



Anti-terrorism control orders in Australia and the United Kingdom: a comparison

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Executive summary

- Control orders have been part of Australian anti-terrorism legislation since December 2005. A control order is issued by a court (at the request of the Australian Federal Police) to allow obligations, prohibitions and restrictions to be imposed on a person, for the purpose of protecting the public from a terrorist act. The types of obligations, prohibitions and restrictions may include a curfew at a particular address, wearing of an electronic monitoring tag, restrictions on use of telecommunications, regular reporting to police, and a range of other measures. Two control orders have been issued in Australia to date, those applying to Jack Thomas and David Hicks.
- Australia's control order scheme is in part based upon the United Kingdom model, however there are significant differences.
- Criticisms of the Australian control order regime include concerns about the *ex-parte* nature of court hearings for interim control orders, reporting and accountability mechanisms, and questions surrounding whether the restrictions which may be imposed by control orders are sufficiently balanced with human rights protections.

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Introduction

Control orders became part of the *Commonwealth Criminal Code Act 1995* in 2005. Under this legislation, the Australian Federal Police (AFP) may seek, with the Attorney-General's consent, the issue of a control order by a court to allow obligations, prohibitions and restrictions to be imposed on a person, for the purpose of protecting the public from a terrorist act.¹ To date, two control orders have been issued in Australia, against Jack Thomas in August 2006 following the quashing of his conviction on terrorism financing charges, and against David Hicks in December 2007 following his release from Yatala Prison.

The Australian legislation

The *Anti-Terrorism Act (No.2) 2005* introduced a number of new mechanisms intended to, in the words of the then Attorney General, 'ensure that [law enforcement and intelligence] agencies are appropriately equipped and resourced to protect the Australian community'.² As part of a 2005 Council of Australian Governments (COAG) agreement on terrorism, all states and territories passed complementary laws, although the ACT legislation varies slightly from the Commonwealth model.³

The measures included in the *Anti-Terrorism Act (No. 2) 2005* included:

- New **Division 104 – Control Orders** inserted into the *Criminal Code Act 1995* (known as the Criminal Code)
- an extension of the definition of a terrorist organisation to enable prohibition of organisations that advocate terrorism (Division 102 of the Criminal Code)
- a preventative detention regime to allow detention of a person for up to 48 hours (and up to 14 days in complementary state/territory legislation) without charge where it is 'reasonably necessary to prevent a terrorist act or to preserve evidence of such an act' (Division 105 of the Criminal Code)
- revised sedition offences (Division 80 of the Criminal Code)

1. [Criminal Code Act 1995](#), s.104.1.

2. Hon. Phillip Ruddock MP, Attorney-General, 'Second Reading: Anti-Terrorism Bill (No.2) 2005', House of Representatives, *Debates*, 3 November 2005, p. 102.

3. Council of Australian Governments, 'Special Meeting on Counter-Terrorism: Communique', 27 September 2005, <http://www.coag.gov.au/meetings/270905/index.htm>, accessed January 2008.

J. Stanhope, ACT Chief Minister: 'New ACT Counter-Terrorism Laws', Media Release 11 May 2006, <http://www.chiefminister.act.gov.au/media.asp?section=52&media=1328&id=1328&title=>, accessed February 2008.

- increased ‘stop and search’ powers and a ‘notice to produce’ regime for the AFP to obtain information and documents related to terrorism and serious crimes (amendments to the *Crimes Act 1914*)
- extension of financing of terrorism offences (Division 103 of the Criminal Code, and amendments to the *Financial Transaction Reports Act 1988*, *Proceeds of Crime Act 2002*, and *Surveillance Devices Act 2004*), and
- increased warrant periods for Australian Security Intelligence Organisation (ASIO) and non-return of seized items if in the interest of national security (amendments to the *ASIO Act 1979*, *Customs Act 1901*, *Customs Administration Act 1985*, and *Migration Act 1958*).

A number of these measures, in particular the control order and preventative detention regimes, and the changes to sedition offences, drew widespread criticism from the (then) ALP opposition, Greens and Democrats, various academic and public commentators and sections of the wider community. Further background on these measures and concerns on the bill can be found in the Parliamentary Library’s *Bills Digest* on the Anti-Terrorism Bill (No. 2) 2005, and the Senate Legal and Constitutional Affairs Committee’s report on the Bill.⁴

A comprehensive chronology of Commonwealth anti-terrorism legislative measures passed since 2001 may be found in the Parliamentary Library’s Criminal Law Internet Resource Guide.⁵

Obtaining a control order

Briefly, the steps in the issue of a control order are as outlined below.

- A senior AFP member must obtain the Attorney-General’s written consent to seek a control order. The AFP’s request to the Attorney-General must include a draft copy of the proposed interim control order, a statement of relevant facts including any previous history of control orders or preventative detention of the individual concerned, an explanation of why each of the obligations, prohibitions and restrictions is being sought, and a summary of the grounds on which the order should be made.
- The AFP member then seeks an interim control order from an ‘issuing court’⁶.

4. Sue Harris Rimmer and others, ‘Anti-terrorism Bill (No. 2) 2005’, *Bills Digest* no. 64, Parliamentary Library, 2005–06, <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd064.pdf>, accessed January 2008.

Senate Legal and Constitutional Affairs Committee, *Provisions of the Anti-Terrorism Bill (No.2) 2005*, Senate Legal and Constitutional Affairs Committee, http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/index.htm, accessed February 2008.

5. R. Jordan, ‘*Terrorism Law: Internet Resource Guide*,’ <http://www.aph.gov.au/library/intguide/law/terrorism.htm>, accessed February 2008.

- The issuing court must be satisfied on the balance of probabilities that the making of the control order would substantially assist in preventing a terrorist attack, or that the person has provided training to, or received training from, a listed terrorist organisation.⁷ In addition, the court must be satisfied that, on the balance of probabilities, each of the obligations, prohibitions or restrictions to be imposed by the control order is reasonably necessary and reasonably appropriate for the purpose of protecting the public from a terrorist act (paragraphs 104.4 (1)(c) and (d)).
- Upon the court's issue of an interim control order, the AFP must personally serve the control order's subject a copy of the control order, and an explanation of its terms and conditions, including the options for application for revocation or variation of the order. In Queensland, a copy must also be provided to the Queensland Public Interest Monitor. A control order does not commence until it is served upon its subject (paragraph 104.5(1)(d)).
- As soon as is practicable (but at least 72 hours after) the issue of the interim control order, the AFP must decide whether to seek the court's confirmation of the control order and advise the subject of the order if the AFP intend to seek such confirmation (section 104.12A). Upon hearing submissions, which may include evidence from the AFP, the subject of the control order, his/her lawyer, (and in Queensland, the public interest monitor), the court may declare the interim control order void, revoke it, or confirm it (including with variations).
- A 'confirmed' control order can be made for a period of up to 12 months from the date of the original interim order (paragraph 104.5(1)(f)). The AFP may then seek an additional control order.⁸
- The subject of the control order, or the AFP, may request that the court revoke or vary a confirmed control order at any time after it is served upon the person. Additional evidence and documents may be presented to the court. In making this decision the court must refer to the requirements for making an interim court order (paragraph 104.4 (1)(c) and (d)).

