orders issued in the UK compared to Australia, a thorough examination of each case akin to the one conducted above was beyond the scope of this study. Moreover, given the secret nature of many proceedings, this undertaking would have been nigh impossible.

Given that control orders originated in reaction to a legal challenge of their predecessor, the ACTSA, it is perhaps not surprising that the new measure was also subject to legal scrutiny, especially given its implications for the legal process. The Belmarsh case\footnote{A and others v Secretary of State for the Home Department [2004] UKHL 56} has contributed to executive measures being increasingly scrutinised by the courts, as has the legislation itself, by encouraging judicial review (C. Walker, 2011). In relation to control orders, judicial involvement has been controversial due to the anticipatory risk assessment they are asked to undertake (C. Walker, 2011). Much in the same way this issue was debated in the Australian context in the Thomas case, critics considered this external to the judicial role, seemingly neglecting to acknowledge that this is precisely what judges are asked to consider on a daily basis when making bail or sentencing decisions (C. Walker, 2011). Since their introduction in 2005, several individuals subject to non-derogating control orders launched legal challenges in response to their control order. The majority of appeals centred around the obligations set out in the orders (Jaggers, 2008), many of which related to the length of the curfew imposed and whether it constituted a breach under Article 5 of the ECHR (deprivation of liberty). Probably the most influential case pertaining to acceptable curfew duration is JJ, which set the precedent for an upper limit of 16 hours. The second theme to emerge is the concern surrounding an individual’s right to receive a fair trial in line with Article 6, secret evidence and Special Advocates proving especially contentious. The two key trials with regard to procedural issues are MB and AF.\footnote{[2007] UKHL 46 and [2009] UKHL 28 respectively} Although both individuals were suspected of having links to extremists, the material at the heart of the justification for the control orders was contained in the secret information. Given the civil nature of the control order process, the House of Lords found that the Home Secretary need not refer to a specific offence given that the aim of the order was preventive in nature and not punitive or retributive (C. Walker, 2011).
The PTA 2005 clearly distinguishes between two distinct species of control order. To date, Britain has only issued the non-derogating variety, meaning no derogation from Article 5 of the ECHR was necessary. In practice, however, the duration some controlees were required to remain at a specified address was initially up to eighteen hours. In Secretary of State for the Home Department v JJ & others (FC)\textsuperscript{259} the Court of Appeal found that the 18 hour curfew, being electronically tagged, being subjected to random searches, as well as restrictions on movement within a specified radius, twice daily reporting requirements, as well as prohibitions on who they could meet and how they could communicate,\textsuperscript{260} amounted to a breach of Article 5, i.e. a deprivation of liberty, and could therefore not be made by the Home Secretary alone (International Commission of Jurists, 2009; Ip, 2007; S. Macdonald, 2007; C. Walker, 2011). The House of Lords upheld the decision, finding that the cumulative effect of these obligations and restrictions was incompatible with Article 5 and amounted to conditions resembling solitary confinement for an indefinite duration. Although the analogy of an open prison was put forward by the Law Lords, they found controlees to be at a greater disadvantage due to the restrictions on contact or indeed entertainment (C. Walker, 2011). Moreover, some controlees had been relocated to unfamiliar areas, thus depriving them of familiar social contacts. It was held that their lives were wholly regulated by the Home Office. Lord Bingham\textsuperscript{261} found that "[b]ecause account must be taken of an individual’s whole situation it seems to me inappropriate to draw a sharp distinction between a period of confinement which will, and one which will not, amount to a deprivation of liberty, important though the period of daily confinement will be in any overall assessment." That being said, Lord Brown proffered 16 hours as being the upper limit of curfews, but still acknowledged that it might be excessive. Indeed, in the case of E, a 12 hour curfew and other obligations were not considered a deprivation of liberty. Not even the 14 hours issued to MB or AF qualified as a deprivation of liberty. It would appear that despite the reluctance of some to specify an accepted threshold, this is precisely what has emerged.

In this regard, the case of Secretary of the State for the Home Department v MB held that there was no determination of a criminal charge or any particular criminal offence in NDCO cases, and no assertion of criminal conduct; it was based on suspicion alone. Moreover, the purpose

\textsuperscript{259} [2007] UKHL 45
\textsuperscript{260} Other obligations included limited (pre-approved) visitors, being subjected to searches, and no mobile phone or internet communication
\textsuperscript{261} Ibid, at 16
of the order was identified as being preventive, not punitive or retributive. The same was held in AF:

“Prevention is one of the recognised aims and consequences of punishment and the effect of a preventative measure may be so adverse as to be penal in its effects if not in its intention.

I would on balance accept the Secretary of State’s submission that non-derogating control order proceedings do not involve the determination of a criminal charge. Parliament has gone to some lengths to avoid a procedure which crosses the criminal boundary: there is no assertion of criminal conduct, only a foundation of suspicion; no identification of any specific criminal offence is provided for; the order made is preventative in purpose, not punitive or retributive; and the obligations imposed must be no more restrictive than are judged necessary to achieve the preventative object of the order.”

Lord Bingham of Cornhill at 23 and 24

Lord Hoffmann further elaborated on the pre-emptive intention underlying the control order scheme (at 48 in AF):

“The order is made on the basis of suspicion about what they may do in the future and not upon a determination of what they have done in the past. And the restrictions imposed by the order are for the purpose of prevention and not punishment or deterrence.”

There was no restriction beyond what was considered necessary to be preventative. ECHR Article 6(1) entitles the controlee to a level of procedural protection commensurate with the gravity of the potential consequences, especially if the order might contain stringent obligations. It applies to both civil and criminal cases, but justifies certain constraints in the interest of national security and justice.

The third issue in MB was determining whether or not the Home Secretary’s reasons to impose the control order were flawed. Originally, the High Court found that the procedure of imposing NDCOs was in violation of Article 6 of the ECHR, due to the Home Secretary’s reasoning being
flawed on the grounds of information available at the time of issuance only, thus weakening any judicial supervision. However, this finding was later overturned by the Court of Appeal which found that all information available at the time of the court hearing needed to be taken into account (Ip, 2007). Indeed, the case divided judicial opinion, ranging from Lord Hoffmann dissenting on the grounds that Special Advocates provided sufficient protection to ensure a fair trial, to Lord Bingham who asserted that the use of closed material could never ensure the “irreducible minimum of procedural protection” guaranteed by Article 6 (Kavanagh, 2010).

Indeed, a Constitutional Affairs Committee Report (2005) had already identified “a number of defects with the Special Advocate system” even prior to its application in conjunction with the PTA (p. 3). It proposed several amendments to improve the fairness of the system and the communication between the appellants and the Special Advocates (Constitutional Affairs Committee, 2005). The role of Special Advocates was further explored in the case of AF. At issue was whether the presence of Special Advocates sufficiently compensated for the non-adversarial hearing to still be compatible with Article 6 requirements of a fair trial. The House of Lords found that in cases where the case against a controlee was heavily based on secret evidence, the right to a fair trial was indeed compromised (Kavanagh, 2010).

“I agree further that the special advocate procedure, highly likely though it is that it will in fact safeguard the suspect against significant injustice, cannot invariably be guaranteed to do so.”

Lord Brown, at 90

The Home Secretary’s case against MB included both open and secret material, but the justification for imposing the order was contained in the closed material. After the Appeal Court judgment in MB, the court was required to decide whether the information upon which the Home Secretary relied actually amounted to reasonable grounds for suspecting involvement in terrorist activity, as well as deciding upon the necessity of each of the requested obligations. The Cerie Bullivant case further clarified several issues relating to the disclosure of evidence and the role of Special Advocates. Material should only be withheld if its disclosure would obviously be detrimental to the public interest. As for the Special Advocates,

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262 In accordance with section 3(10) of the PTA 2005
263 [2006] EWCA (Civ) 1140
264 See Kavanagh for an in-depth analysis of the MB and AF cases and their compatibility with the HRA
265 Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action [2009] UKHL 28 at 8
266 Known initially only as AG; [2008] EWHC B2 (29 Jan 2008)
it was held that they could communicate with the individual to identify matters which would help support the defence. Ordering disclosure on the grounds of fairness alone prior to the testing of evidence will only be ordered in exceptional circumstances. If at the end of the hearing the court finds a breach of Article 6, it must give the Home Secretary the opportunity to disclose further evidence so as to remedy the potential breach.

In February 2009, the Council of Europe ECHR in *A and Others v UK*[^267] ruled on the issues of the effects of non-disclosure in terms of both impact on the adversarial trial procedure in the interests of national security and its effect on the right to a fair trial. It held that the interests of national security are capable of justifying the withholding of certain evidence:

“The Court has held nonetheless that, even in proceedings under Article 6 for the determination of guilt on criminal charges, there may be restrictions on the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person. There will not be a fair trial, however, unless any difficulties caused to the defendant by a limitation on his rights are sufficiently counterbalanced by the procedures followed by the judicial authorities ...

Thus, while the right to a fair criminal trial under Article 6 includes a right to disclosure of all material evidence in the possession of the prosecution, both for and against the accused, the Court has held that it might sometimes be necessary to withhold certain evidence from the defence on public interest grounds.”

*A and Others v United Kingdom* at 205-206

However, it did find that, in cases where the Home Secretary’s case rested predominantly on secret evidence which had not been disclosed to the person in question, the Special Advocate provisions were insufficient protection.

“[T]he special advocate could not perform this function in any useful way unless the detainee was provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate.

While this question must be decided on a case-by-case basis, the Court observes

[^267]: *A and Others v United Kingdom*, ECHR (19 February 2009)
generally that, where the evidence was to a large extent disclosed and the open material played the predominant role in the determination, it could not be said that the applicant was denied an opportunity effectively to challenge the reasonableness of the Secretary of State’s belief and suspicions about him. In other cases, even where all or most of the underlying evidence remained undisclosed, if the allegations contained in the open material were sufficiently specific, it should have been possible for the applicant to provide his representatives and the special advocate with information with which to refute them, if such information existed, without his having to know the detail or sources of the evidence which formed the basis of the allegations.”

A and Others v United Kingdom at 220

As a result of the ECHR decision, Lord Phillips in Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action [2009] UKHL 28, stated:

“This establishes that the controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations. Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirements of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.”

Lord Phillips at 59

Legal challenges and judicial oversight were also on Lord Carlile’s radar reviewing the application of the control order scheme in his annual reports. Given that the most significant legal findings in relation to pre-emption were discussed above, these will not be duplicated in the next section, which focuses on the Independent Reviewer’s annual reports.
7.3.3 The Carlile Reports

The PTA requires the British Home Secretary to prepare a report to Parliament every three months detailing the control orders issued during that period.\(^{268}\) The legislation also provided for a reviewer of these powers, appointed by the Home Secretary, to compile annual reviews\(^{269}\) detailing his opinion of the implications of the act, as well as whether or not and the extent to which the Home Secretary may have issued urgent NDCOs without the consent of the court.\(^{270}\) As per section 14(3) and (5) of the PTA, Lord Carlile of Berriew QC was appointed to review the operation of the act. His reports generally followed the same format every year, outlining the statutory provisions, providing general information on the powers used, listing a summary of court challenges and decisions, as well as providing feedback and/or recommendations in light of that year’s developments. The following sections summarise the most pertinent annual observations and developments.

7.3.3.1 Obligations

Each of the Reviewer’s reports contains sample Schedules of Obligations in the Annex section. It is apparent that the conditions set out in UK cases appear to be far more arduous and cumbersome to comply with than in the Australian cases. Most controlees were required to be electronically tagged and curfew hours were, in some but not all cases, significantly longer than in both Australian cases. Furthermore, controlees were required to report on a daily basis. In many cases, movement was confined to strictly marked areas within a certain radius of the residence or within town boundaries. In his first report in 2006, Lord Carlile acknowledged that the restrictions imposed on most controlees, although not quite amounting to derogation, were nonetheless “extremely restrictive” (at 42), describing them as falling “not very far short of house arrest, and certainly inhibit normal life considerably” (at 43). As a result of these findings, Lord Carlile proposed the establishment of a review group to monitor the continued necessity of obligations in each case (Carlile of Berriew, 2006, at 46). The Control Order Review Group (CORG) was set up in 2006, and includes Home Office staff, relevant public service staff, as well as police. The purpose of the group is:

\(^{268}\) S 14(1)
\(^{269}\) S 14(2)&(3)
\(^{270}\) S 14(5)
1. To bring together the departments and agencies involved in making, maintaining and monitoring control orders on a quarterly basis to keep all orders under frequent, formal and audited review.

2. To ensure that the control order itself remains necessary as well as ensuring that the obligations in each control order are necessary and proportionate. This includes consideration of whether the obligations as a whole and individually:
   a. Are effectively disrupting the terrorism-related behaviours of and risk posed by the individual?
   b. Are still necessary to manage the risk?
   c. Need to be amended or added to in order to address new or emerging risks?

3. To monitor the impact of the control order on the individual, including on their mental health and physical well-being, as well as the impact on the individual’s family and consider whether the obligations as a whole and/or individually require modification as a result.

4. To keep the prospect of prosecution under review, including for breach of the order.

5. To consider whether there are other options for managing or reducing the risk posed by individuals subject to control orders.

Lord Carlile (2009, p. 19)

Whereas the first report emphasised that most controlees were subject to the same restrictions, 22 in total, by the second annual report, Lord Carlile stressed the variations in conditions, ensuring the conditions were tailored to the individual. All had restrictions to reside at a specified address, ten of whom were also subject to a curfew (averaging 13.6 hours). The individuals with curfews were subject to 14.8 conditions on average, compared to 7.1 of those not subjected to curfews. Unfortunately, given the change in reporting style, it was not possible to ascertain the nationalities of these individuals. By the fifth report, up to 25 different restrictions or obligations were being used to control individuals. The variability of the curfew length was already addressed in the previous chapter and thus will not be repeated here. Lord Carlile highlighted that imposing an overnight curfew was associated with considerable safety advantages and in his view, sufficient to manage risk (Carlile of Berriew, 2011).
7.3.3.2 Breaches

At the end of the first reporting period, despite some minor breaches of orders, none had been prosecuted (Carlile of Berriew, 2006). By the end of the second year of the scheme, however, several cases were being pursued. Annex 2 referred to several breaches, though most were apparently minor in scale. Yet one was found guilty and sentenced to five months in prison (Carlile of Berriew, 2007). Another controlee, though charged with seven breaches could not be prosecuted, as he managed to abscond prior to a new order being issued after original one was quashed. Indeed, he was one of two individuals who had absconded that year. Interestingly, Lord Carlile was satisfied that both “present little direct risk to public safety in the UK at the present time” (Carlile of Berriew, 2007, Annex 2 at 21). This statement seems somewhat contradictory to the repeated justification of control orders due to the apparent risk these individuals pose on the general public. The only way that this justification might then be accurate is if the two abscondees were planning to leave the country, and focused their ‘intentions’ overseas. By the end of the third reporting period, there had been seven absconds in total (Carlile of Berriew, 2008). The number of controlees who managed to evade control was a frequently cited criticism of the early years of the control order scheme. Lord Carlile called abscondees an embarrassment to the system, highlighting the enormous demands on resources to ensure compliance (Carlile of Berriew, 2008). The third report contained a list of breached orders, as well as their outcome. Of the five cases listed, two were imprisoned, for five months and a minimum of seven months respectively. One individual not subject to a control order was sentenced to three and a half years imprisonment for assisting a controlee breaching their order (Carlile of Berriew, 2008). This format was included in each subsequent report. Table 7.2 provides a compilation of all prosecutions resulting from breached orders. The table of breaches is by no means comprehensive, as it only lists those which have been subject to criminal charges. Those not included were described as fairly insignificant, such as being a few minutes late for reporting, failing of tagging equipment, or because the breaches arose out of family obligations or emergencies (Carlile of Berriew, 2010). After visiting several controlees, Lord Carlile recommended action on a frequently cited concern, namely a lack of awareness about who to contact in an emergency so as not to constitute a breach of the order. He believed the controlees ought to receive support by the government since the restrictions are imposed in the absence of any finding of guilt and often involve forced relocation, should be remedied by a “careful pastoral care approach” (Carlile of Berriew, 2011, at 35). From the

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271 The dates listed in Annex 2 are from September 2007 to May 2008.
outset he has also been aware of potential psychological effects, highlighting the amendment of one order\textsuperscript{272} in light of medical evidence. In his second report he drew attention to the State’s obligation to monitor effectively the physical and mental well-being of the individual who is subject to coercive measures.\textsuperscript{273}

\textsuperscript{272} In the case of E
\textsuperscript{273} Keenan v UK [2001] 33 EHRR38
Table 7.2 - Summary Table of Breach Charges since January 2007

(adapted from Carlile Reports)