Urgent interim control orders

In cases of 'urgent circumstances' the AFP member may, without the Attorney-General's consent, request in person or via phone, fax or email that the court issue an urgent interim control order. If the Attorney-General's consent was not sought by the AFP prior to the

6. Defined in the legislation as the Federal Court of Australia, Federal Magistrates' Court of Australia, or the Family Court of Australia (the family court).

7. This standard of proof is referred to as the 'civil standard', rather than the criminal standard of proof which is beyond reasonable doubt.

8. A control order cannot apply to children aged under 16 years old. Sixteen and 17 year olds can only be the subject of a control order for a maximum of three months.

issuing of the urgent interim control order, it must be sought within four hours of the order being made, or it ceases to be valid. A written form of the Attorney-General's consent must be provided to the court within 24 hours. As with other interim control orders, an urgent interim control order must be served upon its subject as soon as practicable.⁹

Ex-parte court proceedings and provision of documents

An interim control order can be made *ex parte* (in the absence of the defendant). When an interim control order is issued by the court, the AFP is required to provide its subject, and his or her lawyer if requested, with a copy of the interim control order, but no other documents.

If the AFP decides to seek confirmation of an interim control order, they must notify its subject and provide them with:

- a statement of the facts relating to why the order should be made
- if the AFP member is aware of any facts relating to why the order should not be made—a statement of those facts
- an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person, and of any facts which may be related to why those obligations, prohibitions or restrictions should not be imposed on the person, and
- any other details required to enable the person to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the confirmation of the order.¹⁰

However, the AFP is exempt from providing documents if they may:

- prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*)
- be protected by public interest immunity¹¹

9. *Criminal Code Act 1995*, sections 104.6 to 104.11.

10. *Criminal Code Act 1995* subsection 104.12A(2) .

11. Public interest immunity is a rule of evidence exempting the production of documents or information where their disclosure would be against the public interest. It is a court's duty, and not an executive government's privilege, to determine whether the production or withholding of a document should be ordered. In determining whether to allow the exercise of the public interest immunity, a court must balance the public interest in withholding the production of a document against the public interest in ensuring that courts performing the functions of justice should have access to relevant evidence. (Encyclopaedic Australian Legal Dictionary, Butterworths LexisNexis).

- put at risk ongoing operations by law enforcement agencies or intelligence agencies, or
- put at risk the safety of the community, law enforcement officers or intelligence officers.¹²

Use of information in court proceedings which may be prejudicial to the national interest is governed by the *National Security Information (Criminal Proceedings) Act 2004*. In addition to the exemptions provided by section 104.12A(3) above, the Criminal Code states that the summary information required under the Act for interim or confirmed control orders, is not required to be given if disclosure of that information is likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*).¹³

The *ex-parte* nature of interim control order proceedings, and the restrictions on documents available to the defendant, are key concerns of critics of the control order regime. These concerns are further outlined below.

Terms of a control order

Section 104.5 of the Criminal Code sets out the form that a control order may take. This includes the kinds of obligations, prohibitions and restrictions that may be imposed on a person. These may include prohibition or restriction on the person:

- being at specified areas or places
- leaving Australia
- communicating or associating with specific individuals
- accessing or using specified types of telecommunications, including the internet
- possessing or using specified articles or substances, and
- carrying out specified activities (including in respect to their work or occupation).

Control order terms may also require the person to:

- remain at specific premises at particular times of the day
- wear a tracking device
- report to specified persons at specified times and places

12. *Criminal Code Act 1995* subsection 104.12A (3).

13. *Criminal Code Act 1995*, subsections 104.2 (3A); 104.5 (2A); 104.12A(3); 104.23(3A).

- allow him or herself to be photographed and have fingerprint impressions taken, and
- participate in specified counselling or education (only if they agree to do so).

A person may be imprisoned for up to five years for the offence of contravening a control order (section 104.27).

Reviews/sunset clause

Under section 104.29 of the Criminal Code, the Attorney-General must prepare and table in Parliament an annual report on the operation of control orders.¹⁴ In practicality, the AFP prepares this report and presents it to the Attorney-General.

The legislation includes a 10-year sunset clause.¹⁵ The 10-year period will end on 16 December 2015. In the absence of any legislative amendment, any control orders in force on that date would cease to be in force. In addition, a control order will not be able to be requested, made or confirmed after that date.

As part of the agreement by the states and territories in 2005 to hand responsibility for terrorism offences over to the Commonwealth, COAG undertook to review the legislation after five years.¹⁶ This is confirmed in the Criminal Code (see Notes to the Act). The COAG review is therefore scheduled to take place in 2010, and, according to the legislation, ‘if a copy is given to the Attorney-General,’ he/she must table it in Parliament (emphasis added).¹⁷

Control orders issued to date

Jack Thomas

Australia’s first control order was issued against Joseph ‘Jack’ Thomas in August 2006.¹⁸ On 26 February 2006 Mr Thomas was found guilty in the Victorian Supreme Court of receiving funds from a terrorist organisation and possessing a falsified passport (but not guilty of more

14. Australian Federal Police, Control orders and preventative detention orders, annual report 2006–07, Canberra, 2007, http://www.afp.gov.au/_data/assets/pdf_file/62633/Preventative_Control06_07.pdf, Accessed on 27 March 2008.

15. Criminal Code Act 1995, subsection 104.32..

16. Council of Australian Governments, *Special Meeting on Counter-Terrorism: Communique*, 27 September 2005, <http://www.coag.gov.au/meetings/270905/index.htm>, accessed January 2008.

17. The legislation and the COAG agreement are unclear on the detail of the COAG review. Reviews may be undertaken at the Premier/Chief Minister level, or delegated to another ministerial council such as the Standing Committee of Attorneys-General (SCAG).

18. Mr Thomas has been referred to in some media as ‘Jihad’ Jack.

serious charges relating to providing resources to a terrorist organisation).¹⁹ However, on 18 August 2006 the Victorian Court of Criminal Appeal upheld an appeal by Mr Thomas and quashed the convictions, on the basis that his confession in Pakistan was not freely given.²⁰ On 20 December 2006 Mr Thomas' matter was remitted to the Supreme Court for re-trial, based on interviews he had given to Australian media. His re-trial commenced in the Victorian Supreme Court on 18 February 2008.

In August 2006 the AFP sought an interim control order against Mr Thomas, and it was issued by the Federal Magistrates Court of Australia on 27 August 2006.²¹ The terms of the order included a 'curfew' in his home between midnight and 5am each day, reporting to police three times per week, the use of telephone and internet services restricted to those pre-approved by the AFP, and a ban on communicating with a member of a terrorist organisation or any one of 50 specified people, including Osama Bin Laden.²²

Mr Thomas appealed to the High Court, challenging the constitutionality of the control order by arguing that it conferred a non-judicial power on a federal court, contrary to Chapter III of the Constitution. Mr Thomas also argued that the legislation was an inappropriate use of the Defence and External affairs powers. However, in a 5-2 decision, the High Court rejected the appeal in August 2007.²³

The interim control order had remained in place, pending confirmation, during Mr Thomas's appeal to the High Court. The 12-month time limit for control orders was due to expire shortly after the High Court case was resolved. However, there appeared some confusion as to whether the interim control order would expire (without confirmation) after 12 months, or could continue.²⁴ Mr Thomas and the AFP came to a written agreement, in effect until the

19. 'Thomas guilty on terror charge', the *Age* online, 26 February 2006.

20. *R v Thomas* [2006] VSCA 165 (18 August 2006), summary of judgment, http://www.supremecourt.vic.gov.au/wps/wcm/connect/Supreme+Court/resources/file/ebec4143a110be6/Summary_Thomas.pdf, accessed on 27 March 2008.

21. The full text of the Interim Control Order can be read at *Jabbour v Thomas* [2006] FMCA 1286 (27 August 2006), <http://www.austlii.edu.au/au/cases/cth/FMCA/2006/1286.html>, Accessed on 27 March 2008.

22. The inclusion of Bin Laden and other high-profile (and in some cases, incarcerated) terrorists drew some criticism and ridicule, including from the FMC magistrate who heard the AFP's application for the control order: see 'Thomas contact list rethink', *Sydney Morning Herald*, 31 August 2007, <http://www.smh.com.au/news/national/bin-laden-link-silly/2006/08/31/1156817005419.html>.

23. *Thomas v Mowbray* [2007] HCA 33 (2 August 2007), <http://www.austlii.edu.au/au/cases/cth/HCA/2007/33.html>, accessed on 27 March 2008.

24. N. Robinson, 'Jihad Jack control order dilemma', the *Australian*, 21 August 2007.

conclusion of his Supreme Court re-trial, with similar conditions to those imposed by the interim control order.²⁵ The AFP agreed not to seek a further control order on Mr Thomas.

The use of a control order following the decision of the Court of Appeal to quash Thomas' initial conviction was criticised by some academics:

The interim control order on Jack Thomas shows how the Government is willing to use these schemes in addition to the normal trial process, and even to have a second attempt at detaining a person where there has not been a conviction. Preventative detention orders and control orders may be used by the government to detain people or place them under house arrest when there is not enough evidence to charge a person with a terrorism offence or where no conviction has been recorded against the person after a criminal trial.²⁶

David Hicks

The second control order issued in Australia was against David Hicks in December 2007.²⁷ In March 2007 Mr Hicks pleaded guilty before a US Military Commission to the offence of providing material support to terrorism. He was convicted and sentenced to seven years confinement. Under a pre-trial agreement, six years and three months of the sentence were suspended, and a transfer agreement allowed Mr Hicks to serve out the remaining nine months of the sentence in Adelaide's Yatala Prison.²⁸ Mr Hicks was released from Yatala Prison on 29 December 2007.

In the weeks prior to 29 December 2007, the AFP sought an interim control order against Mr Hicks, and was granted it by Federal Magistrate Warren Donald in the Federal Magistrates' Court of Australia on 21 December 2007. The terms of the interim control order included a 'curfew' at an approved address between midnight and 6am each day, reporting to South Australian police three times a week, fingerprinting, prohibition from leaving Australia, a ban on communicating with members of terrorist organisations, a prohibition on acquiring or possessing weapons or military training materials, and bans on using telecommunications services (including mobile telephones, internet and voice-over-internet) not approved by the AFP.²⁹

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25. J. Madew, 'Federal court lifts 'terror' restrictions on Jack Thomas', the *Age*, 24 August 2007.
 26. E. MacDonald and G. Williams, 'Combating Terrorism: Australia's Criminal Code since September 11, 2001', in *Griffith Law Review* vol 16, no.1,2007.
 27. Confirmed on 18 February 2008.
 28. US Department of Defense, 'Detainee Convicted of Terrorism Charge at Guantanamo Trial', media release, 30 March 2007, <http://www.defenselink.mil/releases/release.aspx?releaseid=10678>, accessed January 2008.
 29. The full text of the interim control order can be read at *Jabbour v Hicks* [2007] FMCA 2139 (21 December 2007), <http://www.austlii.edu.au/au/cases/cth/FMCA/2007/2139.html>, accessed on 27 March 2008.

Upon his release from prison, Mr Hicks indicated (via his lawyer) that he would not challenge the primary basis for the control order, but would ask the court to reduce the requirement that he report to the police three times each week. Mr Hicks's lawyer described the terms as 'too onerous to lead a normal life ... and could interfere with his assimilation back into the community'.³⁰

The confirmation hearing for the interim control order was held on 18 February 2008.³¹ Federal Magistrate Donald confirmed the control order, with minor variances as requested by the AFP.

Mr Hicks chose not to appear before the confirmation hearing (although his lawyers were present and questioned the AFP applicants), or submit any evidence. In his Reasons for Judgement, Federal Magistrate Donald commented several times that he was required to make a decision on the evidence before him, and had Mr Hicks chosen to appear before the court, this could have assisted his case:

The Respondent could have, for example, given evidence to the Court that the evidence produced by the Applicant was false; that it did not correctly convey the impression currently drawn by the Court from it; that his views had changed; that he did not represent a risk to the Australian community; that the current conditions impacted adversely upon him; or that there was any other means by which the concerns of the Australian Federal Police could be addressed. He did not.³²

Speaking outside the court, Mr Hicks's lawyer, David McLeod, stated:

People may be wondering why he did not appear to provide the sort of evidence that the magistrate said might have assisted him. The answer lies in his abuse and mistreatment over the more than 5 and a half years at the hands of the United States, aided and abetted by the Australian authorities, who not only stood by while his abuses took place but served to legitimise his detention by actively supporting the discredited military commission process.³³

The AFP sought to vary the control order, reducing the curfew time to four hours (1am to 5am), and allowing Mr Hicks to move to an approved address in another Australian state (previously he was limited to South Australia). The AFP requested that Mr Hicks still be required to report to police three times per week.

Mr Hicks, via his lawyers at the hearing, objected to the reporting requirement of three times per week, as set by the interim control order. While Mr Hicks's lawyers argued that this was unduly onerous, the AFP argued that given Mr Hicks's terrorist training experience, the

30. P. DeBelle, 'Hicks wants court order terms eased', *The Age*, 31 December 2007.

31. *Jabbour v. Hicks* [2008] FMCA 178 (19 February 2008), <http://www.austlii.edu.au/au/cases/cth/FMCA/2008/178.html>, accessed February 2008.

32. *Jabbour v. Hicks* [2008] FMCA 178 (19 February 2008), paragraph 7.

33. T. Dornin 'Hicks unable to face day in court', *The Canberra Times*, 20 February 2008.

thrice-weekly reporting requirement was necessary, in order to make it difficult to attend training at a remote location in Australia or overseas. In addition, the AFP argued, there was not a ‘technology based alternative’ for ensuring the presence of Mr Hicks at the specified premises.

However, under cross-examination from Mr Hicks’ lawyers, the AFP admitted that they did have the means available to know whether he was present within the specified premises, and also to know the whereabouts of Mr Hicks at some point (ie, through surveillance). Magistrate Donald commented that ‘the means of doing this are unknown to the Court and, no doubt, may not be completely reliable’. Given these ‘other methods’ available to the AFP, and the restrictions imposed by the thrice-weekly reporting, Magistrate Donald decided that reporting on two occasions per week was ‘more reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act’.³⁴

The confirmed control order will expire on 21 December 2008.