<table>
<thead>
<tr>
<th>Carlile Report</th>
<th>Case</th>
<th>Obligations breached</th>
<th>Charge(s)</th>
<th>Date of charge</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Third 2008</td>
<td>A</td>
<td>Reporting and residence</td>
<td>Contravening his control order obligations</td>
<td>Dec 2006</td>
<td>Jan 2007 – pleaded guilty to 3 counts of late reporting and 1 count of residing at an alternative address without first notifying the Home Office. Convicted of breaches and sentenced to 5 months’ imprisonment</td>
</tr>
<tr>
<td>(Annex 2)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B</td>
<td></td>
<td>Curfew</td>
<td>Contravening his control order obligations</td>
<td>May 2007</td>
<td>Bailed until hearing date – not yet scheduled</td>
</tr>
<tr>
<td>C</td>
<td></td>
<td>Residence and police reporting</td>
<td>Contravening his control order obligations</td>
<td>Feb and Jun 2007</td>
<td>Acquitted of all charges by a jury in December 2007</td>
</tr>
<tr>
<td>D</td>
<td></td>
<td>Reporting, communications, residence and financial</td>
<td>Contravening his control order obligations</td>
<td>Sept 2007</td>
<td>Bailed until further notice</td>
</tr>
<tr>
<td>E</td>
<td></td>
<td>Curfew, boundary, and residence</td>
<td>Contravening his control order obligations and conspiracy to contravene his control order obligations</td>
<td>Sept 2007</td>
<td>Remanded in custody until May 2008</td>
</tr>
<tr>
<td>Carlile Report</td>
<td>Case</td>
<td>Obligations breached</td>
<td>Charge(s)</td>
<td>Date of charge</td>
<td>Status</td>
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<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>Fourth 2009</td>
<td>F (A)</td>
<td>Communications and boundary</td>
<td>Contravening his control order obligations</td>
<td>Jul and Nov 2008</td>
<td>Bailed until further notice. The trial for suspected breach of the control order obligations is due to take place in April 2009. The court is awaiting the outcome of the Court of Appeal’s judgment on Article 6 (right to a fair trial) before they hear this criminal case.</td>
</tr>
<tr>
<td></td>
<td>G (B)</td>
<td>Reporting and communications</td>
<td>Contravening his control order obligations</td>
<td>Feb and Jun 2008</td>
<td>Bailed until further notice. The date of his trial has yet to be confirmed. He currently has an appeal against the decision not to allow him to appeal his section 3(10) decision and an appeal against the renewal of the control order in July 2008. The court is awaiting for the outcome of these appeals before they hear this criminal case.</td>
</tr>
<tr>
<td></td>
<td>H (C)</td>
<td>Communications and financial</td>
<td>Contravening his control order obligations</td>
<td>Oct 2008</td>
<td>Bailed until further notice. The trial for suspected breach of the control order obligations is due to take place in March 2009</td>
</tr>
<tr>
<td>Fifth 2010</td>
<td>I (A)</td>
<td>Curfew; reporting to monitoring company, tampering with electronic monitoring equipment and entering prohibited premises.</td>
<td>Contravening his control order obligations</td>
<td>10 Dec 2009</td>
<td>Remanded to prison on 11 December 2009. No date yet fixed for trial (in Feb 2010)</td>
</tr>
<tr>
<td>Carlile Report</td>
<td>Case</td>
<td>Obligations breached</td>
<td>Charge(s)</td>
<td>Date of charge</td>
<td>Status</td>
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</tr>
<tr>
<td>Sixth 2011 (Annex 3)</td>
<td>J (A)</td>
<td>Police station reporting, telephone monitoring company, curfew, possession of unauthorised mobile phone</td>
<td>Contravening his control order obligations</td>
<td>14 Apr 2010</td>
<td>Not guilty plea entered. Trial scheduled for 11 April 2011.</td>
</tr>
<tr>
<td>K (B)</td>
<td>Possession of unauthorised mobile phones</td>
<td>Contravening his control order obligations</td>
<td>2 Feb 2010</td>
<td>Has requested the criminal trial is not heard until his appeal against the decision of the Admin Court to uphold his control order is heard.</td>
<td></td>
</tr>
<tr>
<td>L (C)</td>
<td>Curfew, visiting prohibited premises</td>
<td>Contravening his control order obligations</td>
<td>10 Dec 2009</td>
<td>Trial 23 July 2010, guilty plea to 6 counts, received a 15 month custodial sentence. Due to time served released immediately.</td>
<td></td>
</tr>
</tbody>
</table>
7.3.3.3 Duration of Orders

Throughout each report, Lord Carlile stressed the need for each case to be “proportional to the risk to national security presented by the controlee” (Carlile of Berriew, 2006, at 45). Related to the issue of proportionality is the length of time an individual should be subject to control order restrictions. Acknowledging parallels with the detentions under ACTSA, Lord Carlile was adamant that long-term restrictions on liberty for UK residents would not be acceptable (Carlile of Berriew, 2007). Each control order is valid for one year, but can be renewed if the concerns giving rise to the order are still in place at the time of renewal. After expressing the need for an urgent strategy allowing the termination of control orders in each case, Lord Carlile stated that only in rare cases could a control order be justified for longer than two years, and proposed a recognised presumption to that effect be introduced (Carlile of Berriew, 2007). His justification was that by that time, any cell would have been sufficiently disrupted and aware of the authorities’ interest in their activities. Therefore, any former controlee would be an undesirable asset for that organisation, who would prefer to invest in so-called ‘clean skins’ (Carlile of Berriew, 2008, at 50). Despite supporting court decisions, his proposal to limit the maximum duration of a control order was rejected by the government (Carlile of Berriew, 2009). Writing a year later, Lord Carlile highlighted that a small number of controlees appear to have maintained a level of contact with terrorist associates with a view to engaging in activities at some point in the future. These are the individuals against whom a duration greater than two years was seen as being justified, as the order had not achieved its aim of disrupting their involvement. However, basing such decisions on old evidence would be difficult to justify in front of a judge (Carlile of Berriew, 2010). In early 2010 a quarter (N=3) of the controlees had been on a control order for longer than two years, one was in his fifth year. Carlile was adamant that a “substantial risk assessment” justified the assumption of all three, despite having significantly reduced the danger, still posing an “actual or potential, and significant danger to national security and public safety” (Carlile of Berriew, 2010, at 43). Three categories of controlees emerged (Carlile of Berriew, 2010, at 50):

a) very high risk, continuing and determined terrorists posing a real risk to national security and the public in the UK and abroad;

b) those already trained and wishing to travel abroad for further training and/or active terrorism;

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274 This was also the finding in [2009] EWHC 3390 (Admin) para 182, and in AT and AW [2009] EWHC 512 (Admin)
c) *those in relation to whom the principal information is of wishing to travel abroad for terrorist training.*

There was speculation that the four former British Guantanamo Bay detainees would be issued with a control order given that Britain assured the US government that the four would be monitored (BBC News, 2005). However, Lord Carlile made it clear that these individuals did not constitute a fourth category of controlees, stating that “control orders are not a routine form of control of people who are perceived to be potentially troublesome, and it is over-simplistic to assume that they would be appropriate, acceptable, practicable or even lawful against a group of people simply because they had been detained elsewhere, under a foreign (and unusual) jurisdiction” (Carlile of Berriew, 2009, at 35). This determination is of particular interest given the parallels in David Hick’s case in Australia.

Some control orders against UK citizens were issued on intelligence suggesting they intended to join extremists in the Middle East. Lord Carlile stated that “[w]hilst such uses of the legislation are appropriate in the cases I have seen, they are at the lowest end of the potential range of use for control orders. The greatest care must be taken to ensure that the orders are used only in those cases where there is a clear intention to put the stated desire into effect, as opposed to extravagant expressions of support or wishes” (Carlile of Berriew, 2007, at 37). This statement suggests that pre-emption alone is not as strong a predictor of grounds to issue a control order, but that the government would rather act in reaction to something constituting something more closely resembling other preparatory offences. The threshold for issuing an NDCO is *reasonable grounds to suspect*, which some have argued should be raised to a minimum of *reasonable grounds for belief*. Lord Carlile has come out in favour of this change. He believes that all control orders issued so far have reached that standard, arguing that most even reached the civil standard of balance of probabilities (Carlile of Berriew, 2011).

By 2011, only two controlees subjected to a control order exceeding two years remained. Indeed, Lord Carlile stressed that all of these control measures were imposed with the aim of protecting the public. This was reiterated by a statement included in his fifth report by the then Home Secretary Alan Johnson to the House of Commons in December 2009 stating that “[t]he Government have no higher duty than to protect the public” (Carlile of Berriew, 2010, at 57).
7.3.3.4 Judicial Review Process

In each report, where applicable, Lord Carlile included a summary listing the year’s principal court decisions relating to control orders. The court made several important decisions from 2006 onwards. Carlile acknowledged the considerable impact of court decisions in his second report, citing three and a half pages of Phillips CJ and Sullivan J’s judgement in MB. His assertion was that the judicial review procedure is effective (Carlile of Berriew, 2010). In reaction to the decisions of 2007, which included JJ, E, MB, Mahmoud Abu Rideh and Bullivant, he concluded:

“All of these decisions emphasise the exceptionality of both control orders and of national security. One is left with the clear conclusion that control orders will never be regarded by the courts as acceptable routine, as opposed to an exceptional jurisdiction; and that challenges will not be regarded as an acceptable means of opening the door to wide disclosure if national security is to be affected.”

Lord Carlile (2008, at 64)

In his second report, Carlile made a point of not having received any complaints with relation to the Special Advocate procedure (Carlile of Berriew, 2007, at 49). In 2009 however, he received Special Advocates’ accounts expressing concern about their role.275 Their concerns related to the rule that communication with their client is prohibited after receiving the closed evidence, except with prior permission by the court, and then in writing, and on notice to the Home Secretary.276 In practice, this means that:

“There is in fact no contact between the Special Advocates and the appellant’s chosen representatives in relation to the closed case... Under the SIAC (Procedure) Rules 2003, Special Advocates are permitted to communicate with the appellant and his representatives only before they are shown the closed material... Once the Special Advocates have seen the closed material, they are precluded by r. 36(2) from discussing the case with any other person. Although SIAC itself has power under rule 36(4) to give directions authorizing communication in a particular case, this power is in practice almost never used, not least because any request for a direction authorizing communication must

276 SIAC (Procedure) Rules 2003 and Civil Procedure Rules CPR r. 76. 25(2)
be notified to the Secretary of State. So, the Special Advocate can communicate with the appellant’s lawyers only if the precise form of communication has been approved by his opponent in the proceedings. Such a requirement precludes communication even on matters of pure legal strategy (i.e. matters unrelated to the particular factual sensitivities of a case).

Lord Carlile went on to state the relationship between the Special Advocate and the controlee is sufficiently different from the usual lawyer-client relationship to constitute a break from both the domestic right of access to a court, as well as Article 6 of the ECHR (Carlile of Berriew, 2010, at 134).

A group of Special Advocates proposed two changes to the rules, allowing them to communicate with controlees on matters relating to pure legal strategy and procedural administration, as well as to give them the power to apply to a High Court judge ex parte to question the controlee without the need to give prior notice to the Home Secretary. Although Lord Carlile was sympathetic to their plight, the government rejected their concerns out of concerns related to the disclosure of sensitive information compromising national security.

### 7.3.3.5 National Security Concerns

The issues surrounding national security are twofold. Firstly, much of the information supporting the assertions does not qualify as evidence, instead falling into the intelligence category. Lord Carlile acknowledged the reliance on intelligence in control order cases, and called for the law to be amended to allow interception material to be admitted as criminal evidence (Carlile of Berriew, 2006, at 37; 2007). Findings from a Privy Council review in 2008 stated that admission of intercept material as evidence was necessary to protect the public as well as national security and provided nine tests for its admission (*Privy Council Review of Intercept as Evidence*, 2008). However, the idea was abandoned, at least temporarily, after extensive applied testing found that the proposed model was not legally viable, damaging rather than enhancing the capacity to prosecute. Carlile rejected comparisons with jurisdictions where such material is admissible, calling them “ill-informed and misleading” (at

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278 In a side note, the number of Special Advocates had increased from 50 in to almost 70 by the last report in the space of one year
59), due to the more demanding requirements of disclosure on the prosecution. He cited that in France, much of the material seen by the investigating magistrate (juge d'instruction) is never disclosed to the defence due to the inquisitorial set up. Moreover, he shared the Home Secretary's view that he did not believe admitting such evidence would have led to a prosecution of a controlee.

The second issue concerns the restrictions on the amount of sensitive information that can be disclosed in court and to the controlee for fear of compromising national security. Lord Carlile believes that in most cases, providing sufficient information to legally comply without compromising public interest ought to be possible (Carlile of Berriew, 2011, at 92). While national security concerns warrant certain restrictions on information disclosure, Lord Carlile described anonymity as an advantage to both the controlee and the government, his reasoning being that identification could potentially negatively influence a trial brought at a later date.

Indeed, throughout the reporting period, both the government and Lord Carlile have repeatedly asserted their preference to prosecute and convict terrorist suspects. Lord Carlile affirmed that communications with chiefs of police certified there was insufficient evidence against the controlees and thus “no realistic prospect of prosecution” (Carlile of Berriew, 2007, at 57). That being said, Carlile indicated that he would have liked more detailed accounts and explanations, i.e. for senior police officers to effectively state the reasons for not prosecuting, calling for the situation to be rectified. Moreover, he also called for further investigation into the controlees with a view of criminal prosecution in the future (Carlile of Berriew, 2007). A year later, he cited an improvement in the quality of reasoning given by the police, but urged more clarification as to why certain investigation techniques were less conducive for criminal investigations (Carlile of Berriew, 2008). He cited the nearly 250 individuals convicted of terrorism-related offenses since 9/11 in support of the government’s commitment to prosecution (Carlile of Berriew, 2010). In one case however, the Home Secretary had not passed on important new material about a controlee to either the police or the Crown Prosecution Service, thus breaching his duty (S. Macdonald, 2007). Changes introduced in the Terrorism Act 2006 (UK) and the Counter-Terrorism Act 2008 (UK) yet further contributed to charging more individuals with terrorism-related offences (Carlile of Berriew, 2011).

279 In the case of E: Despite the statutory duty to consult with police about the individuals’ prosecution before and during the order, not doing cannot overturn the order, bar in exceptional circumstances.

280 Secretary of State for the Home Department v E [2007] EWCA Civ 459

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Interestingly, he stated “[n]obody, least of all those who have to administer and enforce them, likes control orders. Other measures may be more appropriate – perhaps Anti-Social Behaviour Orders, or civil proceedings for an injunction against specified activities.” However, he went on to state that in the absence of a viable alternative, they remained necessary for a small number of individuals (Carlile of Berriew, 2008, p. 10). That being said, in each report he stated his support of the Home Secretary’s decision to impose an order in each case, taking great care to highlight the rigorous and structured process involved. He was given access to the same files as the Home Secretary, including summaries of all intelligence and evidence materials, and reviewed them for each case (Carlile of Berriew, 2007). Yet despite his concurrence with the decisions, he indicated that he thought the obligations in some cases were perhaps “more cautious and extensive than absolutely necessary” (Carlile of Berriew, 2007, at 36).

7.3.3.6 Alternatives and Abolition

Carlile began to examine the merits and possible alternatives for control orders in his penultimate report in 2010. He summarised the issues pertaining to control orders as follows (Carlile of Berriew, 2010, at 38):

- Are control orders or something like them necessary?
- If so, are they fair?
- Are they effective?
- Are they enforceable?
- Is there a better alternative?
He went on to list the following arguments for either side (at 41):

<table>
<thead>
<tr>
<th>For</th>
<th>Against</th>
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<tbody>
<tr>
<td>Provide public security and comfort where intelligence cannot be</td>
<td>Can change the rules of evidence, e.g. to allow intercept</td>
</tr>
<tr>
<td>made admissible court evidence in criminal proceedings</td>
<td></td>
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<tr>
<td>Valuable safety net</td>
<td>Blunt instrument, offensive to human rights</td>
</tr>
<tr>
<td>Careful inquiry and advice given by CPS and prosecution occurs</td>
<td>If rules of evidence were changed, more prosecutions would be advised</td>
</tr>
<tr>
<td>wherever possible</td>
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<tr>
<td>Protects UK as compared with foreign jurisdictions regarded as</td>
<td>As much protection could be provided without control orders, with</td>
</tr>
<tr>
<td>having no competent authority to deal with persons deported</td>
<td>‘normal’ policing and surveillance</td>
</tr>
<tr>
<td>At least some persons discharged from control orders would resume</td>
<td>It would be known that they were subject to scrutiny, so their utility</td>
</tr>
<tr>
<td>terrorist activities</td>
<td>as terrorists would be very small</td>
</tr>
<tr>
<td>Capacity for necessary surveillance would mean significant moving</td>
<td>Not accepted</td>
</tr>
<tr>
<td>of resources from other policing etc work</td>
<td></td>
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<tr>
<td>Excessive cost of alternatives</td>
<td>Cost not relevant in human rights context</td>
</tr>
<tr>
<td>System of law is ECHR compatible and special advocates have been</td>
<td>Special advocates complain that they cannot deal fully with cases</td>
</tr>
<tr>
<td>effective</td>
<td>because of limited assistance. Court disclosure requirements render</td>
</tr>
<tr>
<td></td>
<td>control orders impracticable</td>
</tr>
<tr>
<td>Prevents foreign travel for training and insurgency</td>
<td>A very heavy-handed way of achieving a limited objective</td>
</tr>
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</table>

In spite of the above arguments, Lord Carlile concluded that the system remained necessary and that it had functioned reasonably well (Carlile of Berriew, 2010), suggesting that the critics of the scheme have not been sufficiently persuasive. He did, however, suggest that in cases where the main purpose was to prevent the controlee travelling abroad, control orders are not suitable, suggesting replacement with Travel Restriction Orders (TRO). Finally, he advocated introducing a new power into the statute, namely the power of personal searches by a constable.²⁸¹

²⁸¹ This issue arose out of the cases of G and BH, which determined that there was no such obligation permitted under section 1.
Nine of the original eleven ACTSA detainees had their control order revoked after five and a half months, before being served with a notice of intention to deport and detained. Lord Carlile was critical of the lack of Memoranda of Understanding in place with all but one country of origin prior to placing the men in immigration detention. In his opinion, leaving the control orders in place until such understandings had been reach would have been preferable. Deportation agreements exist with Algeria, Jordan, Ethiopia, Libya and the Lebanon, although the agreement with Libya is on hold since 2008. Control orders are also intended to fill the gap where neither prosecution nor deportation is possible (Carlile of Berriew, 2010). Carlile thus called for deportation agreements to be expanded to more countries.

One of the suggested alternatives was to invoke emergency powers which contained the provision to detain without trial (under Part II of the Civil Contingencies Act 2004). Carlile highlighted potential political implications applying such provisions to individuals as opposed to the country as a whole, such as is the intention, which would yet further interfere with civil liberties (Carlile of Berriew, 2010). A year later he reiterated his desire for the new legislation to be treated in “the normal way, not as an emergency” (Carlile of Berriew, 2011, pp., at 88).

By the time of writing his last report, Lord Carlile was aware of the impending abolition of the scheme. He warned, however, that the scheme should not be abolished until new legislation is in place, as it would make the UK more vulnerable to an attack.

“Given the factors outlined above, it is my view and advice that abandoning the control orders system now would have a damaging effect on national security. Of course, on their own control orders are not a failsafe or foolproof mechanism for full disruption of suspected terrorists. Further, because they are a resource-intensive tool for all involved in their management, self-evidently they cannot be used to manage the risk posed by all non-prosecutable suspected terrorists against whom there is robust intelligence.”