The UK legislation and experience

At first glance, it appears that the Australian control order scheme is largely based upon the UK model—in fact, Prime Minister John Howard stated as much in announcing the control order and preventative detention scheme in September 2005.³⁵ However, there are significant differences between the two regimes.

The UK control order scheme was enacted in the *Prevention of Terrorism Act 2005* (the PTA 2005).³⁶ The Act was developed in response to the House of Lords finding that the indeterminate detention of foreign nationals, as was allowed under the *Anti-Terrorism, Crime and Security Act 2001*, was incompatible with the UK’s obligations under the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (the ECHR).³⁷

Unlike Australia, the UK scheme includes two types of control orders:

- non-derogating control orders—which comply with Article 5 of the ECHR regarding an individual’s right to liberty, and

34. Jabbour v Hicks [2008] FMCA 178 (19 February 2008), paragraph 47.

35. Hon. J. Howard MP, *Counter-Terrorism Laws Strengthened*, media release, 8 September 2005, http://pandora.nla.gov.au/pan/10052/20051121-0000/www.pm.gov.au/news/media_releases/media_Release1551.html, accessed January 2008.

36. Prevention of Terrorism Act 2005, http://www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_1, accessed 27 March 2008.

37. Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, 4 November 1950, <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>, accessed February 2005.

- derogating control orders—which impose obligations that are incompatible with Article 5 of the ECHR, thereby requiring UK Parliament to suspend (derogate) its compliance with the ECHR. To date there have not been any of these control orders issued in the UK.

As at February 2008, a total of 31 persons have been subject to control orders in the UK since the introduction of the legislation in 2005 (although the total number of control orders issued is higher because there have been a number issued twice against the same person).³⁸

According to the last report to UK Parliament on control orders, at December 2007 there were 14 control orders in place in the UK, eight applying to British citizens. In the three-month reporting period September–December 2007, there had been 47 modifications to the conditions of control orders, with a further 15 requested modifications refused. One of these refusals was appealed but dismissed by the High Court, and a further one more appeal on a modification refusal has yet to be heard.³⁹

Non-derogating control orders

Non-derogating control orders are issued by the Secretary of State, with the permission of a court. The Secretary of State may make a control order against an individual 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.⁴⁰

The Secretary of State may issue urgent control orders without the permission of a court, however he/she must immediately refer it to a court, with hearings to commence within seven days of the making of the order.⁴¹

In deciding whether to grant permission to the Secretary of State to issue a non-derogating control order, the function of the court is to consider whether his or her decision to make that

38. Lord Carlile of Berriew, Independent Reviewer of Terrorism Legislation, 3rd Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, February 2008, <http://security.homeoffice.gov.uk/news-publications/publication-search/general/report-control-orders-2008?view=Binary>, accessed February 2008.

39. Rt. Hon. T. McNulty MP, Minister of State for Security, Counter Terrorism, Crime and Police, Ministerial Statement, House of Commons, *Debates*, 12 December 2007, <http://security.homeoffice.gov.uk/news-publications/news-speeches/control-orders-wms-dec>, accessed January 2008.

40. [*Prevention of Terrorism Act 2005*](#) (UK), subsection 2(1).

41. *Prevention of Terrorism act 2005* (UK), subsections 3(3) and (4).

order is ‘obviously flawed’.⁴² Thus the role of the court is one of judicial review rather than a ‘merits’ review. If it determines that the Secretary of State’s decision is obviously flawed, the court’s only powers are to quash the order, quash one or more of the obligations imposed by the order, or give directions to the Secretary of State for the revocation or modification of the terms of the order. In every other case the court must decide that the control order is to continue in force.⁴³ Upon granting permission for the Secretary of State to issue a control order, the court must then schedule a hearing on the matter as soon as practicable.

The permission hearings and confirmation of urgent control orders may be heard *ex-parte*.⁴⁴

The obligations which can be included in a control order are similar to those in the Australian regime, including restrictions on movement and association with certain persons, wearing an electronic tracking device, telecommunications, etc.⁴⁵ Non-derogating control orders run for 12 months from their issuing date.

Derogating control orders

In cases where the proposed control order would amount to a deprivation of liberty—described by the Secretary of State at the time the bill was introduced to Parliament as permanent detention at a single address, possibly government-owned or managed—a derogating control order is required.⁴⁶

The first step toward this would be for the government to formally derogate from its obligations under Article 5 of the ECHR. The ECHR allows member nations to derogate if there is a ‘state of public emergency threatening the life of the nation’ and the measures proposed are ‘strictly required by the exigencies of the situation’. The Secretary of State would make the designated derogation order. It would come into force immediately but under the UK *Human Rights Act 1998*, would need to be confirmed by a vote in each House of Parliament within 40 Parliamentary sitting days of its having been made if it were to continue in force.⁴⁷

42. Prevention of Terrorism Act 2005 (UK), subsection 3(2).

43. *Prevention of Terrorism Act 2005* (UK), subsections 3(12) and 3(13).

44. Prevention of Terrorism Act 2005 (UK), subsection 3(5).

45. Prevention of Terrorism Act 2005 (UK), subsection 1(4).

46. Mr Charles Clark, Secretary of State for the Home Department, *Tabling Speech for the Prevention of Terrorism Bill*, House of Commons, *Debates*, 22 February 2005, http://www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050222/debtext/50222-05.htm#50222-05_spm4, accessed March 2008.

47. *Human Rights Act 1988* (UK), section 16.

After making a derogation from the ECHR, the Secretary of State must then apply to the court for the issue of a derogating control order. At a preliminary hearing (*ex-parte*), the court must determine:

- (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.⁴⁸

The police may arrest and detain an individual pending the court's consideration of the Secretary of State's application for a derogating control order.⁴⁹

Legal challenges

There have been a number of legal challenges to UK control orders, mostly regarding the restrictions imposed by the control orders (for example, some orders have required a person to stay at one address for up to 18 hours a day). As noted above, all control orders issued in the UK thus far have been 'non-derogating'—that is, they are supposed to fall within the UK's obligations under Article 5 of the ECHR.

A key appeal was brought in the England and Wales High Court in 2006 by six Iraqi men (that is, not British citizens) who were subject to control orders. The men said the control orders breached their right to liberty because the regime contradicted protections against unreasonable detention in human rights law.⁵⁰ Their control orders included 18-hour curfews, limiting the places they could go in their six hours outside their place of residence, the wearing of an electronic monitoring tag when outside their residence, and a requirement that they not participate in any pre-arranged meeting with a person unless that person had been cleared by the Home Office.

48. Prevention of Terrorism Act 2005 (UK), subsection 4(3).

49. Prevention of Terrorism Act 2005 (UK), section 5.

50. Secretary of State for the Home Department v JJ and others [2006] EWHC 1623 (Admin) (28 June 2006, <http://www.bailii.org/ew/cases/EWHC/Admin/2006/1623.html>, accessed February 2008).