Lord Carlile (2011, at 89)

Despite acknowledging certain administrative problems with the scheme, he affirmed that NDCOs are “a justifiable and proportional safety valve for the proper protection of civil society” (Carlile of Berriew, 2007, at 59). He is adamant that “the current control orders system remains fair and safe, a proper reflection of the need for balance between the considerations of national security and the liberty of the individual” (Carlile of Berriew, 2011, at 49).
7.3.4 UK Summary

The principal issues to arise in British legal challenges to the control order scheme were the maximum length of the curfew permitted without amounting to a deprivation of liberty; the extent to which the preventive aim resembled punishment; and the procedural fairness of the process. The case of AF has shown the ability of the Judiciary to be creative in its interpretation of human rights provisions, ensuring a greater compliance with procedural justice (Kavanagh, 2010). Indeed, even with the increased awareness of the case against a controlee post AF, implementing such changes is more difficult to do in practice, especially considering communication between the parties is still prohibited. Kavanagh (2010) went on to highlight that the finding in AF may have had a significant knock-on effect on the sustainability of the control order system due to the Home Office reliance on sensitive intelligence. Moreover, it has enhanced the measures of procedural fairness, and strengthened position of Special Advocates, forcing the government to revoke orders where it is not prepared to disclose the intelligence against the controlee (Kavanagh, 2010). As a result, if a judge deems further disclosure of evidence necessary to enable the controlee to mount a more viable defence and ensure sufficient procedural protection, the Home Secretary must decide whether to disclose further evidence, or to withdraw it all together. The Home Office faces a dilemma of disclosing sensitive information in the hope of securing a control order but potentially compromising aspects of national security, or take the risk that less sensitive information will be sufficiently compelling to warrant a control order (C. Walker, 2011). As a result, several control orders were revoked.

Although Lord Carlile has reiterated his support for the control order regime throughout the years, he did at times express reservations about the extent of some of the obligations made (Carlile of Berriew, 2006; S. Macdonald, 2007). For instance, he acknowledged the arduous and severely restricting conditions some of the controlees were subject to, without having been found guilty of an offence, many of whom on suspicion alone. Even NDCOs may thus not be proportionate due to the severe restrictions they place on individuals (Bonner 2006).

Clive Walker described the legal challenges as having “applied an ‘intense’ and sustained level of judicial vigilance and regular defeats for the government.” (C. Walker, 2011, p. 323). He argued that if the system as a whole remained intact, the courts are likely to continue their challenge, ensuring more lives are improved in the process. While several authors have acknowledged the increased judicial influence on the executive measure, control orders do not adhere to criminal standards due to the fact that appeal procedures are administrative and not criminal hearings. Although the original order is civil in nature, twelve breaches were
prosecuted, meaning a quarter of all control order cases ended up turning criminal, although sentences were certainly not excessive. Zedner (2007) drew attention to some controlees’ conditions being loosely worded, and apparently not viable, making potential breaches more likely. That being said, control orders were intended to be limited to one year, although the option of extension exists. However, some controlees were subject to stringent restrictions for several years, potentially exceeding a sentence for a minor offence. This was justified as being necessary to disrupt terrorist networks and instil distrust in a controlee wishing to resume activities. This strategy was previously used during internment. One of the underlying strategies of control orders is thus restricting with whom a controlee can associate with. This also interferes with an individual’s right of freedom of association.

It is worth noting that, although implemented more frequently than in Australia, the British control order scheme has not been applied to the same extent as internment in Northern Ireland. To date, only NDCOs have been issued, indicating that the measures at the government’s disposal are sufficient to address the perceived level of threat (Bonner, 2006). Some observers noted the “commendable restraint and composure” with which the British government has decided to implement the scheme, especially compared to the actual number of apparently known terrorist suspects (Bonner, 2006, p. 71; Carlile of Berriew, 2010; C. Walker, 2011).

Finally, the preliminary analysis of British control order issuance indicated that a large proportion of controlees have previous involvement in terrorism-related activities, casting further doubt on the notion that control orders are indeed purely pre-emptive in their aim and application. Having a previous terrorism-related arrest or detention to ones name might indicate a higher risk of future involvement to authorities, thus biasing their decision to issue a control order.

As Lord Carlile’s final review indicated, the British control order scheme will be abolished at the end of 2011 and replaced with a new measure, the Terrorism Prevention and Investigation Measures. Given the volume of criticism of the control order scheme, the next chapter examines how the new measures aim to address some of these issues.
8 Future Developments

“[E]xecutive security measures of all hues should be tempered by the values of individual rights and constitutionalism and by practical experience, which demonstrates the value of judicial review and the occasional exaggeration of security concerns”

Lord Carlile (2010, at 12)

8.1 The End of the Control Order Scheme

Having examined control orders and their ‘predecessor’ internment I now turn, albeit briefly, to discuss future developments. The intention is not to pre-empt, predict or indeed to recommend future policy directions; but rather to examine the changes to the scheme as introduced by the British government in early 2011. Control orders have long been unpopular with the former opposition parties in the UK, the Conservatives and the Liberal Democrats, despite being considered necessary by the police, the security services and even the Independent Reviewer of Terrorism Legislation (BBC News, 2011; Johnston, 2010). Walker argued that simply abolishing control orders would be controversial, as “the imperative of responding to anticipatory risk of terrorism has not dissipated” (C. Walker, 2011, p. 328). In his fifth report, Lord Carlile addressed the issue of potential alternatives to the regime. He reminded us that “[t]he question to be addressed is whether any or a combination of the alternatives provide a sufficient toolkit to manage the risk posed by suspected terrorists, always bearing in mind the imperatives of complying with human rights legislation and other civilised aspects of a fair legal system” (Carlile of Berriew, 2010, at 51). He went on to state that

“The importance and difficulty of ensuring that control orders are enforced means that so-called ‘light touch’ control orders are not a realistic proposition save in exceptional cases. My discussions with Ministers and officials leave me with the conclusion that the limitations of so-called ‘light touch’ control orders are well understood. This conclusion is strengthened by the current view of the Courts in relation to disclosure: the judges have held that the standard of disclosure is the same for all control order cases."

Lord Carlile (2010, at 84)

282 For an overview of the various alternatives, see Lord Carlile’s Fifth Report, points 70-84 (Carlile of Berriew, 2010).
In the run up to the general election in May 2010, the Liberal Democrats pledged to scrap the control order regime and allow for intercept evidence to be used in court (Liberal Democrats, 2010). The Conservatives, on the other hand, were less committal, promising a review of the control order scheme, as well as a wider review of the current anti-terrorism laws and measures. In May 2010, a new coalition government made up of Conservatives and Liberal Democrats took office. Coming good on its promise to review control orders, the new Home Secretary Theresa May announced a review of the counter-terrorism and security measures in July 2010. Its aim was to ensure a greater focus on civil liberties by ensuring that the powers and measures were “necessary, effective and proportionate and meet the UK’s international and domestic human rights obligations” (May, 2011, p. 4). In addition to control orders, the review also examined

- The detention of terrorist suspects before charge, including how to reduce the period of detention to below 28 days;
- Section 44 stop and search powers and the use of terrorism legislation in relation to photography;
- The use of the Regulation of Investigatory Powers Act 2000 (RIPA) by local authorities and access to communications data more generally;
- Measures to deal with organisations that promote hatred or violence - Extending the use of ‘Deportation with Assurances’ in a manner that is consistent with legal and human rights obligations.

The government also tasked Lord Macdonald of River Glaven QC to conduct an independent review alongside to ensure a fair and balanced review of the measures. His report was published on January 23 2011, the main points of which are summarised below.

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283 http://www.conservatives.com/Policy/Where_we_stand/National_Security.aspx (last accessed on July 29 2011). Although this intention was listed on their website, the Conservative Party manifesto makes no mention of the control order scheme, nor indeed the review (Conservative Party, 2010). This might also explain why they decided to issue at least one control order since coming into power, which was also after announcing the upcoming abolishment of the scheme (NDCO issued to CD in February 2011, which was upheld by the courts in late July 2011 (Press Association, 2011))
8.1.1 The Macdonald Review

Lord Macdonald highlighted that his Review found evidence of the control order regime impeding prosecution. “In other words, controls may be imposed that precisely prevent those very activities that are apt to result in the discovery of evidence fit for prosecution, conviction and imprisonment” (K. Macdonald, 2011, p. 9). He recommended that any future scheme ought to encourage and prioritise evidence gathering so as to facilitate prosecution down the line. He indicated that the Security Services taking over as lead agency in cases had further undermined criminal prosecutions, since their priorities are not focused on prosecution. Although he acknowledged the Review’s awareness of this issue, he proposed going one step further, where restrictions would only be imposed if the Home Secretary has reasonable grounds to believe that a named individual is engaged in terrorist activity, and if as a result the DPP believes a criminal investigation into that individual is justified. Lord Macdonald stated that

“If a regime of restrictions were to be linked to a criminal investigation in this way, it would sharply highlight the need for the prohibitions positively to assist, rather than to hinder, the route to prosecution, conviction and imprisonment. Further, the restrictions themselves would be closer in character to bail conditions, and therefore inherently less objectionable. They would also retain their protective quality and they would maintain their contribution to public safety.”

Lord Macdonald (2011, p. 11)

Acknowledging that insufficient evidence against an individual may prevent prosecution at that point in time, Lord Macdonald recognised the appropriateness of the state imposing some form of restrictions on the individual, as long as these were proportionate and facilitated evidence gathering with a view to prosecute at some point in the future.

As for the restrictions used in the control order scheme, Lord Macdonald criticised relocation of controlees as being a form of internal exile incompatible with British norms. He strongly disagreed with the previous government’s use of curfews in cases where individuals had not been charged; stating that this is what distinguished the rule of law from totalitarianism. “I would regard the use of curfews and tags in this context to be disproportionate, unnecessary and objectionable. They would serve no useful purpose” (K. Macdonald, 2011, p. 13). Finally, he also criticised the restrictions imposed on communication and association, arguing that these would be precisely the kind of means giving rise to evidence to be used in prosecution. Indeed, this argument was also levelled at relocation and the curfew. On this basis, he
supported the Review’s recommendation of abolishing these measures. He believed that abolishing any measure resembling house arrest constituted a significant reform of the scheme. He was, however, supportive of introducing foreign travel bans. He concluded that “[t]he evidence gathered by the Review plainly demonstrates the importance of avoiding at all costs any replication of the present control regime in which, because of the widespread nature of the prohibitions placed upon them, controlees become ‘evidence neutral’, and prosecutions become more or less unachievable” (K. Macdonald, 2011, p. 14). He proposed a maximum duration of two years on obligations approved by the High Court, to run in parallel to the criminal investigation. Finally, all restrictions available should be listed and limited by statute.

8.2 The Alternative – Terrorism Prevention and Investigation Measures

In January 2011, the Home Secretary Theresa May announced that given the continued likelihood of individuals constituting a threat to security, but who cannot be successfully prosecuted or deported, the imperfect control order scheme would be repealed. In its place, the Home Secretary proposed to introduce more focused and targeted restrictions under the new Terrorism Prevention and Investigation Measures (TPIMs). 284

“Restrictions that have an impact on an individual’s ability to lead a normal life should be the minimum necessary, should be proportionate and should be clearly justified. The legislation that we will bring forward will make clearer what restrictions can and cannot be imposed. These will be similar to some of the existing powers used in the civil justice system, for example to prevent sexual offences and domestic violence.”

H.C. Hansard, col. 308 (26 January 2011)

TPIMs would be supported by increased surveillance and investigative resources to ultimately support evidence gathering for prosecution. At the same time, the Home Secretary also announced proposals to allow for the use of intercept evidence in court. In her announcement, Theresa May insisted that the new measures under the “more focused and flexible regime” would not require any derogations from the ECHR such as would have been the case for derogating control orders, calling such measures draconian. That being said, she did go on to qualify that

284 The first draft of the bill can be found at http://www.publications.parliament.uk/pa/bills/cbill/2010-2012/0193/2012193.pdf
“in exceptional circumstances, faced with a very serious terrorist threat that we cannot manage by any other means, additional measures may be necessary. We want to prepare for this possibility while ensuring that such powers are used only when absolutely necessary.”

H.C. Hansard, col. 309 (26 January 2011)

Preparation will include the publication but not the introduction of legislation permitting more severe measures, such as curfews and additional restrictions on association, movement and communications. Requiring an even higher standard of proof (though she did not elaborate), such measures would only be introduced if they were required to protect the public from terrorism.

The new Terrorism Prevention and Investigation Measures were described as addressing several criticisms of the control order regime:

- They are limited to a maximum of two years;
- The evidential test is raised to “reasonable belief”;
- Curfews are abolished and replaced with so-called overnight residence requirements;
- Forcible relocation will end, although exclusion zones or areas will remain;
- Access to communication devices, such as mobile phones and internet, will be increased;
- Fewer restrictions will apply to whom they associate with;
- More stringent onus on police to seek prosecution throughout the length of the TPIM.

The government argued that these new measures would make living a normal life, including continuing with employment or study, easier to manage. Limiting the TPIM to a maximum of two years is in their opinion proof that these measures are intended to be temporary in nature, compared to the seemingly indefinite renewal of some control orders in the past. The new measures will also introduce restrictions on travel abroad. Moreover, the new measures purport to eliminate the need to derogate from the ECHR, which would currently be required if a DCO were to be issued. That being said, the Home Secretary’s wording of exceptional circumstances leaves some scope for the government to go back on their promises, should the apparent need arise. The Home Secretary stressed another point, namely that the introduction
of these new measures would be delayed until 2012 to allow sufficient time for scrutiny and debate, thus distinguishing them from previous measures.

As for its effectiveness, beyond the financial assurances by the government, Lord Carlile stated that he believed the new regime would provide the same level of public protection (Travis, 2011a). That being said, he believed that much of the new government’s opposition to the control order regime was borne out of a lack of awareness of the facts in each case.

“It is uncontradicted that the manifestos of the political parties then in opposition were written without detailed knowledge of the evidence base for control orders, generally and in relation to individuals. In my view this is regrettable, and should be remedied in the present system and any legislative replacement. Whether it needs to be included in the legislation or (probably) not, for the future I recommend that one or two senior spokespersons for at least the official Opposition should be ‘DV’ vetted (developed vetted): the purpose of this would be that, whilst respecting confidentiality and national security, they should be able to give informed advice to their shadow colleagues on the merits of the legislation.”

Lord Carlile (2011, at 45)

Lord Carlile went on to state that in each case, only the minimum restrictions necessary to ensure national security should be imposed (Carlile of Berriew, 2011, at 51). He expects the new system will apply to a more limited range of cases (Carlile of Berriew, 2011). Moreover, he still believes a maximum of two years duration should apply, unless there are exceptional circumstances. After such time, the threshold should be raised to the civil standard.

The continued necessity of control orders had been justified due to the inadmissibility of intercept evidence in criminal prosecutions (Lynch, 2008; C. Walker, 2007a). It is with great anticipation that these reforms will be received by those in the legal profession, the police and security services and academics alike.
The Alternative – Terrorism Prevention and Investigation Measures

8.2.1 The Enhanced Terrorism Prevention and Investigation Measures Bill

A few months into the parliamentary debate on TPIMs, the government introduced an enhanced version of the Bill which reflected the Home Secretary’s earlier caveat that there may be exceptional circumstances where the measures contained in the new legislation would be insufficient to deal with a particular emergency. Not wanting to rely on the Civil Contingencies Act 2004 in such an eventuality, the Draft Enhanced Terrorism Prevention and Investigation Measures Bill, published in September 2011, proposes the establishment of enhanced TPIM notices with “more stringent restrictions” compared to the regular TPIM notice if certain conditions are met.\(^\text{285}\) In essence, many of the restrictions involve imposing the very measures which were criticised under the control order regime, including restrictions on residence, including relocation; travel and movement restrictions, both internationally, as well as the requirement not to leave a specified area; exclusion measures, such as restricting areas or places; financial restrictions, including relating to property ownership; restrictions on electronic communications; on association, work or study; as well as obligations to report, have their photograph taken and be electronically tagged. These emergency measures, which would run parallel to the regular system,\(^\text{286}\) would require the Home Secretary to be satisfied of the individual’s involvement in terrorism-related activities on the balance of probabilities rather than the lesser standard of reasonable belief. Despite the more stringent conditions, the penalty for breaching a measure outlined in an enhanced TPIM notice is the same as that of breaching a standard TPIM, namely up to five years imprisonment and/or a fine. If invoked, the enhanced TPIM powers expire after 12 months, unless they are renewed by a maximum of a further 12 months.

Although the Coalition government has proposed some real changes in their replacement of the control order regime, they have also transferred some of the same restrictions and obligations into the standard TPIM bill, subsequently including the more severe obligations and restrictions in the Enhanced TPIM bill. While some might argue that re-naming curfews as

\(^{285}\) These conditions, referred to as conditions A to E in s. 2 of the bill, include the higher standard of proof; that at least some of the relevant activity relates to new/recent terrorist activity; that the Home Secretary considers the imposition of such a notice as reasonably necessary to protect the public; or prevent or restrict the individual’s involvement in terrorism and the conditions cannot be imposed by a standard TPIM notice; and that either the court permits the HS to impose such measures, or the HS reasonably considers that the urgency of the case permits the imposition without obtaining said permission.

\(^{286}\) An individual is not bound by a previously issued standard TPIM notice during the duration of an enhanced notice (s. 4(1))
overnight residence requirements is a matter of semantics, others point out that combined with the other changes, and a maximum duration of two years is at least a step in the right direction.\footnote{287}

Even though the government announced the abolition of control orders, there are several similarities between the control order regime and TPIMs. In the end, the new measure provides a permanent statutory basis for control orders, albeit under a different name. In addition to the new name for the measure, curfews no longer exist, instead being replaced with overnight residence requirements. Nowhere in the bill is overnight defined, nor indeed a maximum number of hours. The procedures are still held ex parte,\footnote{288} with the individual being represented by a Special Advocate.\footnote{289} The TPIM is still an executive-driven civil-criminal hybrid, albeit with a raised burden of proof.

The Coalition seem to be shooting themselves in the foot with the same gun as the Labour government, wanting to pursue prosecution via evidence gathering, albeit with the new introduction of intelligence evidence in support, whilst placing these individuals under the very conditions designed to prevent them from engaging in said conduct in the first place. In a scathing criticism of the new measures, the human rights organisation Liberty highlighted that not a single controlee has ever been prosecuted subsequently (Liberty, 2011).

\section*{8.3 Beyond Terrorism}

Much has been written about the apparent shift towards pre-emptive justice and the proliferation of preventive orders, not just in the terrorism context, but also their expansion to other domains. Several scholars argued that an anticipatory mode of justice is emerging, challenging the traditional reactionary orientation of prosecution and punishment (Ericson, 2007; Loader & Sparks, 2002; C. Walker, 2011; Zedner, 2007b). Moreover, Zedner (Zedner, 2007b) contended that this pre-emptive focus was becoming a key component in the legal system, and thus would be increasingly difficult to remove. Indeed, these debates, as well as preventive orders, pre-date 9/11.

\footnote{287 Section 5(2) of the Terrorism Prevention and Investigation Measures Bill provides for a one time extension of one year, in essence extending its duration to a maximum of three years.}

\footnote{289 Schedule 4, s 10 outlines the appointment of special advocates, something that was never explicitly included in its predecessor.}
The precautionary approach is frequently associated with measures lying outside the criminal arena. Bonner (2006) has described the expansion of executive measures as a worrying development. Though characterised by less rigorous procedural protections, control orders were seen as a necessary but exceptional measure to prevent terrorist activity. According to some, the criminal justice system is being infiltrated and transformed by such exceptional measures. For example, the role of Special Advocates first originated at immigration hearings. Today, in addition to being commonly used in national security cases, the use of Special Advocates is expanding to other domains, including parole hearings, where the anticipated risk to the general public by the offender is considered (Bonner, 2007; Constitutional Affairs Committee, 2005; Kavanagh, 2010; Zedner, 2007b). A further frequently cited example of expansion is the Serious Crime Prevention Order (SCPO). The aim is to protect the public by preventing, restricting or disrupting involvement by the person in serious crime. While the SCPO resembles the control order in that it is a civil/criminal hybrid order capable of imposing restrictions on an individual, it differs in a crucial aspect – it is not pre-cautionary. The Serious Crimes Act 2007 sets out that SCPOs can be issued either by a Crown Court following a conviction, or by the High Court if it is “satisfied that a person has been involved in serious crime (whether in England and Wales or elsewhere)”. Indeed, most of the frequently cited examples, such as the ASBO, driving disqualifications, exclusion orders for football hooligans, exclusion from licensed premises, or Sexual Offences Prevention Orders, are examples of reactive prevention, i.e. intended to prevent recidivism after having established a previous transgression or offence.

However, despite multiple comparisons between the control orders and ASBOs, it appears they are suffering a similar fate under the current Coalition government. ASBOs, it was claimed, were also only ever issued in exceptional circumstances (S. Macdonald, 2007). The rapid increase in orders issued, however, might lead some to question such assertions (see Figure 8.1). Not only were they issued at an increasing rate, there are reports that, although originally intended to deal with anti-social behaviour, ASBOs were also issued in response to prostitution and begging (S. Macdonald, 2007), thus signalling an expansion beyond its original remit. The number of ASBOs issued peaked in 2005, the same year control orders were introduced. Ever since then, however, their number has been on the decline.

290 Several Australian States introduced similar legislation in response to serious and organized crime, mainly due to Outlaw Motorcycle Gangs. The use of ‘Bikie’ control orders, however, these have been found to be unconstitutional in South Australia (Totani v South Australia) and most recently in New South Wales (Wainohu v NSW) (Ayling, 2011; Weston-Scheuber, 2009).
Recent years saw a shift away from the preventive intent, as ASBOs were increasingly issued as part of criminal convictions (Wintour & Stratton, 2011). In response to figures indicating that over half of all ASBOs had been breached at least once, the new Coalition government announced its intention to reduce the number issued, eventually replacing the ASBO with a less criminalising, more restorative measure (Rogers, 2010; Travis, 2010). Less than a week after announcing the changes to the control order scheme, the Home Secretary Theresa May announced an overhaul of government policy dealing with anti-social behaviour. In addition to removing the term ASBO, replacing it with ‘criminal behaviour order’ and ‘crime prevention injunctions’, the number of associated offences would be cut by 75 per cent, from 19 to five (Wintour & Stratton, 2011).

8.4 Summary
As with control orders and internment before that, the British government appears to have employed the strategy of renaming a controversial anti-terrorism measure to address criticism. While TPIMs may not contain curfews, labelling them overnight restrictions neither alters the mode of control exercised on individuals, nor does it necessarily reduce their length. That being said, it is important to highlight that the proposed new measures do raise the standard
of proof to “reasonable belief”, rather than on suspicion alone. Also, two of the changes affect the duration of the new measures, the first limits its application to two years; the second is set to permanently add TPIMs to the statute book. Walker (2011) emphasised that executive measures against terrorism have been almost constantly in force in Britain since 1974, highlighting that the government appears reluctant to abandon them altogether. He further argued that since there was obviously a growing trend towards “preventive quasi-crime devices” (2011, p. 328), terrorism should not be excluded from this trend. While there are several arguments both for and against such measures, arguing they cannot be abolished simply because they have been in use for 37 years, or that similar measures are in vogue elsewhere is wasting the opportunity to engage in critical debate.

Whilst the UK appears to be making an attempt to distance itself from certain preventive measures, even if predominantly through linguistic strategies, Australia has at the time of writing not expressed any plans to follow suit. Having illustrated pre-emptive anti-terrorism law using British and Australian examples throughout this thesis, I now turn to two Continental European jurisdictions for comparison, France and Germany. France is a frequently cited example of a nation employing pre-emptive anti-terrorism measures, which include detention without trial for up to four years. In contrast, Germany has been comparatively cautious in its implementation of measures impeding basic human rights, even in the wake of 9/11. The following chapter attempts to provide insight into the different pre-emptive governmental strategies used in these countries. Looking to other jurisdictions may help provide valuable insight and refinement, potentially even inspiring an alternative to long-standing strategies.

291 Except an eleven month period in 2001
9 French and German Perspectives on Pre-emption

9.1 Introduction

Having explored two similar common law jurisdictions’ conception and application of one particular example of a measure described as pre-emptive, I now turn to two civil law jurisdictions for analysis. France has a long history of dealing with terrorism, including left-wing, separatist and international movements. This extensive history is frequently cited as the reason for its well publicised and controversial pre-emptive approach. Germany has also dealt with its share of terrorism, especially the left wing movements in the 1970s. More recently, there have been several links to Al-Qaeda and the 9/11 attacks, as well as foiled attacks on German soil. The relatively recent experiences under the Third Reich appear to have created a sense of precaution against increasing state power under the guise of an emergency. At present, Germany has no directly comparable pre-emptive measures, although former Interior Minister Otto Schily proposed the introduction of such measures in 2005 (The Economist, 2005). However, introducing preventive detention for terror suspects was heavily criticised, some even likening it to measures introduced by the Nazis (Spiegel Online, 2005).

While neither jurisdiction has control orders or an equivalent, comparison is useful to illustrate different pre-emptive measures and approaches developed in response to terrorism in different countries with different legal systems. In the absence of control orders, the continental comparison of pre-emptive measures focuses on preparatory offences and administrative measures against aliens, both of which also exist in Australia and the UK. I begin by examining the French approach, tracing its origins and developments, most of which happened well before 9/11, moving on to examine Germany’s major developments, before concluding the chapter with a discussion about these jurisdictions’ pre-emptive strategies compared to Australian and British measures.
9.2 The French Connection

9.2.1 Pre September 11

France’s contemporary approach to terrorism has its origins in the Algerian war of independence.\(^{292}\) During the 1950s the Algerian war shaped the political agenda as well as parts of the legal framework, mainly via the introduction of emergency legislation (Gross & Ní Aoláin, 2006). In 1960 a special Court of State Security (Cour de Sûreté de l’État) was created to deal with offences against state security. The court, headed by a judge specialising in the area of state security, held its proceedings in secret and there was no right of appeal, prompting critics to label it as an instrument of political repression (Oehmichen, 2009; Shapiro & Suzan, 2003). The court was eventually abolished in 1981 and replaced by the Army Tribunal in Times of Peace (Tribunal aux Armées en temps de paix) a year later. Essentially, this was a tribunal composed of between three and seven judges, but no jury. Despite Denis Szabo’s assertion made in 1970 that purely politically motivated crimes were progressively declining, a law that same year\(^{293}\) introduced particular procedures relating to pre-trial and preventive detention in relation to crimes against the security of the state (Szabo, 1970).

The Eighties saw increased activity predominantly at the hand of Corsican, but also Basque separatists. Although the regional separatist groups were responsible for three-quarters of all terrorist attacks in the seventies and eighties, left-wing groups, such as Action Directe, began to step up their campaign, culminating in political assassinations (Shapiro & Suzan, 2003). Legislative changes in 1981 extended police stop and search powers and increased the duration of remand custody (garde à vue) to three days for serious crimes. The Code of Criminal Procedure was amended in 1982\(^{294}\) to ensure that during peace time, any crimes directed against the fundamental interests of the nation are dealt with within the existing criminal justice system (Human Rights Watch, 2008). By the mid-eighties, however, a new wave of attacks on civilians by a previously unknown group, the Committee for Solidarity with Near Eastern Political Prisoners (CSPPA), announced the arrival of a new form of foreign terrorism, whose primary objectives was to influence France’s foreign policy\(^{295}\) (Shapiro & Suzan, 2003). Interestingly, Shapiro and Suzan (2003) explained that the French intelligence services showed little interest in foreign terrorism when it first came to prominence in the

\(^{292}\) That being said, France was a signatory to the international convention against terrorism as early as 1937 (Szabo, 1970)

\(^{293}\) Law No. 70-743 (17 July 1970)

\(^{294}\) Law No. 82-621 (21 July 1982)

\(^{295}\) Via the release of three terrorist leaders in French custody, two of whom were linked to Lebanese groups, the other to the Secret Army of the Liberation of Armenia
early eighties. They attributed both the lack of initial interest and the subsequent wave of international terrorism to the government’s so-called ‘sanctuary doctrine’, which attempted to create neutral foreign policy to dissuade foreign terrorists from wanting to take action against France. This policy condoned foreign terrorists operating from French soil, as long as the attack was not directed at France or her interests (Shapiro & Suzan, 2003; Transnational Terrorism Security & the Rule of Law, 2008a). This policy eventually began to backfire when political rivals of groups enjoying French sanctuary began to express their discontent with the French strategy.

After suffering a wave of international terrorist attacks in 1986, many related to French foreign policy in the Middle East, France abandoned the sanctuary doctrine and introduced its first anti-terrorism legislation. Police custody was extended from the normally permitted 48 hours to four days in line with other serious offences, and police search powers were also extended. The most significant change of the 1986 law was its creation of a centralised judicial system for terrorism-related offences, comprised of a specialised corps of investigating magistrates, the so-called *juges d’instruction* (Foreign and Commonwealth Office, 2005; Human Rights Watch, 2008; Oehmichen, 2009). The centralised approach was reminiscent of the somewhat controversial Court of State Security used in Algeria in the Sixties, but sitting entirely within the normal criminal justice system (Shapiro & Suzan, 2003). In keeping with the civil law tradition, investigating magistrates are charged with conducting an impartial investigation to determine whether or not a crime has been committed. Essentially they fulfil both the investigation and the judicial function. There are currently seven *juges d’instruction* who oversee terrorism cases from their Paris headquarters. Proponents of the French system argue it provides the judges with an in-depth knowledge of not only the case at hand, but terrorism as a whole, resulting in judges becoming experts of particular groups or ideologies; thus reducing the time of the investigation and preventing future attacks (Bruguière, 2004; Shapiro & Suzan, 2003). Moreover, the French also believe this format depoliticises terrorism and reduces intimidation of jurors or judges (Oehmichen, 2009; Shapiro & Suzan, 2003). Despite the overwhelming support, Anna Oehmichen cited the International Federation of Human Rights’ finding that one individual alone should not be able to determine a person’s

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296 Examples include the PLO, disputes between Iraq and Syria played out on French soil (see Shapiro & Suzan, p.71).
297 French foreign policy in the early eighties conflicted with Iranian, Libyan and Syrian interests. For example, Iran resented France supplying weapons to Iraq during the Iran-Iraq war.
298 Law no. 86-1020 of 9 September 1986 on the fight against terrorism and crimes against the security of the state (loi relative à la lutte contre le terrorisme et aux atteintes à la sûreté de l’État) aiming to repress acts of terrorism and to compensate victims of terrorism.
299 The *juge d’instruction* is part of criminal investigations, not just terrorism.
liberty, especially without giving the accused the opportunity to give evidence. Moreover, there have been serious concerns voiced over the quality of the evidence against suspects. Prior to its enactment, the Constitutional Council concurred\textsuperscript{300} that in terrorism cases only, the special centralised regime constituted a justified exception to the rule (Oehmichen, 2009).

After several attacks by Algerian terrorists during the 90s,\textsuperscript{301} France yet again expanded its anti-terrorism measures.\textsuperscript{302} A law denying terrorism suspects\textsuperscript{303} in garde à vue access to a lawyer during the first seventy-two hours of detention was introduced in 1993.\textsuperscript{304} Interviews conducted during this time are not recorded; instead, a written summary is produced. Moreover, all of the information obtained during the police questioning can be used in subsequent proceedings (Human Rights Watch, 2008). Reacting to several terrorist incidents linked to Algerian terrorism, the French authorities conducted several operations involving mass arrests and detention (Oehmichen, 2009; Shapiro, 2007; Shapiro & Suzan, 2003). After a cycle of retaliatory attacks and further arrests, France established the broadly defined offence of ‘criminal association in relation to a terrorist undertaking’ (association de malfaiteurs en relation avec une entreprise terroriste) in 1996.\textsuperscript{305} Punishable by up to ten years imprisonment,\textsuperscript{306} Article 421-2-1 of the Criminal Code states that the participation of any group or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for in previous articles shall in addition be an act of terrorism. In essence, this creates a new preparatory offence similar to conspiracy, criminalising any act deemed to be in preparation of a terrorist offence, without actually having committed the prohibited act, in other words focusing on intent and not fact

\textsuperscript{300} Conseil constitutionnel, decision DC 86-213, 3 September 1986

\textsuperscript{301} Eventually, these movements came to be known as Islamist terrorism. I use this term reluctantly, as I do not mean to imply any motivations originating in Islam. Islamist as opposed to Islamic, has been adopted in the literature as implying an extremist ideology in which certain doctrines of Islam have been misappropriated. It is in this context that I apply the term here. The Oxford English Dictionary defines it as “Islamic militancy or fundamentalism”. I acknowledge that the term has recently been used in a political context for parties advancing a particular religious agenda.

\textsuperscript{302} For a more detailed background of the political situation in Algeria at the time, see Shapiro (2007) and Shapiro & Suzan (2003)

\textsuperscript{303} Also applied to drug related offences

\textsuperscript{304} Law 93-1013 24 August 1993 originally intended to abolish the right altogether, but was found to be unconstitutional

\textsuperscript{305} Law no. 96-647 (22 July 1996) modifying Art.421-2-1 of the Penal Code, modifying the more general offence of association de malfaiteurs created in 1992 (92-683; Art 450-1 Penal Code)

\textsuperscript{306} Increased to up to 20 years in 2006
The French Connection

(Bonelli, 2008). Jean-Louis Bruguière, former chief anti-terrorism investigating judge described it as follows:

_The particularity of the law is that it enables us to prosecute individuals involved in terrorist activity without having to establish a link between that activity and a specific terrorist project. That's the big difference with the situation abroad where you have to have a link to a specific project. This text allows us to take action well ahead of the threat and to move against clandestine support networks or logistical support for these organizations._

Human Rights Watch (2008, p. 19)

Central to France’s pre-emptive approach (Human Rights Watch, 2008), it allows the authorities to detain terrorism suspects for up to six days before they have been linked to any specific act of terrorism that has been planned or carried out. Its purpose is to gather evidence to confirm intelligence held about the person or event, and decide whether or not an investigation is warranted. Again, the person is unable to communicate with his legal representative during the first 72 hours of detention. Even then contact is limited to 30 minutes. Moreover, the lawyer is kept in the dark as to the charges against their client, with no access to the case file (Human Rights Watch, 2008). A person of interest can be held in police custody (garde à vue) for up to four years before being tried while the investigating magistrate pursues detailed investigations. During this time, the examining magistrate can continue to question the suspect as and when new evidence emerges. According to Shapiro and Suzan (2003) this allows for investigations to commence pre-emptively, as opposed to simply reacting to terrorist attacks, which is the usual requirement of French law. There are several concerns raised in relation to the offence (Human Rights Watch, 2008). The International Federation of Human Rights condemned the legislation’s broad and vague definition, citing the criminalisation of acts which if not committed in a terrorism context are perfectly legal, amounted to arbitrary enforcement (Human Rights Watch, 2008; Oehmichen, 2009;

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307 Art. 421-2-1 CP, participation in a group or an association formed with a view to prepare, constituted by one or multiple material facts, any of the acts of terrorism mentioned in previous articles
308 Oehmichen cited the case of Debboub alias Husseini Ali in front of the ECHR, who was held on remand between November 1994 and January 1999. The court held that the reasons provided for detention (the severity of the crime, flight risk of the defendant, maintenance of public order, prevent recidivism and collusion with co-accused) justified the initial remand detention, but not for the entire duration he was held. The French Courts were criticised for their lack of promptness, thus resulting in excessive detention and a breach of Article 5(3) of the ECHR. See also United Nations Human Rights Committee (2008) point 15.
309 Contrary to Article 7 of the ECHR which requires laws to be sufficiently clear and well defined
Transnational Terrorism Security & the Rule of Law, 2008b). This is further facilitated by a low standard of proof and a preference for pre-trial detention. Similar to issues highlighted in relation to control orders, procedural fairness is compromised by relying on intelligence as part of the judicial investigation, ultimately leading to decisions based on potentially unsound or weak evidence.

In the late nineties, the investigating magistrates tasked with Islamist terrorism increasingly began to collaborate with the French domestic intelligence agency, the Direction de la surveillance du territoire (DST), facilitated by its dual mandate of intelligence agency and judicial police (Bonelli, 2008; Gouvernement Français, 2006; Shapiro & Suzan, 2003). Once the intelligence service began to trust the magistrates would not compromise their sources, this proved to be an effective collaboration, not least because magistrates can transform an intelligence-based suspicion into a judicial investigation (Shapiro & Suzan, 2003). A French government white paper highlighted the necessity of this collaboration to effectively implement their pre-emptive approach. Not surprisingly, despite its apparent advantages and effectiveness, this close collaboration between the intelligence service and the Judiciary was criticised for its lack of independent oversight and arbitrary detention of suspects (Bonelli, 2008; Fédération Internationale des Ligues des Droits de l'Homme, 1999; Human Rights Watch, 2008; Shapiro & Suzan, 2003). For instance, Laurent Bonelli (2008) cited a police officer involved in anti-terrorism investigations who highlighted that innocent people may well get caught up in this law, as the simple fact of one’s telephone number being found in a suspect’s address book is considered sufficient cause to detain. A report by Human Rights Watch (2008) questioned the ability to provide the defendant with a fair trial, especially in relation to evidence based on intelligence material originating from questionable sources.