The court quashed the orders, finding that the restrictions imposed by them amounted to a deprivation of liberty under Article 5 of the ECHR. Justice Sullivan commented:

I am left in no doubt whatsoever that the cumulative effect of the obligations has been to deprive the respondents of their liberty in breach of Article 5 of the Convention. I do not consider that this is a borderline case. The collective impact of the obligations ... could not sensibly be described as a mere restriction upon the respondents' liberty of movement. In terms of the length of the curfew period (18 hours), the extent of the obligations, and their intrusive impact on the respondents' ability to lead anything resembling a normal life, whether inside their residences within the curfew period, or for the 6-hour period outside it, these control orders go far beyond the restrictions in those cases where the European Court of Human Rights has concluded that there has been a restriction upon but not a deprivation of liberty.⁵¹

Immediately following the court order to quash the control orders, the Secretary of State issued new orders with 14-hour curfews, and appealed the court's finding. In August 2006 the Court of Appeal dismissed the appeal but the Secretary of State appealed further to the House of Lords. In October 2007 the Law Lords dismissed this final appeal (by a majority of 3:2).⁵²

In dismissing the final appeal regarding deprivation of liberty, the majority Lords made it clear that they upheld the control order regime in general, and that they would accept curfews of less than 18 hours—specifically, up to 14 or even 16 hours. Lord Brown stated:

I have reached the clear conclusion that 18 hour curfews are simply too long to be consistent with the retention of physical liberty. In my opinion they breach article 5. I am equally clear, however, that 12 or 14-hour curfews (those at issue in two of the related appeals before the House) *are* consistent with physical liberty. Indeed, I would go further and, rather than leave the Secretary of State guessing as to the precise point at which control orders will be held vulnerable to article 5 challenges, state that for my part I would regard the acceptable limit to be 16 hours, leaving the suspect with 8 hours (admittedly in various respects controlled) liberty a day. Such a regime, in my opinion, can and should properly be characterised as one which restricts the suspect's liberty of movement rather than actually deprives him of his liberty.⁵³

51. Sullivan J, *Secretary of State for the Home Department v JJ and others* [2006] EWHC 1623 (Admin) paragraph 73.

52. *Secretary of State for the Home Department v JJ and others* [2006] EWCA Civ 1141 (1 August 2006) in the UK Court of Appeal (Civil Division), <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1141.html>, accessed February 2008; and *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45 (31 October 2007) in the House of Lords, <http://www.bailii.org/uk/cases/UKHL/2007/45.html>, accessed February 2008.

53. Lord Brown, *Secretary for the Home Department v JJ and others* [2007] UKHL 45.

There have also been several challenges based upon whether the subjects of control orders were given a 'fair trial'. In one case, a subject referred to only as 'MB' appealed to the High Court for dismissal of his control order because in giving permission for the control order to be issued, the court had access to evidence that was not provided to MB (referred to as 'closed material'). In making his judgement, Justice Sullivan found that the use of closed material was inconsistent with MB's right to a fair trial under article 6(1) of the ECHR, and quashed the control order.⁵⁴

However, the Secretary of State's appeal to the Court of Appeal was upheld, with Justice Phillips finding that if closed material were not permitted in some court hearings, such as those regarding control orders,

... the Secretary of State would be in the invidious position of choosing between disclosing information which would be damaging to security operations against terrorists, or refraining from imposing restrictions on a terrorist suspect which appear necessary in order to protect members of the public from the risk of terrorism.⁵⁵

The Court of Appeal Justices also noted section 8 of the PTA 2005, which provides that

Before making, or applying for the making of, a control order against the individual, the Secretary of State must consult the chief officer of the police force about whether there is evidence available that could realistically be used for the purposes of a prosecution of the individual for an offence relating to terrorism.

Justice Phillips stated:

It is implicit in the scheme that if there is evidence that justifies the bringing of a criminal charge, a suspect will be prosecuted rather than made the subject of a control order.⁵⁶

MB and another subject of a control order, referred to as 'AF', then appealed to the House of Lords on the 'fair trial' point, and also argued that the control order hearings constituted criminal proceedings, and therefore should be subject to criminal fair trial procedures.

The House of Lords rejected the criminal proceedings argument, but found that civil fair trial procedures were breached by the lack of information provided to the defendants, and that the use of a 'special advocate'⁵⁷ by the court did not provide sufficient procedural justice.

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54. Re: MB [2006] EWHC 1000 (Admin), 12 April 2006, <http://www.bailii.org/ew/cases/EWHC/Admin/2006/1000.html>, accessed February 2008, and Secretary of State for the Home Department v AF [2007] EWHC 651 (30 March 2007), <http://www.bailii.org/ew/cases/EWHC/Admin/2007/651.html>, accessed February 2008.
55. Chief Justice Lord Phillips, Secretary of State for the Home Department v MB [2006] EWCA Civ 1140 (1 August 2006), <http://www.bailii.org/ew/cases/EWCA/Civ/2006/1140.html>, accessed February 2008.
56. *ibid.*

Referring to MB's case, Lord Bingham stated:

This is not a case ... in which the order can be justified on the strength of the open material alone. Nor is it a case in which the thrust of the case against the controlled person has been effectively conveyed to him by way of summary, redacted documents or anonymised statements. It is a case in which, on the judge's assessment which the Court of Appeal did not displace, MB was confronted by a bare, unsubstantiated assertion which he could do no more than deny. I have difficulty in accepting that MB has enjoyed a substantial measure of procedural justice, or that the very essence of the right to a fair hearing has not been impaired.⁵⁸

Lord Carswell stated:

I cannot accept that a suspect's entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism (vital though, of course, I recognise that public interest to be). On the contrary, it seems to me not merely an absolute right but one of altogether too great importance to be sacrificed on the altar of terrorism control. By the same token that evidence derived from the use of torture must always be rejected so as to safeguard the integrity of the judicial process and avoid bringing British justice into disrepute (*A v Secretary of State for the Home Department (No 2)* [2006] 2 AC 221), so too in my judgment must closed material be rejected if reliance on it would necessarily result in a fundamentally unfair hearing.

Referring to Section 3 of the *Human Rights Act 1998*, the majority court 'read down' the procedural provisions in the PTA and its Rules of the Court, and sent the MB and AF cases back to a High Court judge for further consideration. To date these reconsiderations have not been completed.⁵⁹

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57. Special advocates, vetted by the Attorney-General, are appointed to represent the interests of defendants during closed hearings. They may see restricted documents, however once they have done so they may not take instructions from their clients, do not have access to a full legal team, and cannot call witnesses.
<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/32307.htm>, accessed February 2008.
 58. Secretary of State for the Home Department v. MB (FC) (Appellant) [2007] UKHL 46 (31 October 2007)
<http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/jd071031/home-3.htm>, accessed February 2008.
 59. The *Human Rights Act 1998* requires all legislation to be interpreted and given effect as far as possible, compatibly with the ECHR. Where it is not possible to do so, a court may quash or disapply subordinate legislation (such as Regulations or Orders) or, if it is a higher court, make a declaration of incompatibility in relation to primary legislation. While this does not affect the validity of the legislation, it triggers a power that allows a Minister to make a remedial order to amend the legislation to bring it into line with the ECHR Rights.
<http://www.dca.gov.uk/peoples-rights/human-rights/pdf/act-studyguide.pdf>, accessed March 2008.

Points of difference between the Australian and UK control order schemes

There are a number of significant differences between the UK and Australian control order schemes.

Basis for the scheme

While, as pointed out above, the Australian control order legislation was largely modelled on the UK scheme, Andrew Lynch argues that there are two important contextual differences between the schemes.⁶⁰

Firstly, Australia has had a number of preparatory terrorism offences since 2002.⁶¹ At the time the PTA 2005 was introduced, the UK had no similar preparatory offences (they were introduced in 2006 via the *Terrorism Act 2006*).⁶² Therefore, when introduced, UK control orders were intended to be used in a bid to prevent terrorist activities or support of such activities, as there could be no prosecutions for such preparatory activities. The UK's Independent Reviewer of Terrorism has commented that with the introduction of preparatory offences in the UK, reliance on the control order scheme should diminish (although the latest figures on issue of control orders during 2007 do not appear to support this argument).⁶³

Secondly, in the UK, intercept and intelligence-based evidence cannot be used in criminal trials, under the UK *Regulation of Investigatory Powers Act 2000*⁶⁴ (although the UK Government has signalled it may introduce changes to allow some use of intercept evidence).⁶⁵ UK control order hearings, however, may use such evidence.⁶⁶ Australia has no

60. A. Lynch, 'From Blair's Britain with love: Control orders in Australia' *Seminar Paper* delivered at the Social-Legal Research Centre, Griffith University, Brisbane, 10 March 2008.

61. In 2002 the government introduced a package of bills to address shortcomings in Australian counter-terrorism legislation, post 9/11. See Nathan Hancock, 'Security Legislation Amendment (Terrorism) Bill [No.2] 2002,' Bills Digest, no. 126, Parliamentary Library, Canberra, 2001-02, <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd126.pdf>, accessed March 2008.

62. UK *Terrorism Act 2006*, http://www.opsi.gov.uk/acts/acts2006/ukpga_20060011_en_1, accessed March 2008.

63. Lord Carlile of Berriew, Independent Reviewer of Terrorism Legislation, *Report on the operation in 2005 of the Terrorism Act 2000*, May 2006, <http://security.homeoffice.gov.uk/news-publications/publication-search/terrorism-act-2000/tact-2005-review?view=Binary>, accessed March 2008.

64. UK Regulation of Investigatory Powers Act 2000, http://www.opsi.gov.uk/acts/acts2000/ukpga_20000023_en_1, accessed March 2008.

65. On 30 January 2008 the Prime Minister, Gordon Brown, released a cross-party inquiry report: *Privy Council Review of Use of Intercept Evidence* and indicated that the government will investigate implementing its recommendations for use of intercept evidence. <http://www.number-10.gov.uk/output/Page14490.asp>, accessed March 2008.

such restrictions on use of this evidence (providing interception has been lawfully carried out as set out in the *Telecommunications (Interception and Access) Act 1979*).

Issuing the control orders

UK control orders are issued by the Secretary of State, then approved by a court, as opposed to Australian control orders which are applied for by the AFP and issued by the court. In the UK, either the ‘controllee’ (that is, the subject of the order) or the government may apply to the court for anonymity of the identity of the controllee.⁶⁷ There is nothing in the Australian legislation to provide for this.

The UK’s PTA 2005 also includes an important step which requires the Secretary of State, prior to issuing a control order, to consider whether the controllee’s involvement in terrorism-related activities may have involved the commission of an offence relating to terrorism, which is being, or would fall to be investigated by a police force. The Secretary of State is also required to consult the chief officer of the police force about whether there is evidence available that could realistically be used for the purposes of a prosecution for terrorism-related offences. The Chief police officer must then continue to investigate the possibility of a prosecution, throughout the period during which the control order has effect.⁶⁸

Lynch notes that this was a hard-won amendment during debate on the original bill. There is no requirement in the Australian legislation for the Attorney-General, in giving permission for the AFP to request a control order, or the court in issuing the control order, to consider the viability of a criminal prosecution.⁶⁹

Human rights protections

An important difference between the UK and Australian schemes is that the UK scheme is built around the UK *Human Rights Act 1998* and the UK’s obligations to the ECHR. To facilitate this, as outlined above, there are two levels of control order in the UK—derogating and non-derogating from the ECHR—which have different processes of approval. Australia has no dedicated human rights act at the Commonwealth level. At the state/territory level there are two examples—the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities Act 2006*.⁷⁰ In drafting its complementary anti-terrorism

66. United Kingdom. *Privy Council Review of Intercept Evidence: report* 4 February 2008, <http://www.official-documents.gov.uk/document/cm73/7324/7324.pdf>.

67. Schedule to the PTA 2005: Control order proceedings, etc: subsection 5.

68. UK Prevention of Terrorism Act 2005, section 8.

69. A. Lynch, op.cit.

70. *Human Rights Act 2004* (ACT), <http://www.legislation.act.gov.au/a/2004-5/current/pdf/2004-5.pdf>, accessed February 2008, *Charter of Human Rights and Responsibilities Act 2006* (Vic), http://www.dms.dpc.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/51dea49770555e

legislation in 2005, the ACT Government made changes to the model used in NSW and other states to reflect standards in its Human Rights Act—for example, control orders may not be issued against children under the age of 18 (they may apply to 16 year olds, but with more limited scope, in other jurisdictions). The Western Australian Attorney-General has also proposed a human rights act for WA, with a draft bill out for public comment.⁷¹ The applicability of a human rights act for control order schemes is further discussed below.

Reporting and oversight

The UK's PTA 2005 includes a requirement for quarterly reporting to Parliament by the Minister for Home Affairs on his/her exercise of the control orders powers for the preceding three months.⁷² This is in contrast to the Australian control order scheme which requires an annual report by the Attorney-General (in practice provided by the AFP).

The PTA 2005 also includes the appointment of an Independent Reviewer of Terrorism Legislation (currently Lord Carlile of Berriew) who is required to report nine months after the Royal Assent for the Act, and then annually, on the operation of control orders.⁷³ The Independent Reviewer has a similar role for other pieces of legislation, namely the *Terrorism Act 2000* and the *Terrorism Act 2006*.

One of the tasks of the Independent Reviewer is to 'replicate exactly the position of the Home Secretary at the initiation of a control order'.⁷⁴ The Independent Reviewer is given the same information as that provided to the Home Secretary, and draws a conclusion as to whether a control order should have been issued in each case. To date, Lord Carlile has reached the conclusion that in each case, a control order should have been made. However he has, on occasion, disagreed with the conditions imposed by control orders.⁷⁵

[a6ca256da4001b90cd/54D73763EF9DCA36CA2571B6002428B0/\\$FILE/06-043a.pdf](http://a6ca256da4001b90cd/54D73763EF9DCA36CA2571B6002428B0/$FILE/06-043a.pdf),
accessed February 2008.