9.2.2 Post September 11

Similar to the United Kingdom, the existence of anti-terrorism laws prior to 9/11 did not preclude the French from introducing further measures, covering various different fields of law. However, these changes were not considered significant (Bonelli, 2008). Unlike previous

310 A similar situation to the one in Australia arose, in that the accused needs not be intending a specific terrorist act, just an act.
311 As opposed to other forms of terrorism also prevalent in France. See Note 301.
312 The DST has since merged with the Renseignements Généraux (internal security police) to form the Direction central du renseignement intérieur (DCRI) (Central Directorate of Internal Intelligence) comprising two mandates, one focusing on intelligence, the other on judicial issues.
terrorism laws, the first law relating to daily security\textsuperscript{313} was not presented to the Constitutional Council prior to its enactment due to the perceived “urgency and exceptionality of the situation [prevailing] over any other consideration” (Oehmichen, 2009, p. 314). It extended the powers of the police and the security services to search and seize, increased security and powers at ports and airports, obliged phone companies to keep records, introduced new financing offences, and extended the use of the DNA database to terrorism as well as other less serious crimes, such as theft. Incidentally, many of the above named expansions of power were extended beyond the original terrorism aim to much less serious crimes. Yet further expansions of police powers (extending to organised crime) were introduced in 2004 to the apparent evolution of criminality, including increased surveillance, and asset freezing. The so-called \textit{Perben II Law},\textsuperscript{314} however, introduced reductions in sentences and protection for individuals who decide to cooperate with police to help prevent terrorist attacks.\textsuperscript{315} In essence, for the first time this introduced the notion of pleading guilty into the inquisitorial system. Further legislative amendments were passed in 2006, again extending the powers of video and electronic surveillance and personal information gathering and storage.\textsuperscript{316} Moreover, it extended the period of questioning for terrorism suspects to six days, sparking concern with the UN Human Rights Committee (United Nations Human Rights Committee, 2008, at 14).

Although neither the French government nor the Council of Europe classify these measures as emergency laws, “merely special laws containing derogations” (Council of Europe, 2006, p. 1), others have criticised them for turning the exception into the rule (Oehmichen, 2009; Simonnot & Thoraval, 2004). The famous riots in the Paris suburbs in 2005 led to the declaration of a state of emergency on 8 November 2005, the legal basis for which was a law introduced in 1955 in response to the war in Algeria (Gross & Ní Aoláin, 2006; Oehmichen, 2009).\textsuperscript{317} Parliament decided to approve a new law extending the state of emergency from twelve days to a maximum of three months. It remained in force for two months.\textsuperscript{318}

\textsuperscript{313} Law no. 2001-1062 of 15 November 2001 – \textit{loi relative à la sécurité quotidienne}
\textsuperscript{314} The second of two laws named after the then Minister of Justice; the first being introduced in 2002
\textsuperscript{315} Article 132-78 of the Criminal Code
\textsuperscript{316} Loi du 23 janvier 2006 relative à la lutte contre le terrorisme et portant dispositions diverses relatives à la sécurité et aux contrôles frontaliers. There are also military provisions which allow the France to act pre-emptively in a situation of self defence under Article 51 of the UN Charter.
\textsuperscript{317} Law no. 55-385 of 3 April 1955 declaring a state of emergency and its application in Algeria (\textit{Loi intitulant un état d’urgence et en déclarant l’application en Algérie})
\textsuperscript{318} It was eventually lifted on 3 January 2006
On a final note, while the 1986 and 1996 laws have been described as the true backbone of French anti-terrorism law (Bonelli, 2008; Gouvernement Français, 2006; Transnational Terrorism Security & the Rule of Law, 2008a), France’s pre-emptive approach also involves the use of administrative measures in the form of removing non-citizens considered a threat to national security. Again, these national security removals have been used since the mid-1990s. The French government has two avenues of procedure in such cases: criminal deportation following a criminal conviction (*Interdiction du Territoire Français*), which can form part of the punishment after serving time in prison; or alternatively, administrative expulsion (*arrêté ministériel d’expulsion*), which can be ordered on the basis of intelligence reports highlighting that that individual is considered a threat to national security (Human Rights Watch, 2007; International Commission of Jurists, 2009). According to Human Rights Watch (2007), foreign nationals convicted of *association de malfaiteurs* are regularly deported. France amended its immigration law in 2003, further expanding the grounds for administrative expulsion\(^{319}\) so the government had an alternative to criminal prosecution (International Commission of Jurists, 2009). Indeed, although most of France’s legal response is contained within criminal law, it also applies civil and administrative law, much like Australian and British anti-terrorism provisions.

### 9.2.3 Summary

According to Olivier Dutheillet de Lamothe (2004),\(^{320}\) there are two decisive factors why France’s anti-terrorism laws are effective at preventing attacks: a) permanent legislation capable of adapting to the evolution of terrorism, and b) good collaboration between the police and the Judiciary. The head of the Ministry of the Interior’s Anti-terrorism Unit described the French approach as a strategy of “preventive judicial neutralisation” (Durand & Tourancheau, 2005; Human Rights Watch, 2008, p. 11). Indeed, the lack of terrorist attacks in France since the mid 1990s is often cited as proof that the French system is effective at preventing terrorism (Bruguière, 2004; Gouvernement Français, 2006). The French Government described its ability to identify and neutralise suspected terrorists as being part of the “mission of prevention”, aided by the system’s lack of clear distinction between prevention and punishment (Gouvernement Français, 2006). The mid nineties in France were characterised by measures designed to prevent politically destabilising attacks at any cost.

\(^{319}\) Incitement to discrimination, hatred or violence against an individual or group – Law no. 2003-1119 of 26 November 2003

\(^{320}\) Member of the French Conseil d’État and Justice at the French Constitutional Council
even if it meant committing some injustices against individuals belonging to the targeted
groups (Bonelli, 2008). The majority of terrorism detainees in France are held under preventive
measures (Dutheillet de Lamothe, 2004; Human Rights Watch, 2008).321 Despite the human
rights implications, even critics of the French system have commended its ability to adapt to
the changing nature of terrorism without having to resort to extra-judicial measures (Human
Rights Watch, 2008).

321 According to Durand and Tourancheau (2005), 300 out of 358 individuals incarcerated for terrorism-
related offences in September 2005 were charged with association de malfaiteurs
9.3 German Lessons

9.3.1 Pre September 11

In order to fully understand the factors influencing German political decision-making and the apprehension of imposing derogations or emergency provisions, it is paramount to understand its constitutional underpinnings and the history preceding it. In 1933, Adolf Hitler introduced a so-called Enabling Law (Ermächtigungsgesetz) which in essence gave Hitler the right to legislate without requiring parliamentary support (Fergusson, 1964; Schneider, 1953). Post World War I Germany saw several similar laws vesting legislative power in the Executive enacted prior to the aforementioned legislation. In essence, one might describe such laws as emergency measures. However, prior to 1933 such measures had always been temporary. That being said, the Enabling Law was also introduced as a temporary measure, initially limited to four years. After being renewed twice for the same period, it was eventually renewed until further notice in 1943 (Schneider, 1953). More to the point, the 1933 act went further than previous such statutes (Fergusson, 1964). In essence, by merging the Executive and the Legislature, the entire Parliament and court bodies answered to Hitler alone. While there has since been considerable debate over the legality of this move, many observers believe that Hitler’s apparent adherence to the Weimar Constitution gave his actions the necessary air of legitimacy required without people questioning his motives (Fergusson, 1964; Schneider, 1953). Moreover, the German name of the Enabling law, a law for the removal of distress from people and state (Gesetz für Behebung der Not vom Volk und Staat) conveyed a sense of acting on behalf of the welfare of the German people, a point which was used to justify the necessity of the act (Fergusson, 1964). The repression of political violence under the Nazi regime took on a truly extra-legal dimension, far exceeding the need to protect the state (Szabo, 1970). Given Germany’s history of abuse of state power, its constitution post World War II, the Grundgesetz (Fundamental Law) emphasises the protection of fundamental rights, including in criminal proceedings. However, it has also incorporated international treaties, such as the ECHR, into its domestic law (Oehmichen, 2009). Despite the state’s responsibility to protect its citizens from crime and terrorism, the German constitution does not, however, recognise a right to security, which is present in the ECHR, for instance; it is seen more as the state’s aim rather than a basic right (Limbach, 2004, 2007).

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322 Fergusson noted Hitler’s intention to cease reliance on emergency measures, instead favouring a return to the normal parliamentary rule (Fergusson, 1964, p. 247)
Due to the ramifications of the Second World War, the process of returning Germany’s sovereignty after years of Allied occupation involved declaring emergency legislation in 1968 to ensure the safe withdrawal of Allied troops. These emergency laws (Notstandsgesetze) enabled a reduction of basic rights and civil liberties in emergencies by a federal authority for the first time since 1945. However, the introduction of these laws coincided with student protests against the Vietnam war and the rise of capitalism. These movements gained in strength after a politically charged rally in Berlin led to confrontation between police and protestors, in which one student was shot by a police officer, who was later acquitted. Driven by a desire to bring these issues to the attention of the German people, left-wing terrorism began to make its mark on German history, resulting in several fatalities on both sides. The rise of left-wing terrorism in the 1960s and 70s, especially by the Red Army Fraction (RAF), led to Germany introducing anti-terrorism laws (Oehmichen, 2009). These included the Eavesdropping Act (Abhörgesetz), authorising telephone and postal interceptions, extending to non-suspects; the exclusion of defence counsels; limiting the number of defence lawyers to three; as well as amending the rules of trials in absentia.

In June 1972, several key RAF members, including Ulrike Meinhof and Andreas Baader were arrested and put on trial. After several attempts to disrupt the trial, new legislation was introduced in response (Oehmichen, 2009). The violence, mainly kidnappings and killings of prominent business men, continued for several years, further escalating after the controversial death of Ulrike Meinhof in prison. The procedural rights of terrorism defendants were restricted after new legislation in 1976. The changes to German law during this period focused on amending criminal procedure.

One of the earliest examples of executive action, the exclusion of defence counsel, was introduced after defence lawyers were suspected of passing on information from the incarcerated leaders of the RAF to members on the outside (Oehmichen, 2008). After the law was initially quashed for restricting the role of the defence, it was later given a more solid legal

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323 It took the German parliament close to ten years to agree upon its emergency legislation
324 Later found to be unconstitutional and amended
325 Introduced in reaction to the RAF trial at which defendants employed up to 14 lawyers each, designed to obstruct the trial
326 Originally, trials could not be conducted ex parte. RAF members took advantage of the situation in an effort to delay proceedings by not appearing in court, either voluntarily or for medical reasons, or provoking the judge until they were removed from the court.
327 On an interesting side note, one of their defence lawyers was Otto Schily, who occupied the position of German Minister of Interior Affairs between 1998 and 2005; and was thus responsible for the introduction of the anti-terrorism laws post 9/11
basis. As Oehmichen (2009) has elaborated, the defence counsel can be excluded if they are “suspected of participating in the criminal activity of the accused or of abusing their contact with the accused in order to commit criminal acts or jeopardise the security of the prison” (p. 243).

At the height of the RAF campaign in the autumn of 1977, following the abduction of yet another business executive, Germany took drastic action. It completely isolated the prisoners to prevent any communication with persons on the outside, ultimately to avert imminent terrorist threats; essentially imposing incommunicado detention for existing RAF detainees. The measure was first invoked without any legal basis, but after being challenged, a legal basis was rapidly pushed through parliament (Oehmichen, 2008, 2009). The so-called *Kontaktsperregesetz* completely isolated the prisoners from any contact with the outside, including the defence lawyers for a temporary period of up to 30 days; though it is renewable indefinitely. Despite containing provisions for judicial review, the law attracted many criticisms, primarily related to the denial of a defence lawyer, the executive authority for deciding on detention, and the undermining of the rule of law (Hufnagel, 2008; Oehmichen, 2008, 2009). Despite the Kontaktsperregesetz not being used since, not only has it never been repealed, it was actually extended in 2006 to include members of criminal organisations (Oehmichen, 2008, 2009). Indeed, Oehmichen cited this development as an illustration of what she called “the general tendency of provisional *ad hoc* legislation to become permanent” (2008, p. 856).

Germany decided to criminalise membership and support of a terrorist organisation in August 1976. Due to their wide scope these organisational offences (*Organisationsdelikte*) also potentially affect a defence lawyer’s ability to represent his or her client without being charged with support. After a relatively quiet phase, new laws predominantly targeting organised crime and drug trafficking, but extending to terrorism, were introduced during the 1990s (Oehmichen, 2009; Zöller, 2001).

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328 Para 138a/b Strafprozessordnung (StPO) (Code of Criminal Procedure)
329 The Federal Court justified the measure as a necessity under Para 34 of the Strafgesetzbuch (Emergency legislation)
330 The literal translation is Act to block contact. For a detailed overview of its history and process, see Oehmichen (2008)
331 It was amended in 1985 introducing a clause assigning a legal representative to the prisoner
332 Section 38a of the Introductory Act to the Judicature Act (Einführungsgesetz zum Gerichtsverfassungsgesetz, or EGGVG)
333 Para 129a Strafgesetzbuch (StGB) (German Criminal Code)
9.3.2 Post September 11

In the wake of September 11, Germany amended several existing laws and regulations (Hufnagel, 2008), as well as introducing so-called ‘anti-terrorism packages’ or ‘security packages’ (Sicherheitspakete), which, unlike the developments in the 1970s, were very much focused on administrative measures, such as expanding powers and responsibilities of the intelligence and police services, tightening border and immigration controls, facilitating the deportation of radical preachers and securing German airspace (Eiardt & Köppe, 2007; Hufnagel, 2008; Lendermann, 2009; Lepsius, 2004; Limbach, 2004; Oehmichen, 2009; Zöller, 2001). The first security package withdrew the previously existing religious privilege bestowed on organisations excluding them from prosecution on the grounds of their ideological beliefs, thus outlawing certain organisations. It also criminalised the formation and membership of foreign terrorist organisations. The second package introduced some fairly significant changes to German immigration procedures. Immigrants perceived as threatening either the basic order or security of the nation can be refused residency and deported, the latter process being further expedited. Furthermore, it set out to strengthen law enforcement and the security services capabilities by enhancing their access to various data from public and private institutions. The aim was early detection and thus prevention of an attack. This package was considered particularly controversial in light of previous experiences in the former East Germany and in the Third Reich. The constitutional separation of the police and intelligence services is considered vital to ensure the freedom of its citizens (Lepsius, 2004; Oehmichen, 2009). However, this principle was further compromised after a foiled attack gave rise to the idea of a central database combining police and security service data on suspected terrorists. The Joint Databases Act 2006 (Gemeinsame-Dateien-Gesetz) aimed to promote the exchange of information between the police and security services to facilitate collaboration and ultimately aid detection, disrupt and prevent attacks. Again, this act has been highly controversial and almost four years in the making (Ramelsberger, 2006; Spiegel Online, 2006a, 2006b). The second package was due to expire in January 2007. However, the corresponding sunset clause was removed a week prior to its expiry date, and a clause further expanding information gathering powers added (Oehmichen, 2009).

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334 Gesetz zur Bekämpfung des Internationalen Terrorismus (Terrorismusbekämpfungsgesetz)
335 See for example Wegener (2006)
336 The unabridged name of this law is Gesetz zur Errichtung gemeinsamer Dateien von Polizeibehörden und Nachrichtendiensten des Bundes und der Länder (law establishing joint data files of police and intelligence agencies of the federation and states)
337 In 2007, 38 agencies had contributed data to the joint database (Borchers, 2007)
The first real attempt to introduce pre-emptive powers was pioneered via amendments to criminal law. The introduction of the Act to Prosecute the Preparation of Serious Seditious Acts of Violence (Gesetz zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten) criminalised preparatory offences and participation in terrorist training camps. While this law might appear to follow the international trend, it contains a rather innovative clause, highlighting the legislator’s awareness of introducing an offence which goes beyond the realm of inchoate offences, into that of pre-emptive prevention (Oehmichen, 2009). Subsection 7 stipulates that

The court can reduce or even waive any punishment if the offender voluntarily desists his preparation of the seditious violent act, and endeavours to discourage further preparation or execution of dangers by others caused or recognised by him, or he voluntarily prevents the execution of the act. Should the act in question be prevented without his intervention, then a serious voluntary attempt to do so is considered sufficient.

Hence, not only is there an awareness of the pre-emptive nature of the offence, the law implicitly addresses the window of moral opportunity described by Lendermann (2009) to desist from engaging in the eventual actus reus.

Finally, the blurring of intelligence and evidence were highlighted in the first trial against an alleged participant in the September 11 attacks on charges of abetting murder in 3066 cases, and being a member of a terrorist organisation. Whilst there was apparent evidence of the defendant’s involvement in the 9/11 plot, both the German and US intelligence services refused to disclose this information to the court, making it completely unavailable to the court. In light of European human rights provisions, German courts are called upon to determine guilt and adapt the sentence accordingly. However, guilt cannot technically be determined without witness examination, although non-direct evidence may also be relied upon (Safferling, 2004). Christoph Safferling pointed out that the German court can uphold a conviction on the basis of

338 §89a StGB, which is punishable with up to 10 years imprisonment, also applies to offences committed abroad, both internally to the EU, as well as externally, if the offender is German or a German resident, or the offence is intended on German soil or it targets a German citizen (subsection 3). As for other preparatory offences, § 89b StGB also criminalises any association with an organisation if the intention is to commit a serious offence, and is punishable by up to three years imprisonment or a fine. Finally, §91 criminalises possession, distribution or appropriation of material which is determined to incite or constitute instructions on how to commit a serious act of violence.

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indirect evidence of an informant, but the information is subject to thorough scrutiny. The German standard of proof for all offences, including terrorism, being equivalent to ‘beyond reasonable doubt’, it is difficult to see how a conviction in absence of any evidence could be upheld (Safferling, 2004). Safferling condemned the lack of cooperation by the intelligence services as arrogant, warning that trials risked “becoming a travesty in evidence matters” (Safferling, 2004, p. 523). While he acknowledged the necessity of secret intelligence in police enquiries, he warned that its transferral to the criminal justice system was both “foreign and poisonous” (Safferling, 2004, p. 523). He concluded by warning that if these principles are not adhered to, we would soon be “dependent on the good will of the government instead of the rule of law” (Safferling, 2004, p. 524).

9.3.3 Summary
Lendermann described the measures against terrorist financing, disruption of terrorist networks and seamless international cooperation as the pillars in Germany’s fight against terrorism (Lendermann, 2009). The underlying aim of the security packages introduced in the wake of 2001 is prevention (Council of Europe, 2006; Lepsius, 2004). However, the German preventive approach has focused on strengthening its administrative measures, rather than incorporating it into the criminal law. While the criminal law has incorporated a pre-emptive element into its preparatory offence, it appears unlikely to be as vulnerable as in other jurisdictions due to its higher and uncompromising safeguards. A universal standard of proof offers vital protection to defendants, avoiding potentially unsound intelligence being used as evidence in a court of law.

9.4 Cross-Jurisdictional Discussion
Having outlined both France and Germany’s major developments in relation to pre-emptive anti-terrorism measures, several common themes identified with both control orders and internment re-emerge. Moreover, the shift towards the precautionary principle is also apparent, with changes akin to both Ericson’s counter-law, i.e. introducing or amending existing laws to circumvent existing principles and extending surveillance networks; as well as Borgers and van Sliedregt’s preventive characteristics, i.e. criminalising the preliminary offence stages, expanding investigative powers and pre-trial detention, and using non-criminal
administrative measures, being introduced in both countries.\footnote{Several commonalities post 9/11 are attributable to the Council of Europe Convention on the Prevention of Terrorism 2005, which created a confluence in criminal offences, punishment, as well as extradition.} It is important to reiterate that, although not the focus of this thesis, comparable developments have also taken place in both Australia and the UK. Both countries introduced offences criminalising the preparation and planning of terrorist offences.\footnote{Sections 101.4 to 101.6 of the Criminal Code (Cth) and sections 5 and 6 of the Terrorism Act 2006 (UK)} Detention without trial upon arrest for terrorist suspects in the UK, while nowhere near as extensive as the French model, was also extended to 28 days.\footnote{From 14 days. However, the Government had pushed for a period of 90 days (C. Walker, 2007a)} Moreover, the international link to Islamist terrorism provided the impetus to amend immigration procedures. In addition to the Special Immigration Appeals Commission (SIAC) hearings discussed previously, the Immigration, Asylum and Nationality Act 2006 introduced provisions to strip dual nationals of their British citizenship or their right of abode, facilitating deportation. The “exit model”, as Clive Walker (2007a) called it, focused its attention on deporting or excluding foreign nationals whose presence in the UK is considered unconducive to the public good,\footnote{S 3(5)(a) of the Immigration Act 1971} e.g. a threat to national security. Similarly, Australia has used immigration measures against suspected terrorists, probably most famously in the Dr Mohamed Haneef case.\footnote{After being arrested and detained for questioning for 12 days, Dr Haneef, an Indian national on an Australian work visa, was charged with providing support to a terrorist organisation and released on bail. Upon his release, Haneef’s visa was cancelled by the Minister for Immigration and Citizenship on character grounds (under section 501 of the Migration Act 1958, i.e. his association/familial ties with one of the Glasgow airport bombers, resulting in his return to detention. 22 days after his arrest charges against him were dropped and he was released. See the Report of the Inquiry into the Case of Dr Mohamed Haneef (Clarke QC, 2008).}

Despite the different legal systems underlying the jurisdictions examined in this research, precautionary strategies appear to have overarching characteristics regardless of time or place. For instance, France’s Court of State Security was overseen by a single judge and held in secret. Its replacement was seen as somewhat less repressive, partly due to the increased number of judges overseeing the proceedings. The Court of State Security eventually provided the basis for the centralised judicial system seen as integral to France’s anti-terrorism set up today. Again, a single investigating magistrate is not only in charge of the judicial proceedings, but also leads the associated investigation, adding yet a further dimension to the process. These characteristics are not dissimilar from the juryless Diplock courts introduced in Northern Ireland, although the judge is not in charge of the investigation. The French have argued that this system eliminated jury intimidation in terrorism cases, an argument which was also cited
in support of Diplock courts in Northern Ireland. Secret court hearings are not a thing of the past, as control order proceedings in the UK have demonstrated. Yet a further similarity is revealed in the restricted access to legal representation of terrorism suspects. Even when a French suspect is eventually able to communicate with his lawyer, the latter is not aware of the full details of the accusations or case against his client. Special Advocates in the UK share a similar predicament. Germany introduced two measures limiting access to lawyers in response to the RAF trials in the mid seventies, excluding the defence counsel and incommunicado detention, reacting to suspicion of collaboration with their legal representation to continue operations on the outside. This rationale was also the driver behind the French and British measures.

Despite the Kontaktsperre being introduced in reaction to a particular situation involving one particular trial, and never having been used since, the legal basis for incommunicado detention was never abolished; rather it was expanded beyond terrorism offences in 2006, raising two important issues. Firstly, legislation introduced in reaction to a particular terrorist threat, or indeed the exception, remains permanently in the statute book. In addition to the Kontaktsperre example, the extension of the security package in 2007 provides yet further support of this hypothesis. Secondly, these exceptional laws pertaining to terrorism are often expanded to other offences at some point in the future. Even with the German apprehension to compromise or derogate from fundamental rights, the threat of terrorism appears to have justified exceptional measures to some degree, albeit in a more controlled fashion than in some of the other jurisdictions examined. Similar developments were observed in the French context. Indeed, pre-emptive investigations such as those initiated by investigating magistrates are not the norm in France, so despite assertions to the contrary, the pre-emptive approach is indeed the exception, not the rule. While the majority of France’s approach predates 2001, its strategies have taken a slightly different direction since then. Although increasing stop and search powers, record keeping and surveillance pre-date the post 9/11 reality, France has extended these increased powers to organised and less serious crimes, signalling a potential expansion of anti-terrorism exceptions and justifications.

In terms of the timeline of the alleged terrorist act, each jurisdiction has moved further along the axis of prevention towards pre-emptive prevention in that preparatory acts have become criminalised, essentially criminalising otherwise harmless acts if it is interpreted as being for the intent and purpose of a terrorist act at a later time. France’s association de malfaiteur legislation is vaguely defined and does not relate to a specific act of planned terrorism. By pre-
empting the actus reus of a crime, it appears almost inevitable to venture into uncertain and vague linguistic territory as proving someone’s ultimate intent short of an admission is a difficult undertaking, and often difficult to prove in a court of law; meaning that such cases are rarely prosecuted, and those that are often struggle on this very point. That being said, a lower standard of proof and an increased reliance on intelligence information has proven to support not only the French cause, but also that in Australia and the UK; albeit in a much smaller number of cases, which one might argue serves more as a symbolic deterrent. In Germany, on the other hand, although a preparatory offence was also introduced into the statute books post 9/11, there is an innovative ‘safety valve’, offering reduced sentences as incentives for individuals to come forward and abort the continuation along the axis. Moreover, the German standard of proof is never lowered, remaining at beyond a reasonable doubt even in terrorism cases. This has made the prosecution of terrorist suspects that much harder in Germany. France, however, has facilitated prosecution by consolidating and strengthening collaboration between the intelligence services and the Judiciary. Such a collaboration appears almost unthinkable in Germany, where the creation of an inter-agency database was criticised for threatening the separation of powers between the police and the security services. To reiterate Safferling’s point, if we want to rely on judicial oversight and the rule of law rather than executive action, a certain standard needs to prevail. Finally, the inclusion of a defendant being able to plead guilty for the first time in the French system indicated a potential ‘rapprochement’ of the two legal systems, potentially paving the way for a distinct anti-terrorism approach based on best practice.

The extra dimension of a comparative study has identified several similarities in how different states chose to apply pre-emptive strategies in their efforts to combat terrorism. While there is an element of history rhyming, there is clear support to state that pre-emptive measures in the fight against terrorism pre-date the events of 2001 across several jurisdictions. Moreover, the states’ pre-emptive measures appear to have evolved over time, yet retaining the fundamental characteristics of pre-emption. It is to this discussion that I now turn.
10 Discussion

10.1 Introduction

The purpose of this research was to determine the characteristics of pre-emption as used in relation to anti-terrorism legislation across time and place. More precisely, it set out to determine the aims of pre-emption, how and under what circumstances it was and is used, and whether these principles have been consistently implemented across the jurisdictions examined, or whether they change over time and place. The contemporary academic literature identified control orders as an example of the current trend to introduce pre-emptive legislation. As such, the most frequently cited critiques of the measure relating to both the British and Australian implementations were discussed. The underlying theoretical framework, however, revealed that control orders are part of a trend pre-dating 9/11, namely that of actuarial justice and risk management.\(^\text{344}\) The departures from well established criminal justice safeguards identified in the literature were then further examined in the context of emergency legislation and the exception. Moreover, the mechanisms underlying pre-emption were further examined with reference to historical precedents. A statutory analysis sought to identify the provisions giving rise to the pre-emptive issues identified and subsequent critiques; the resultant implementation processes and complications in both the UK and Australia were discussed. Given that the British control order system is being replaced with Terrorism Prevention Investigation Measures (TPIMs) in 2012, the subsequent changes were outlined and discussed. Finally, in a bid to extend the analysis beyond the two central jurisdictions, France and Germany’s pre-emptive anti-terrorism measures rounded out the case studies. This chapter aims to tie together these findings and to provide insight into the evolution of the selected pre-emptive anti-terrorism measures. Particular attention is paid to the effect that one might attribute to 9/11 given the assertions in the academic literature of its role as a trigger of the subsequent proliferation of pre-emptive measures. It is to this endeavour I now turn.

10.2 Evolutionary Stages of Pre-emptive Anti-terrorism Laws

Having examined different pre-emptive anti-terrorism measures spanning several decades and across multiple jurisdictions, this research has identified that governmental strategies and technologies, as well as risk, possess some characteristics which remain fairly stable, and also

\(^{344}\) As discussed in Chapter 3.3
some which vary between jurisdictions or evolve over time. The following section outlines these stable and dynamic characteristics of pre-emption.

10.2.1 Stable Characteristics of Pre-emption

The underlying aim of all the measures examined here, as well as the non-terrorism related pre-emptive measures discussed, is the same: public protection via the control of groups or individuals who are thought to pose a threat to the public. For the terrorism-specific measures, this is done in conjunction with aiming to prevent a terrorist attack. Given that the aim is to intervene prior to the commission of any terrorist act, the underlying rationale has been to adopt a pre-emptive or precautionary approach. Thus, pre-emptive measures are used against individuals against whom insufficient evidence to prosecute exists, as evidence of a prevented crime is difficult to come by, particularly if it is to stand up to scrutiny in a court of law. In its place, the executive branch of government with whom these measures originate relies on intelligence, which traditionally is not admitted or relied upon in court. It is however important to reiterate at this point that none of the pre-emptive measures examined involve criminal proceedings at the outset; care should thus be taken not to oversimplify or generalise the standards against which they are judged. Nevertheless, the reliance on often unreliable and speculative intelligence has led to a fundamental change to the adversarial tradition of justice.

The British anti-terrorism measures examined as part of this study have relied on mechanisms and technologies more akin to an inquisitorial system in their efforts to deal with both domestic and international terrorism. A similar, although less bold observation can also be made with respect to the Australian control order measures. The judicial involvement is limited to a single judge. The absence of a jury is justified by the civil nature of the trial, as well as the need to protect sensitive information pertaining to national security. The single judge approach originated from variations to criminal justice procedures in situations of emergency. First introduced in Northern Ireland, the so-called Diplock courts have stood the test of time, outlasting both internment, and now control orders. This specialised judicial system is also at the heart of the French model. However, unlike their British counterparts, the French juges d'instruction (investigating magistrates) are not only actively involved in, but also direct the investigation, which involves close collaboration with the French security and intelligence services. The French have not implemented a measure similar to control orders, instead relying on a measure which allows for the detention without charge of individuals for up to four years.
Evolutionary Stages of Pre-emptive Anti-terrorism Laws

The underlying mechanisms inherent in its centralised anti-terrorism system bear distinct similarities to the pre-emptive measures employed during internment.

That being said, an inquisitorial system of justice appears not to be a necessary precursor for pre-emptive anti-terrorism measures, either pre or post 9/11. While Germany may be closer to France in geographical terms than Britain is to Australia, historical antecedents appear to have created sufficiently diverse barriers to the introduction of pre-emptive measures compromising well established safeguards.

10.2.2 Variations of Pre-emptive Characteristics

Not all the pre-emptive characteristics identified in relation to anti-terrorism have remained stable; several have changed over time. The introduction of pre-emptive or precautionary measures, be they related to terrorism or not, often follows a particularly significant event or incident, which is cited as the justification for the new legislation and the potential derogation from established norms. The subsequent situation is described as an emergency or exceptional, and even though its recurrence cannot be accurately predicted, the potential risk and potentially devastating aftermath are sufficient to justify deviations from the norm. Terrorism has frequently been used to justify exceptional measures; whilst this is still true to some extent today, variations in implementation have led to some significant differences between jurisdictions.

The legal frameworks under which pre-emptive measures were introduced varied between jurisdictions. Internment, for instance, was introduced as emergency legislation (for Northern Ireland) with the intention of being a temporary measure. Ultimately, the most recent instalment was in place for over four years. While the control order regime was not introduced under emergency provisions, its introduction was nonetheless justified as responding to exceptional circumstances. Given the controversial nature of the provisions contained within the Prevention of Terrorism Act 2005 (PTA), it was also initially introduced as a temporary measure. Having been renewed annually ever since its introduction in 2005, the control order regime will have been in place for close to six years before being replaced with TPIMs. Unlike its predecessors, the Terrorism Prevention and Investigation Measures Bill has been conceived to be a permanent addition into the British statute books. In contrast, France’s pre-emptive law has been permanent from the outset, a feature believed to have contributed to its preventive success by its investigating magistrates. Given the historical situation of abusing emergency power in the Third Reich, the Germans have been understandably reluctant to re-
introduce such measures. Even the most controversial law in relation to terrorism pre-9/11, the Kontaktsperregesetz, was used reactively, and only once against members of the RAF. The recent death of Osama Bin Laden created a flurry of activity in the German parliament, as it happened at a time when the laws introduced in the wake of 9/11 were up for renewal, reigniting the debate about the necessity of special anti-terrorism provisions, such as the integrated database. Germany’s anti-terrorism laws were extended by a further four years in 2011.

Contemporary British control order provisions may not have been introduced as part of emergency legislation, yet their administratively issued civil-criminal hybrid nature enables them to deviate from well established civil and criminal procedure doctrines, allowing secret evidence to be presented to the judge without a suspect ever being made aware of the accusations against him or her. In an apparent effort to rectify this shortcoming, so-called Special Advocates were introduced to view sensitive information on their clients’ behalf and represent them. However, as soon as the Special Advocate has consulted the information, any further contact between the two parties is prohibited; making the appointment of Special Advocates appear somewhat quixotic. The Australian system, although restricted by national security considerations, appears to have operated in a more transparent fashion. However, all of the measures selected for comparison in this thesis rely heavily on intelligence material in support of the executive decision. Intelligence material does not conform to the more rigorous standards of evidence in court. Historical accounts have highlighted the unreliability of intelligence used during internment, in turn contributing to a significant backlash against the British regime in Northern Ireland. The inadmissibility of intercept evidence in the United Kingdom to date was a frequently cited reason to uphold the control order regime. The planned amendments contained within the replacement TPIM scheme have proposed a revision to this prohibition, so as to facilitate prosecution. Whether or not the suspect will be granted access to said intercept evidence is, as yet, unknown.

We have seen that control orders, especially the British species, share many of the same characteristics as internment. As David Bonner (2007) has highlighted, the derogating control order could be considered internment by a different name, as controlees would be detained without trial. However, derogating control orders are limited to a duration of six months.\textsuperscript{345} This safeguard was not available to internees. Non-derogating control orders, on the other hand, do not involve detention to an extent which would require derogation from Article 5 of...\textsuperscript{345} Although a non-derogating control order could be renewed indefinitely
the ECHR. That being said, the use of eighteen hour curfews was ruled incompatible with human rights and in violation of Article 5. However, curfews of sixteen hours were still being issued and considered the informal upper threshold. The average curfew in the UK cases amounted to just over twelve hours over the six years of the scheme’s implementation. Some of these conditions have been repeatedly criticised for amounting to house arrest. In contrast, Australian courts refrained from imposing long curfews, the maximum being five hours. In summary, we can observe a decreasing trend in both the deprivation and restriction of liberty in the United Kingdom and a reluctance to impose lengthy curfews in Australia.

A similar declining trend can also be identified comparing the extent to which pre-emptive measures were implemented across jurisdictions. For instance, one of the reasons internment was seen as controversial was the scale at which suspected paramilitaries, Republicans in particular, were interned. Between 1971 and 1975, over 2000 individuals were interned within a 52 month period, most of whom were Republicans. Similarly, France’s broadly defined association de malfaiteurs offence has also been criticised for “casting a wide net” on terrorist suspects and their associations (Human Rights Watch, 2008, p. 2). In contrast, control orders have not been issued as broadly, although they have been exclusively applied to individuals with suspected links to international, Islamist organisations, and to both foreign nationals and British citizens. The Australian implementation of only two orders against suspects with alleged links to Al-Qaeda may be a reflection of restraint by the AFP, a lack of terrorist suspects against whom there is insufficient evidence to prosecute, or indicative of a legal gap in 2005 to deal with individuals who were thought to pose a risk based on suspicions of having trained with extremists prior to it being outlawed. A significant decrease in the frequency with which such measures were applied has thus been observed in the common law jurisdictions examined. The introduction of the British control order into Australian law led to some important distinctions between the two varieties so as to ensure its compatibility with the Australian Constitution, which was extensively debated in the Thomas case. Judicial decision-making thus plays a crucial role of selecting which traits survive and which ones are destined for extinction.

The Judiciary fulfils an important role of selecting suitable mechanisms of control. The role of the Judiciary is important in deciding which statutes are retained, are subjected to modification in accordance with human rights principles, and which ones are abandoned. In the past, the administrative nature of certain measures, including internment, has meant that

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346 See Note 301
the selection process was often carried out by administrative tribunals, which had the potential to undermine the impartiality and fairness of any decisions they issued. Having recourse to an independent Judiciary, in theory at least, ensures not only a degree of objectivity, but also sets the criteria for retaining or abandoning certain strategies and procedures. One of the effects of Britain’s more extensive application of control orders compared to Australia has been a much more comprehensive selection process established through various challenges to the scheme. The Judiciary has established clearer guidelines as to the acceptable upper limit for curfews, as well as forcing the disclosure of previously secret intelligence to the controlee so as not to violate his or her right to a fair trial. The Human Rights Act 1998 and the European Convention on Human Rights have successfully curbed the application of control orders, even if it has not quite managed to curtail their proliferation into other domains. So while control orders were not originally required to adhere to certain procedural safeguards, the process of judicial selection has set the basic standards, forming the foundation of a new variety, which has now been formalised and rebranded as TPIMs.