71. A WA Human Rights Act: consultation committee for a proposed Human Rights Act – Final Report, November 2007. <http://www.humanrights.wa.gov.au/>, accessed on 1 April 2008. After 30 June 2008 the report can be found on <http://www.justice.wa.gov.au>.
72. Hon. T. McNulty, Minister for Home Affairs, op.cit.
73. Independent Reviewer of Terrorism Legislation, Recent independent reviews of UK terrorism legislation, <http://security.homeoffice.gov.uk/legislation/independent-review-legislation/>, .
74. Independent Reviewer of Terrorism Legislation, February 2008, op.cit.
75. Lord Carlile of Berriew, Independent Reviewer of Terrorism Legislation, First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005, February 2006, <http://security.homeoffice.gov.uk/news-publications/publication-search/prevention-terrorism-act-2005/laws-against-terror.pdf?view=Binary>, accessed March 2008.

In 2006 Lord Carlile recommended that officials of the control authorities meet regularly to review each case, with a view to revising the necessity of the obligations placed on each controllee, including the effects of the order on controllees' families (particularly children). In response the government established the Control Order Review Group, which meets quarterly to assess the conditions of each control order. He has also recommended improvements to the Home Secretary's quarterly reporting to Parliament.

In his latest report, dated February 2008, Lord Carlile expressed concern about the ending of control orders, arguing that they should not be renewed beyond two years. He recommended a statutory limitation to that effect, save in genuinely exceptional circumstances.⁷⁶

Although Australia has an Inspector-General of Intelligence and Security (IGIS), their purview does not cover the activities of the AFP or the legislation which establishes the Australian control order regime.⁷⁷ Complaints regarding the actions of the AFP may be made to the Commonwealth Ombudsman, however he/she may only review individual complaints, rather than the operation of the control order scheme as a whole, as occurs in the UK.⁷⁸

In 2006 Australia's Parliamentary Joint Committee on Intelligence and Security (PJCIS) recommended the appointment of an Independent Reviewer of Terrorism Legislation, with the ability to set their own agenda and to access all necessary information, to report annually to Parliament, and for the PJCIS to review the Independent Reviewer's reports.⁷⁹ In March 2008 Coalition member Mr Petro Georgiou MP tabled a private member's bill to establish an Australian independent reviewer of terrorism laws.⁸⁰ At the time of writing this paper, the Parliament had not considered the bill.

The previous and current governments have not yet responded to this recommendation. Professor Clive Walker, Professor of Criminal Justice Studies, University of Leeds, argues that an Australian model should differ from the UK by having statutory terms of appointment, a panel of reviewers rather than a single person in order to draw on wide

76. Independent Reviewer of Terrorism Legislation, February 2008, op.cit.

77. Inspector-General of Intelligence and Security, <http://www.igis.gov.au>, accessed on 1 April 2008.

78. Commonwealth Ombudsman, <http://www.ombudsman.gov.au>, accessed on 1 April, 2008.

79. Australia. Parliament. Joint Committee on Intelligence and Security, *Review of Security and Counter-terrorism Legislation*, Canberra, 2006, <http://www.aph.gov.au/house/committee/pjcis/securityleg/report.htm>, accessed January 2008.

80. Independent Reviewer of Terrorism Laws Bill 2008, <http://parlinfoweb.parl.net/parlinfo/browse.aspx?NodeID=58>, accessed March 2008.

expertise, and that the reviewer/s should have explicit links to a Parliamentary committee in order to ensure debate on the work of the reviewer (this point reflects that of the PJCIS).⁸¹

Sunset clause

Sections 1-9 of the PTA 2005 (which establish the UK control order scheme) expire 12 months after Royal Assent of the Act. The Home Secretary may, by statutory instrument, extend the scheme by no more than 12 months. Before doing so, the Home Secretary must consult with the Independent Reviewer of Terrorism Legislation, the Intelligence Services Commissioner (similar to Australia's Inspector-General of Intelligence and Security), and the Director-General of the Security Service. The statutory instrument must be laid before Parliament and approved by each House by resolution.⁸² This process is significantly different to the Australian scheme, which has a ten-year sunset clause (due in 2015).

As the PTA 2005 received Royal Assent in March 2005, it was renewed by the House of Commons and House of Lords in March 2006 and again in 2007, despite a critical report in 2007 by the Parliament's Human Rights Committee.⁸³

Criticisms of the Australian control order scheme

Grounds for issuing control orders

The inclusion of the grounds 'has received training from a terrorist organisation' in the list of reasons for which a control order may be issued has been questioned. Critics have argued that this effectively punishes a person retrospectively for an act which may not have been illegal under Australian law at the time.⁸⁴

It was largely this reason which the AFP relied upon in seeking an interim control order against David Hicks in December 2007. During submissions, Federal Magistrate Warren Donald expressed 'some doubt' about whether an interim control order would substantially assist in preventing a terrorist act, as outlined in subparagraph 104.4(1)(c)(i) of the Criminal

81. C. Walker, 'The United Kingdom's Anti-terrorism Laws' in Andrew Lynch, Edwina MacDonald and George Williams (eds) *Law and Liberty in the War on Terror*, The Federation Press, Sydney, October 2007, p. 189.

82. Prevention of Terrorism Act 2005, section 13, http://www.opsi.gov.uk/acts/acts2005/ukpga_20050002_en_2#pb3-11g13. accessed February 2008.

83. *UK Parliament votes to renew control order regime*, Counter-terrorism-law.org, at: <http://www.counter-terrorism-law.org/control2007renewal1.htm>, accessed February 2008.

84. Australian Lawyers for Human Rights, *Submission* to the Senate Legal and Constitutional Affairs inquiry into the Anti-terrorism Bill (No. 2) 2005, Canberra, November 2005, http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/c04.htm, accessed January 2008.

Code. He stated that his doubts stemmed from the lack of any evidence that Mr Hicks had at any time made any threat towards Australia or the Australian community.

Magistrate Donald also commented several times on his deliberations being hampered by the absence of evidence from, or produced on behalf of, Mr Hicks.

However, in forming his final decision Federal Magistrate Donald decided that letters written by Mr Hicks when he was in Pakistan and Afghanistan, coupled with evidence of his military-style training, provided a sufficient basis for the issue of an interim and then a confirmed control order. He stated:

Even if I am wrong in relation to [the interim control order substantially assisting in preventing a terrorist act], I am satisfied that the Respondent has received training from a listed terrorist organisation ... it is not relevant to the consideration of this aspect that they became listed after the dates on which the Respondent trained with them.⁸⁵

Ex parte hearings and provision of documents

At the time of its introduction (the legislation commenced in December 2005) and since, there has been significant criticism of the control order scheme. Much of this criticism has focused on the *ex-parte* nature of the court proceedings in Australia for issuing an interim control order, rather than the conditions which have been imposed on the two subjects of control orders thus far.

For example, Amnesty International states:

In relation to both control orders and preventative detention orders a lawyer is only entitled to see or request a copy of the order and (where confirmation of a control order is sought) a statement of facts said to have the reasons for the order (s.104.12A). It is probable that these reasons will not be provided if it would, amongst other things, prejudice national security and/or be protected by public interest immunity. This is circular. A person may never know the reason he or she is the subject of an order and might never find out.