Outside of the United Kingdom, the lack of a bill of rights in Australia may have been a reason for the increased judicial input into, as well as the limited application of control orders. The Thomas case established, albeit not unanimously, that issuing control orders was indeed part of the Judiciary’s mandate and thus did not violate the separation of powers. The role of the Australian Judiciary as a mechanism of independent oversight was thus upheld.

In France, the juges d'instruction’s mandate extends beyond that of the common law judges, since they are also in charge of the investigation. In that sense their role as selector may be clouded due to their active involvement in the case, thus not offering an independent opinion on the appropriateness of a particular measure. On the other hand, and this is the view of several judges themselves, they believe their position offers them unprecedented insight and thus they can base their decisions on all possible information, including all the relevant intelligence material. In contrast, the German approach might be more accurately described as cautious and more considered compared to other jurisdictions, as their Grundgesetz (Basic Law) has successfully managed to keep any rashly implemented precautionary measures out of the statute books, even post 9/11.
10.3 The 9/11 Effect

Much of the previous literature identified a pre-emptive shift in how western states dealt with terrorism in the wake of the September 11 attacks. Control orders and preventative detention orders were frequently cited examples of this trend away from reactive law enforcement to pre-emptive, intelligence-led measures. Just as favourable climate changes can create the conditions for a surprisingly speedy increase of a particular plant or animal in nature (Darwin, 1859), the political climate in the aftermath of 9/11 can be described as having been advantageous to the propagation of preventive measures based on precaution and pre-emptionary principles. While the existence of such mechanisms in the last few centuries has been demonstrated, and the trend in actuarial justice had gained momentum in previous decades, the events of 9/11 may have accelerated the propagation of such measures in some jurisdictions.

Characteristics such as public protection and controlling apparently risky individuals against whom insufficient evidence to prosecute exists, have remained static over time, showing little or no variation post 9/11. Perhaps one of the most significant changes made post 9/11 was the introduction of the control order scheme in the UK, which re-introduced measures resembling internment. Internment has not been used since 1975, and was eventually abolished in 1998. Yet despite its controversial nature, the British government believed the risk from international terrorism was sufficiently great to introduce a similar measure, even prior to the attacks on July 7 2005 in London. While the control order scheme did resemble internment strategies, certainly with regards to the derogating variety, there were also important differences, such as the increased judicial oversight. In addition to the control order scheme, the precautionary approach was further supported by increased police and security services powers. Indeed, this latter development was evident in all four jurisdictions studied. France’s post 9/11 strategy was similar in that it set out to strengthen the powers of the police and intelligence services to further support their already existing pre-emptive approach. Despite the inquisitorial traits adopted by common law countries in response to terrorism, France’s pre-emptive and centralised approach still raises many eyebrows in civil and common law countries alike. However, changes introduced in the wake of 9/11 pioneered the adversarial admission of guilt into the French system for the first time in a bid to prevent attacks. This strategy was conceived to provide an incentive to desist at the planning stage of an attack in return for a reduced sentence. The same strategy was also introduced into German criminal law post 9/11 with the introduction of the preparatory offence.
Australian changes in response to 9/11 are, on the one hand, easily identified given the absence of any Federal anti-terrorism legislation prior to 2002. The introduction of over fifty statutes since then is nothing short of legal hyperactivity (Ransley & Donkin, 2009). However, this also suggests pre-emptive or precautionary Australian anti-terrorism legislation did not exist until 2005, indicating that 9/11 and ensuing signal events undoubtedly influenced its inception. The subsequent expansion of control orders to target outlaw motorcycle gangs and organised crime raises the question whether this evolutionary journey is still in its early stages. Recent court decisions finding the States’ control orders against biker gangs constitutionally invalid may however bring about their equally rapid extinction.\textsuperscript{347} Equally, while the constitutional validity of anti-terrorism control orders was upheld, none have been issued since December 2007.

In summary then, 9/11 appears to have provided sufficient weight to the precautionary logic to justify the (re-)introduction of measures with the underlying precautionary rationale of acting even in absence of evidence. Police and security services in each jurisdiction saw their powers extended so that they can effectively support this policy, be it by way of intelligence or evidence gathering.

\subsection*{10.3.1 Reacting to the Pre-emption Meme}
Having established that the precautionary imposition of obligations or restrictions even in the absence of hard evidence was facilitated by post 9/11 developments, I now wish to pick up on a finding made after examining the implementation of the control order scheme in Australia. My analysis of control orders has questioned the extent to which the contemporary measures can be described as being pre-emptive. The Australian statute contains a dual clause for issuance of orders: one indicating a pre-emptive or precautionary approach, the other, having trained with a proscribed terrorist organisation, being reactive prevention. It is on the basis of the latter reactive clause that both Australian control orders have been issued. The reason why Thomas and Hicks were not prosecuted for these offences was that their training took place prior to such activity being criminalised. Hence, the Australian application has been exclusively reactively preventive, and not pre-emptive. Had the control orders been issued on the first

\textsuperscript{347} One of the reasons for the incompatibility in \textit{Totani} was the wording in s 14 directed the court to impose a control order once a person had been identified as belonging to a proscribed organisation, thus raising serious concerns about the independence of the Judiciary and lack of judicial discretion (Weston-Scheuber, 2009). Attempting to deny the court its role as selecting the appropriateness of the measures led to the measure being declared invalid.
premise alone, i.e. that making the order would substantially assist in preventing a terrorist act; this would not be the case. Given that both control orders were issued relatively shortly after the scheme’s introduction to Australian law, it might well be argued that control orders fulfilled a role akin to a stopgap; in that the authorities had credible suspicion about activities which under the new anti-terrorism laws were outlawed, but could not retrospectively charge them with anything. Not wanting to release these individuals into the community, the control order was used. In David Hicks’ case, having already served several years at Guantanamo Bay for his alleged involvement with extremist groups, the Howard government was perhaps unwilling and/or unable to release him back into the community unsupervised after his return, making him first complete his sentence in an Adelaide jail, prior to releasing him on a control order. My analysis of British control orders also indicates a degree of reactively preventive implementation. In at least 31 per cent of cases, the individuals in question had previous instances of terrorism-related arrests or detention to their name, mainly abroad. Of course, having previous convictions or arrests does not necessarily make these individuals more likely to be involved in a terrorist act in the UK. However, previous records may serve as reasonable grounds for suspecting involvement in terrorist activity. If that is the case, then again these orders are not issued on a purely pre-emptive basis. Other controlees, such as Cerrie Bullivant for example, appear to have been caught up in the system due to their acquaintance with terrorist suspects or controlees. In these cases, the rationale is clearly pre-emptive prevention, although in some cases, these suspicions appear to have been unfounded. Thus, control orders, in practice at least, are not (always) pre-emptive in the traditional sense of the word. Had Australia detained an individual on a preventative detention order instead, i.e. without charge and suspected of being linked to terrorist activity which is believed to be imminent or has recently occurred, the term pre-emption would be used in the more traditional militaristic sense of the word. Despite the reactively preventive implementation of control orders then, it makes sense to consider how the concept of pre-emption was so readily embraced by scholars and practitioners alike.

Comparable to genetic transmission, Richard Dawkins talked about the notion of cultural transmission being capable of replication and evolution, the so called meme \(^{349}\) (Dawkins, 1989), also referred to as a replicator (Nelson, 2006). He used language as an example, which evolves

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\(^{348}\) Although beyond the scope of this study, it would be interesting to examine further whether these previous records are due to opposition to a particular administration, such as the Gaddafi regime in Libya, or indeed related to a particular ideological cause they might seek to act upon in Britain.

\(^{349}\) From the Greek \textit{mimeme}, something inherited, or the French \textit{mème}, the same
at a faster rate than genetic evolution. Other examples include ideas or melodies, even customs or law.

“Just as genes propagate themselves in the gene pool by leaping from body to body via sperms or eggs, so memes propagate themselves in the meme pool by leaping from brain to brain via a process which, in the broad sense, can be called imitation. If a scientist hears, or reads about, a good idea, he passes it on to his colleagues or students. He mentions it in his articles and his lectures. If the idea catches on, it can be said to propagate itself, spreading from brain to brain.”

Dawkins (1989, p. 206)

I propose that pre-emption itself developed into a meme in post 9/11 criminal law and criminological literature. Indeed, Dawkins (1989) highlighted that the propagation of a scientific idea meme is dependent on the acceptability of the idea to the scientific community. While the term pre-emption was used in academic literature prior to 2001, it caught on and propagated into new areas of research at an ever-increasing rate. The proliferation of preventive post 9/11 measures appears to have spurred on its evolution. Especially in Australia, where prior to 2002 no federal anti-terrorism legislation existed, measures such as control orders and preventative detention orders stood out, attracting a lot of attention and demanding interpretation. The sudden propagation of the concept of pre-emption thus could be argued to be one of the most significant effects of 9/11, certainly in academic circles.

10.4 Towards A New Paradigm

As we have seen, the often overwhelmingly emotional response by both the public and politicians to extraordinary events has the potential to facilitate, as Ramsay (2009) called it, “unprincipled political opportunism” (p. 111) and an acceptance of the violation of liberal norms. Many of the most prominent critiques of control orders relate to infringements of procedural safeguards, which, although not technically guaranteed given the civil nature of the orders, it has been argued, should nonetheless be upheld given the severity of the restrictions imposed. Contemporary academic literature frequently describes control orders as hybrids between civil and criminal law, or as executive and judicial hybrids. Hybrids, however, are defined as being made up of two distinct elements, whereas the control order borrows elements from at least three areas of law, i.e. administrative, civil and criminal law. As such, I
believe the control order scheme might be better described as a chimera, composed of multiple distinct legal entities. Moreover, given their reach across previously distinct categories, control orders are examined in light of derogation or adherence to one or the other category. However, comparing them to existing norms is problematic as they no longer fit neatly within the existing paradigm. None of the measures examined in this thesis are fully criminal measures, even if one of the stipulated aims of control orders is to (eventually) prosecute those subject to them. The primary enabler of these derogations has been a shift away from the adversarial tradition towards adopting elements more familiar to inquisitorial tribunals in terrorism cases, introduced under the justification of exceptional risk. While the French anti-terrorism model may still appear somewhat exaggerated to some observers, similar proposals have already been made in the UK. One of the Newton Inquiry’s proposals in 2004 was to introduce a security cleared examining judge to handle terrorism cases.\(^{350}\) That being said, the decreased rate at which precautionary measures have been issued even post 9/11, as well as the increase in safeguards and amendments brought about via a judicial oversight indicates that despite the perceived risk to the population from terrorism, the Home Secretary and government may be conducting their own political risk assessment, namely that of their political survival. Changes made over time to wording or certain elements means these components have adapted to their environment, driven by judicial oversight, and further supported by public pressure and academic opposition. The British coalition government has proposed to abolish the control order regime only to introduce a new variety of preventive order, which although it will be known by another name, bears striking resemblance to the superseded measure. It has, however, decided not to continue the equivalent of the derogating control order, which during its six years on the statute book was never sought. Indeed, much like in the natural world, rarity appears to have been a precursor to extinction (Darwin, 1859). The government’s decision to rebrand control orders into TPIMs lends support to Zedner’s argument that preventive measures are not reversible, but here to stay. It is all the more important then to heed her call to develop “appropriate principles, values, and goals with which to frame the continuing development of preventive measures” (Zedner, 2007b, p. 203).

Given that control orders contain reactive and pre-emptive elements, as well as sitting somewhere between detention and restriction, I propose not only to widen the scope of examination in terms of its chimerical nature, but also to look outside of the traditional binary classifications against which they are currently evaluated. Control orders evolved out of a real

\(^{350}\) David Davis, H.C. Deb., col. 310 (26 January 2004)
or imagined inability of the traditional systems to deal with a situation created by a legal ruling in relation to their statutory predecessor. As anti-terrorism measures evolve as a result of these developments, it is time for scholars to evolve their thinking. Supportive of Zedner’s call for a new framework, I propose a new set of standards against which to evaluate not only control orders and TPIMs, but any new measure, both anti-terrorism and non-terrorism related, which creates a hybrid or chimeric paradigm of justice to keep pace with evolution. Be it criminal, civil or administrative, the underlying aim should be justice and security.

While the creation of such a framework is beyond the scope of this study, based on the findings of this study, I propose the incorporation of the following elements:

**Permanence** – Consideration should be given to introducing permanent anti-terrorism laws. The threat of terrorism is not likely to dissipate any time soon; having been present in Britain for the last several decades, the new era of international terrorism makes its long-term survival more likely. A permanent character would remove excuses for the justification of extraordinary measures on the basis that they are only intended to be temporary, leading to hopefully more carefully considered and debated measures.

**No deprivation of liberty without criminal law procedural safeguards** – any anti-terrorism measure which may result in an individual being deprived of their liberty (continuous or up to 16 hours a day) should adhere to criminal procedural safeguards given the severity of the consequences, including the higher standard of proof.

**Restrictions on liberty only where the individual is aware of the accusations and intelligence against them** – Any restrictions severe enough to interfere with an individual’s or his family’s daily routine or ability to remain in gainful employment should only be issued on the basis of a minimum level of disclosure of the intelligence giving rise to said restrictions, sanitised to protect any sources or ongoing operations, so as to ensure the ability of the individual to receive a fair hearing. Moreover, obligations interfering with gainful employment should be kept to a minimum given that a suspect has not been found guilty of a crime.
**Conclusion**

Admission of intercept evidence – if the focus is to prosecute, intercept evidence should be admitted as evidence in an open court. The law in Britain would need amending to enable this development.

Rather than focusing on the traditional legal categories, a more macro-level approach is called for, one which is capable of seeing and interpreting the bigger picture of the underlying aims of these measures, whilst not forgetting the principles of civil liberties underlying our systems of justice. Although Marc Lendermann (2009) made the sobering assertion that the law itself only has a limited ability to prevent terrorism, he believes it is an important point to remember, potentially preventing the introduction of future laws compromising civil liberties.

### 10.5 Conclusion

This thesis has traced the evolution of recent developments in pre-emptive and precautionary anti-terrorism laws across both time and place, focusing specifically on two implementations of pre-emptive anti-terrorism legislation, i.e. internment and control orders. Drawing on a conceptual framework associated with evolutionary theory, this conclusion has suggested that the overarching aim of all the measures examined has remained stable over time; whereas other elements are subject to variation, both over time and across jurisdictions. Moreover, the Judiciary has increasingly taken on the role of selecting which of these strategies and rationalities are retained or abandoned. Whilst there has been a shift away from a state’s reliance on emergency law, precautionary measures have been justified as being necessary to respond to uncertainty and potentially catastrophic events. The events of September 11 2001 were not directly responsible for a new species of pre-emptive legislation; rather the resultant political climate facilitated and accelerated the proliferation of often hastily introduced precautionary measures. Control orders are part of a more general evolution towards precautionary government strategies. Given the need to introduce a non-discriminatory measure for individuals, foreign and domestic alike, against whom insufficient evidence to prosecute existed and whom they were unable to deport, going outside the criminal process was considered necessary, albeit controversial. The precautionary rationale prevailed both in light of the uncertainty of the terrorist threat, as well as the uncertainty over how best to deal with this group of individuals considered to pose a risk to the population at large. That being said, the decreasing issuance of control orders indicates that they themselves are indeed being applied only in exceptional circumstances.
Internment was not the first form of pre-emptive legislation introduced to deal with terrorism, nor will the Terrorism Prevention Investigation Measure (TPIM) be the last. This thesis has illustrated the evolution of the pre-emptive or precautionary anti-terrorism legislation through the analysis of a limited number of intermediate varieties. These iterations accumulated small but successive variations rather than abrupt or large changes, often in reaction to legal challenges or negative public opinion.

“It is not the most intellectual of the species that survives; it is not the strongest that survives; but the species that survives is the one that is able best to adapt and adjust to the changing environment in which it finds itself.”

Meggison (1963, p. 4)
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Appendix A

European Convention on Human Rights (ECHR)

ARTICLE 5

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

   (a) the lawful detention of a person after conviction by a competent court;
   (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
   (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
   (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
   (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;
   (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

ARTICLE 6

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and the facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.
ARTICLE 15

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.
Appendix B

Sections 2.2-2.11 of the Police and Criminal Evidence Act 1984 (UK) (PACE)

Searches requiring reasonable grounds for suspicion

2.2 Reasonable grounds for suspicion depend on the circumstances in each case. There must be an objective basis for that suspicion based on facts, information, and/or intelligence which are relevant to the likelihood of finding an article of a certain kind or, in the case of searches under section 43 of the Terrorism Act 2000, to the likelihood that the person is a terrorist. Reasonable suspicion can never be supported on the basis of personal factors. It must rely on intelligence or information about, or some specific behaviour by, the person concerned. For example, unless the police have a description of a suspect, a person’s physical appearance (including any of the ‘protected characteristics’ set out in the Equality Act 2010 (see paragraph 1.1), or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other, or in combination with any other factor, as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people as more likely to be involved in criminal activity.

2.3 Reasonable suspicion may also exist without specific information or intelligence and on the basis of the behaviour of a person. For example, if an officer encounters someone on the street at night who is obviously trying to hide something, the officer may (depending on the other surrounding circumstances) base such suspicion on the fact that this kind of behaviour is often linked to stolen or prohibited articles being carried. Similarly, for the purposes of section 43 of the Terrorism Act 2000, suspicion that a person is a terrorist may arise from the person’s behaviour at or near a location which has been identified as a potential target for terrorists.

2.4 However, reasonable suspicion should normally be linked to accurate and current intelligence or information, such as information describing an article being carried, a suspected offender, or a person who has been seen carrying a type of article known to have been stolen recently from premises in the area. Searches based on accurate and current intelligence or information are more likely to be effective. Targeting searches in a particular area at specified crime problems increases their effectiveness and minimises inconvenience to law-abiding members of the public. It also helps in justifying the use of searches both to those who are searched and to the public. This does not however prevent stop and search powers being
exercised in other locations where such powers may be exercised and reasonable suspicion exists.

2.5 Searches are more likely to be effective, legitimate, and secure public confidence when reasonable suspicion is based on a range of factors. The overall use of these powers is more likely to be effective when up to date and accurate intelligence or information is communicated to officers and they are well-informed about local crime patterns.