The effect of all this is that neither the person who is the subject of the order or anybody acting on his or her behalf is given documentation other than the order which describes the basis upon which the order is made. The information that the Australian Federal Police (or any other officer for that matter) rely upon may be wildly inaccurate, maliciously informed, distorted or hysterically motivated or simply little more than gossip or rumour that is dressed as reliable information. It is untested and untestable.⁸⁶

85. Jabbour v Hicks [2007] FMCA 2139.

86. Amnesty International Australia, *Submission* to the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, March 2006, <http://ejp.icj.org/IMG/AustraliaAI.pdf>, accessed February 2008.

Australian Lawyers for Human Rights have commented that the *ex parte* nature of interim control order proceedings is a fundamental departure from the way in which both civil and criminal proceedings are conducted in Australia, and that *ex parte* proceedings are usually only used in cases of extreme emergency where it is not practicable to have the defendant attend court.

The Lawyers for Human Rights argue:

... it is not clear why an interim control order should be made *ex parte*. That is, where urgency is properly established then an *ex parte* application may be necessary but otherwise the process, in order to protect the right to a fair trial, must allow for both parties to be before the court. This may be achieved by serving the 'request' for an interim control order on the person concerned and specifying a short period before the matter comes before the Court for hearing of the request. We point out that if the procedures are justifiably urgent to necessitate an *ex parte* hearing it is unlikely they would fall foul of the right to a fair trial.⁸⁷

Commentators such as the Law Council of Australia also argued that the restriction of access to documents concerning the making of control orders amounted to a denial of natural justice⁸⁸ for the person subject to the control order:

An essential feature of judicial power is that it is exercised in accordance with judicial process and, critically, that includes the application of the rules of natural justice. It is of the essence of judicial power that, in its exercise, there be an open and public inquiry, subject to limited exceptions, and that there be an application of the rules of natural justice. The absence of fair procedures including the lack of full disclosure of the basis upon which orders are sought and made does not accord natural justice to the person in question.⁸⁹

Safeguards

A number of commentators have also pointed out that while Australia's control order regime is based largely upon the UK model, it is not subject to the same level of scrutiny or safeguards, particularly surrounding human rights protections. Christopher Michaelsen comments for the Democratic Audit of Australia:

87. Australian Lawyers for Human Rights, *Submission to the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, March 2006, <http://ejp.icj.org/IMG/AustraliaALHR.pdf>, accessed February 2008.

88. The concept of 'natural justice' includes the right to be given a fair hearing and the opportunity to present one's case, the right to have a decision made by an unbiased or disinterested decision maker, and the right to have that decision based on logically probative evidence, Encyclopaedic Australian Legal Dictionary, LexisNexis Butterworths, March 2008.

89. Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs inquiry into the Anti-terrorism Bill (No. 2) 2005*, Canberra, 2005, http://www.aph.gov.au/SENATE/committee/legcon_ctte/terrorism/submissions/sub140.pdf, accessed March 2008.

... even in cases where judicial review is possible, Australian courts cannot examine the compatibility of anti-terrorism laws with any human rights instrument ... Australia neither has a constitutional bill of rights (like the United States or Germany), nor does it have any special act of parliament protecting the citizens' basic rights and freedoms (like the United Kingdom and New Zealand). Although Australia has been a party to the UN International Covenant on Civil and Political Rights since 1980, it has failed so far to give domestic effect to its international obligations (again in contrast to the United Kingdom).⁹⁰

Similarly Greg Carne comments:

The new Australian legislation, the *Anti-Terrorism Act (No.2) 2005* (Cth), is in fact justified on a claimed precedence of the UK control orders legislation, but includes fewer and weaker safeguards and review mechanisms - as such, it is another confirmatory example of the practice of selective internationalism.⁹¹

Lynch and Williams argue that the use of control orders and preventative detention orders may be used to cover circumstances where the intelligence and law enforcement agencies do not hold enough evidence to charge someone. According to Lynch and Williams then:

Both schemes might therefore represent an attempt to avoid the regular judicial procedures for testing and challenging evidence in criminal trials before a person's freedoms are removed. [This applies] to the use of a lower standard of proof by courts charged with issuing control orders. The broad scope of [control orders] – as well as their longer duration, makes this concern particularly strong.⁹²

In March 2006, upon concluding its Australian hearings on Counter-Terrorism Laws, Practices and Policies, the Eminent Jurists Council of the International Commission of Jurists (ICJ) stated:

Provisions permitting use of control orders are disquieting due to the wide range of conditions that can be imposed on the liberty, movement and communication of a person subjected to the order, without any trial or charge.

At the national level, a key difficulty in testing the above laws and practices against international standards, particularly the International Covenant on Civil and Political Rights (to which the country is a party), is that the country has not yet adopted a federal law to

90. C.Michaelsen, *Australia's Antiterrorism Laws Lack Adequate Oversight Mechanisms*, Democratic Audit of Australia, November 2005, http://democratic.audit.anu.edu.au/papers/200511_michaelsen_anti_terror.pdf, accessed February 2008.

91. G. Carne, 'Gathered intelligence or antipodean exceptionalism? Securing the development of ASIO's detention and questioning regime', in *Adelaide Law Review*, vol 27 no.1, 2006, pp. 1–58.

92. A. Lynch and G. Williams, *What Price Security? Taking stock of Australia's Anti-Terror Laws*, UNSW Press, Sydney, 2006.

incorporate international standards into national law. Such incorporation would help to establish a clear human rights framework based on international standards.⁹³

Conclusion

Compared to the British experience, the Australian control order scheme is largely untested to date. With only two control orders issued thus far, the scheme was challenged in *Thomas v. Mowbray* on the question of the court's role in issuing the control order, and its reliance on the defence and external affairs powers. On each point the majority court found that the legislation was constitutional.

It can be argued that Australians have fewer grounds upon which to challenge control orders than our UK counterparts, as there is no bill of rights or human rights act against which the restrictions imposed by control orders can be measured. There are also fewer opportunities for external monitoring and reporting on Australian control orders. While a non-binding COAG review is due in 2010, the control order regime in its current form does not expire until 2015.

The two control orders issued to date have not involved severe restrictions on liberty, such as 18-hour house arrest, as have occurred in the UK model. However, lawyers for Mr Hicks commented that the requirements imposed by his interim control order would impede his assimilation back into Australian society. At the confirmation hearing for his control order, Mr Hicks had a small victory in reducing the frequency of his reporting to police.

A number of UK control orders have been challenged on the basis of deprivation of liberty. A test for the Australian courts, and the public's support of control orders, will be the extent to which any future control orders balance the need for security against human rights protections. Parliament could consider possible means of strengthening the human rights protections in the Australian control order regime, including implementation of a Commonwealth human rights act or bill of rights, more frequent reporting to parliament on in-force control orders, and independent oversight of the regime as occurs in the UK with the Independent Reviewer of Terrorism legislation.

93. Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Eminent jurists panel concludes Australia hearing on counter-terrorism laws, practices and policies*, media release, ICJ Geneva, 17 March 2006, ICJ, at:

http://www.icj-aust.org.au/files/EJP%20Final%20Statement%20Australia%20170306_public.pdf, accessed February 2008.

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