2.6 Where there is reliable information or intelligence that members of a group or gang habitually carry knives unlawfully or weapons or controlled drugs, and wear a distinctive item of clothing or other means of identification to indicate their membership of the group or gang, that distinctive item of clothing or other means of identification may provide reasonable grounds to stop and search a person.

2.7 A police officer may have reasonable grounds to suspect that a person is in innocent possession of a stolen or prohibited article or other item for which he or she is empowered to search. In that case the officer may stop and search the person even though there would be no power of arrest.

2.8 Under section 43(1) of the Terrorism Act 2000 a constable may stop and search a person whom the officer reasonably suspects to be a terrorist to discover whether the person is in possession of anything which may constitute evidence that the person is a terrorist. These searches may only be carried out by an officer of the same sex as the person searched (see Annex F). An authorisation under section 44(1) of the Terrorism Act 2000 allows vehicles to be stopped and searched by a constable in uniform who reasonably suspects that articles which could be used in connection with terrorism will be found in the vehicle or in anything in or on that vehicle. See paragraph 2.18A below.

2.9 An officer who has reasonable grounds for suspicion may detain the person concerned in order to carry out a search. Before carrying out a search the officer may ask questions about the person’s behaviour or presence in circumstances which gave rise to the suspicion. As a result of questioning the detained person, the reasonable grounds for suspicion necessary to detain that person may be confirmed or, because of a satisfactory explanation, be eliminated. Questioning may also reveal reasonable grounds to suspect the possession of a different kind of unlawful article from that originally suspected. Reasonable grounds for suspicion however
cannot be provided retrospectively by such questioning during a person’s detention or by refusal to answer any questions put.

2.10 If, as a result of questioning before a search, or other circumstances which come to the attention of the officer, there cease to be reasonable grounds for suspecting that an article is being carried of a kind for which there is a power to stop and search, no search may take place. In the absence of any other lawful power to detain, the person is free to leave at will and must be so informed.

2.11 There is no power to stop or detain a person in order to find grounds for a search. Police officers have many encounters with members of the public which do not involve detaining people against their will. If reasonable grounds for suspicion emerge during such an encounter, the officer may search the person, even though no grounds existed when the encounter began. If an officer is detaining someone for the purpose of a search, he or she should inform the person as soon as detention begins.
Appendix C

Section 4 Prevention of Terrorism Act 2005 (UK) – List of Obligations

(4) Those obligations may include, in particular—
   
   (a) a prohibition or restriction on his possession or use of specified articles or substances;
   
   (b) a prohibition or restriction on his use of specified services or specified facilities, or on his carrying on specified activities;
   
   (c) a restriction in respect of his work or other occupation, or in respect of his business;
   
   (d) a restriction on his association or communications with specified persons or with other persons generally;
   
   (e) a restriction in respect of his place of residence or on the persons to whom he gives access to his place of residence;
   
   (f) a prohibition on his being at specified places or within a specified area at specified times or on specified days;
   
   (g) a prohibition or restriction on his movements to, from or within the United Kingdom, a specified part of the United Kingdom or a specified place or area within the United Kingdom;
   
   (h) a requirement on him to comply with such other prohibitions or restrictions on his movements as may be imposed, for a period not exceeding 24 hours, by directions given to him in the specified manner, by a specified person and for the purpose of securing compliance with other obligations imposed by or under the order;
   
   (i) a requirement on him to surrender his passport, or anything in his possession to which a prohibition or restriction imposed by the order relates, to a specified person for a period not exceeding the period for which the order remains in force;
   
   (j) a requirement on him to give access to specified persons to his place of residence or to other premises to which he has power to grant access;
   
   (k) a requirement on him to allow specified persons to search that place or any such premises for the purpose of ascertaining whether obligations imposed by or under the order have been, are being or are about to be contravened;
   
   (l) a requirement on him to allow specified persons, either for that purpose or for the purpose of securing that the order is complied with, to remove anything found in that place or on any such premises and to subject it to tests or to retain it for a period not exceeding the period for which the order remains in force;
(m) a requirement on him to allow himself to be photographed;
(n) a requirement on him to co-operate with specified arrangements for enabling his movements, communications or other activities to be monitored by electronic or other means;
(o) a requirement on him to comply with a demand made in the specified manner to provide information to a specified person in accordance with the demand;
(p) a requirement on him to report to a specified person at specified times and places.
Appendix D

Section 104.5(3) Criminal Code 1995 (Cth) – List of Obligations

Obligations, prohibitions and restrictions

(3) The obligations, prohibitions and restrictions that the court may impose on the person by the order are the following:

(a) a prohibition or restriction on the person being at specified areas or places;
(b) a prohibition or restriction on the person leaving Australia;
(c) a requirement that the person remain at specified premises between specified times each day, or on specified days;
(d) a requirement that the person wear a tracking device;
(e) a prohibition or restriction on the person communicating or associating with specified individuals;
(f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the Internet);
(g) a prohibition or restriction on the person possessing or using specified articles or substances;
(h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
(i) a requirement that the person report to specified persons at specified times and places;
(j) a requirement that the person allow himself or herself to be photographed;
(k) a requirement that the person allow impressions of his or her fingerprints to be taken;
(l) a requirement that the person participate in specified counselling or education.

Note: Restrictions apply to the use of photographs or impressions of fingerprints taken as mentioned in paragraphs (3)(j) and (k) (see section 104.22).
Appendix E

Thomas Interim Control Order – Schedules 1 and 2

SCHEDULE 1

This schedule sets out the obligations imposed on Joseph Terrence Thomas pursuant to sub-section 104.5(3) of the Criminal Code:

OBLIGATIONS

The following obligations form part of the interim control order and are imposed on you by virtue of sub-section 104.5(3) of the Criminal Code:

Upon personal service of the interim control order and thereafter for the duration of this interim control order:

1. You are required to remain at your current place of residence in Williamstown, Victoria, between midnight and 5.00am each day, unless you notify the Coordinator of the Australian Federal Police Counter Terrorist Team, Melbourne Office, 383 Latrobe Street, Melbourne (the AFP CT Coordinator) in writing of another address that you will be residing at between these times.

2. You are required to report to the following specified persons at the following specified times and places:
   a. a member of Victoria Police;
   b. every Monday, Wednesday and Saturday, at any time between the hours of 9am and 9pm;
   c. at any of the following Victoria Police premises (the ‘specified premises’):
      (i) Werribee Police Station;
      (ii) Footscray Police Station; or
      (iii) Sunshine Police Station
   d. or any other person, time and/or place agreed in writing by the AFP CT Coordinator.

3. You are required to allow impressions of your fingerprints to be taken by the Victoria Police via the ‘Fingerprint Live Scan’ unit for the purposes of ensuring compliance with paragraph 2 of this interim control order:
   a. within 24 hours following the issuing of this interim control order; and
   b. where required by a member of Victoria Police, on any occasion you report at the specified premises.

and
4. You are prohibited from leaving Australia except with the prior written permission of the AFP CT Coordinator.

and

5. You are prohibited from carrying out the following specified activities:
   a. acquiring, taking possession of, producing, accessing or supplying documentation (including in electronic form) regarding:
      a. the manufacture or detonation of explosives;
      b. weapons; and/or
      c. combat skills;
   b. manufacturing, acquiring, taking possession of or using or attempting to manufacture, acquire, possess or use any commercial, military or home made and/or improvised explosives or explosive accessories, initiation systems or firing devices;
   c. subject to section 104.5(5) of the Criminal Code, communicating to any person, whether directly or indirectly (including via internet chat rooms, websites, media interviews, publications and group gatherings) in relation to:
      – methodology, tactics and other knowledge connected with, or likely to facilitate, terrorist acts, including explosives, weapons and/or combat skills
      – names or contact details of persons you know to be associated with a listed terrorist organisation (see Schedule 3).

and

6. You are prohibited from communicating or associating with:
   a. up to 50 individuals listed by the Department of Foreign Affairs and Trade pursuant to Part 4 of the Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002 (Cth), as notified to you in writing by the AFP CT Coordinator, with such prohibition to take effect from notification; and
   b. any individual that you know to be a member of a listed / specified terrorist organisation (see Schedule 3).

and

7. Following the expiration of 48 hours after this control order is served upon you, you are prohibited from accessing or using the following specified forms of telecommunications or other technology:
   a. any mobile telephone service that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one mobile telephone service is nominated in total and sufficient details to identify the service to be used are provided;
   b. a telephone service card, SIM card or account, incorporating a credit or “top up” facility that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one telephone service card, SIM card or account,
incorporating a credit or “top up” facility is nominated in total and sufficient details to identify the service to be used are provided;

c. any fixed or landline telephone service that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one fixed or landline telephone service is nominated in total and sufficient details to identify the service to be used are provided or is required in the case of an emergency;

d. any public telephone except in the case of an emergency;

e. any satellite telephone service;

f. any Voice Over Internet Protocol (VOIP) service including any software or hardware that will facilitate a VOIP service that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one Voice Over Internet Protocol (VOIP) service including any software or hardware that will facilitate a VOIP service is nominated in total and sufficient details to identify the service to be used are provided;

g. any internet service provider account that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one internet service provider account is nominated in total and sufficient details to identify the account to be used are provided;

h. any electronic mail (e-mail) account that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one electronic mail (e-mail) account is nominated in total and sufficient details to identify the account to be used are provided.

and

8. You are prohibited from having in your possession, custody or control or using any firearm or ammunition except during the 48 hours after this control order is served upon you during which you must arrange for the surrender to police of any firearm or ammunition in your possession, custody or control.
SCHEDULE 2

SUMMARY OF THE GROUNDS ON WHICH THIS ORDER IS MADE

1. Mr Thomas has admitted that he trained with Al Qa’ida in 2001. Al Qa’ida is a listed terrorist organisation under section 4A of the Criminal Code Regulations 2002, made under the Criminal Code Act 1995. Mr Thomas also admitted that while at the Al Qa’ida training camp he undertook weapons training, including the use of explosives and learned how to assemble and shoot various automatic weapons.

2. There are good reasons to believe that given Mr Thomas has received training with Al Qa’ida he is now an available resource that can be tapped into to commit terrorist acts on behalf of Al Qa’ida or related terrorist cells. Training has provided Mr Thomas with the capability to execute or assist with the execution directly or indirectly of any terrorist acts.

3. Mr Thomas is vulnerable. Mr Thomas may be susceptible to the views and beliefs of persons who will nurture him during his reintegration into the community. Mr Thomas’s links with extremists such as Abu Bakir Bashir, some of which are through his wife, may expose and exploit Mr Thomas’s vulnerabilities.

4. Furthermore, the mere fact that Mr Thomas has trained in Al Qa’ida training camps, and associated with senior Al Qa’ida figures, in Afghanistan is attractive to aspirant extremists who will seek out his skills and experiences to guide them in achieving their potentially extremist objectives.

5. The controls set out in this interim control order statement will protect the public and substantially assist in preventing a terrorist act. Without these controls, Mr Thomas’s knowledge and skills could provide a potential resource for the planning or preparation of a terrorist act.
Appendix F

Hicks Interim Control Order – Schedules 1 and 2

SCHEDULE 1

This schedule sets out the obligations imposed on David Mathew Hicks pursuant to sub-section 104.5(3) of the Criminal Code Act 1995 (Criminal Code).

OBLIGATIONS

The following obligations form part of the interim control order and are imposed on you by virtue of sub-section 104.5(3) of the Criminal Code Act 1995 (Criminal Code):

This interim control order will be in force when personally served on you. However, you are not required to comply with the remainder of the obligations contained in this Schedule until you are released from custody from Yatala Prison:

1. You are required to remain at specified premises between specified times each day, or on specified days, namely, you are to remain at a premises in the State of South Australia which is agreed in writing between yourself and the coordinator of the Australian Federal Police (AFP) Joint Counter Terrorism Team, Australian Federal Police Adelaide Office (the AFP CT Coordinator) (“the specified premises”) between midnight and 6.00am each day, unless:
   a. you notify the Australian Federal Police CT Coordinator, AFP Adelaide Office, Level 8, 55 Currie Street, Adelaide, South Australia in writing\(^{351}\) of another address that you will be residing at between these times or you request an amendment to the above times for specified reasons; and
   b. The AFP CT Coordinator consents to the amendment in writing.

2. You are required to report to the following specified persons at the following specified times and places:
   a. a member of South Australia Police every Monday, Wednesday and Saturday, between 8am and midnight, at a police station in a location as directed by the Australian Federal Police CT Coordinator unless:

\(^{351}\) For the purposes of this Order, the term “in writing” includes hand or type written hard copy letters and, subject to paragraphs 7g and 7h, electronic correspondence in the form of an “e-mail”.
(i) You contact the AFP CT Coordinator in writing, requesting an amendment to the obligations set out in section 2a; and
(ii) The AFP CT Coordinator consents to the amendment in writing.

3. You are required to allow impressions of your fingerprints to be taken by the South Australia Police for the purposes of ensuring compliance with paragraph 2 of this Interim Control Order:
   a. within 24 hours of your release from custody from Yatala Prison; and,
   b. where required by a member of the South Australia Police, on any occasion you report at the place specified in paragraph 2.

4. You are prohibited from leaving Australia except with the prior written permission of the AFP CT Coordinator.

5. You are prohibited or restricted from carrying out the following specified activities (including in respect of your work or occupation), namely:
   a. You are prohibited from acquiring, taking possession of, producing, accessing or supplying documentation (including in electronic form) or attempting to acquire, take possession of, produce, access or supply documentation (including in electronic form) regarding:
      i. explosives; and/or
      ii. weapons; and/or
      iii. combat skills; and/or
      iv. military tactics
   b. You are prohibited from manufacturing, acquiring, taking possession of or attempting to manufacture, acquire, or take possession of any commercial, military or home made and/or improvised explosives or explosive accessories, initiation systems or firing devices;
   c. subject to section 104.5(5) of the Criminal Code Act 1995 (Cth), you are prohibited from communicating to any person, whether directly or indirectly (including via internet chat rooms, websites, media interviews, publications and group gatherings) in relation to:
      i. methodology, tactics and other knowledge connected with, or likely to facilitate, terrorist acts, including explosives, weapons and/or combat skills; or
      ii. names or contact details of persons you know to be associated with a terrorist organisation;
6. You are prohibited from communicating or associating with specified individuals, namely:
   a. Any individual that you know to be a member of a terrorist organisation.

7. You are prohibited from accessing or using the following specified forms of telecommunications or other technology:
   a. Any mobile telephone service that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one mobile telephone service is nominated in total and sufficient details to identify the service to be used are provided;\textsuperscript{352}
   b. A telephone service card, subscriber identification module card (SIM card) or account, incorporating a credit or “top up” facility that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one telephone service card, SIM card or account, incorporating a credit or “top up” facility is nominated in total and sufficient details to identify the service to be used are provided;
   c. Any fixed or landline telephone service that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one fixed or landline telephone service is nominated in total and sufficient details to identify the service to be used are provided or is required in the case of an emergency.
   d. Any public telephone except in the case of an emergency;
   e. Any satellite telephone service;
   f. Any Voice Over Internet Protocol (VOIP) service including any software or hardware that will facilitate a VOIP service that has not been approved in writing by the AFP CT Coordinator with such approval to be given provided only one VOIP service including any software or hardware that will facilitate a VOIP service is nominated in total and sufficient details to identify the service to be used are provided;
   g. Any internet service provider account that has not been approved in writing by the AFP CT Coordinator, with such approval to be given provided only one internet service provider account is nominated, in total and sufficient details to identify the account to be used are provided;

\textsuperscript{352} It is noted that the Australian Federal Police will provide you with a pre-paid mobile telephone service and meet the initial costs of purchasing the phone. Any subsequent costs associated with this service shall be your responsibility. This service shall be an approved service for the purposes of this order.
h. Any electronic mail (e-mail) account that has not been approved in writing by the AFP CT Coordinator, with such approval to be given provided only one e-mail account is nominated in total and sufficient details to identify the account to be used are provided.

8. You are prohibited or restricted from possessing or using specified articles or substances, namely:
   a. You are prohibited from possessing or using any firearm or ammunition (you must immediately surrender any such items in your possession to police); and
   b. You are prohibited from possessing or using commercial, military, home made and/or improvised explosive or explosive accessories, initiation systems or firing devices (you must immediately surrender any such items in your possession to police).
SCHEDULE 2

SUMMARY OF THE GROUNDS ON WHICH THIS ORDER IS MADE

1. Mr Hicks trained with Lashkar-e-Tayyiba between March and June 2000. LeT is a listed terrorist organisation under regulation 4V of the Criminal Code Regulations 2002, made under the Criminal Code. Mr Hicks stated that he received weapons training, hand to hand combat, topography, guerrilla warfare and survival training.

2. Mr Hicks trained with Al-Qa’ida between January 2001 and August 2001. Al-Qa’ida is a listed terrorist organisation under regulation 4A of the Criminal Code Regulations 2002, made under the Criminal Code. Mr Hicks stated he undertook four training courses with Al- Qa’ida in Afghanistan.
   a) Basic training; which he undertook at ‘Muaskar Farouq’ in January/February 2001. The course was of 8 weeks duration split into 4 components of 2 weeks instruction in: weapons training, commando tactics and explosives.
   b) Guerrilla Tactics/Mountain Warfare; which he undertook at ‘Muaskar Farouq’ in March/April 2001. This course was of 7 weeks duration, comprising instruction in: guerrilla warfare strategies, advanced marksmanship, topography, ambush, attacks, reconnaissance and surveillance.
   c) Urban Warfare which he undertook at ‘Muaskar Ubada’ in May/June 2001. This course was of 7 or 8 weeks duration comprising instruction in: weapons training, advanced marksmanship, sniper training, house entries.
   d) Information Collecting which he undertook in a private house at Kabul in July/August 2001. This course was of 3 weeks duration comprising instruction in how to disguise your appearance as a Muslim when travelling to foreign countries and surveillance of people, streets and premises.

3. The training referred to above has provided Mr Hicks with the capability to execute plans for terrorist acts or to provide instruction to others in this regard.

4. The fact that Mr Hicks has trained in LeT and Al-Qa’ida training camps, and associated with senior Al-Qa’ida figures in Afghanistan may lead aspirant and current extremists to seek out his skills and experiences to guide them in achieving their potentially extremist objectives.

5. The controls will protect the public and assist Mr Hicks to reintegrate into the community and adapt back into the Australian society and culture. Without these controls, Mr Hicks could
be exploited or manipulated by terrorist groups. Due to his knowledge and skills, he is a potential resource for the planning or preparation of a terrorist act.