

The Legal Framework

3.1 Introduction

The aim of this chapter is to conduct a statutory analysis of the legislation providing the legal framework for control orders. 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.

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 9/11, Parliament hastily introduced further legislation, the *Anti-Terrorism, Crime and Security Act 2001* (ATCSA) (Macdonald 2007). Its most controversial provision enabled the Home Secretary to detain foreign nationals suspected of terrorism, indefinitely and without charge or trial.¹ 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,² 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*³ held 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 the European Convention on Human Rights.⁴ The Law Lords found the powers to be discriminatory against foreign nationals, and a disproportionate response to the level of threat⁵ (McDonald 2007). Within three months of the judgment, the government passed the *Prevention of Terrorism Act (PTA) 2005*, replacing the unlawful detention⁶ 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 can neither be prosecuted nor deported.⁷ To recap briefly, 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.⁸ 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*.

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 and its provision for both derogating and non-derogating varieties of control orders. The control order scheme was eventually abolished in December 2011 and replaced with Terrorism Prevention and Investigations Measures (TPIMs), retaining many of the controversial aspects outlined below.

3.2 British Control Orders: The Origin of Two Species

The *Prevention of Terrorism Act (PTA) 2005* set out two types of control order, namely the derogating and the non-derogating order. The distinction by derogation pertained 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 was required to liaise with the police to determine whether there was sufficient evidence against that

individual to be used for the purposes of prosecution.⁹ Throughout the duration of the control order, the police were required to continually review the individual's conduct with a view of prosecution.¹⁰ Given that only non-derogating orders were ever issued, this Brief focuses on this type only.

3.2.1 The Non-Derogating Control Order

A non-derogating control order (NDCO) severely *restricted* an individual's liberty by imposing a range of conditions on a person suspected of involvement in terrorism. Section 1(3) stated:

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 translated to restrictions on the controlee's belongings, activities, ways of earning a living, association, place of residence and who was 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. For instance, whether or not the controlee was required to be electronically tagged was at the Home Secretary's discretion.

As for the alleged involvement in terrorism-related activity, it not only covered the more commonly assumed stages of an offence, i.e. commission, preparation or instigation,¹¹ 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.¹² Examples of such offences

⁹ S 8(2).

¹ S 8(4).

⁰ S 1(9)(a).

¹ S 1(9)(b–d) respectively.

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include writing, publishing or distributing material glorifying terrorism; publicly advocating or preaching, and encouraging others to commit terrorist acts.¹³

3.2.1.1 Issuance of NDCO

Section 2(1) stated that a NDCO could 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 was in effect for twelve months, and could be renewed for the duration for which the Home Secretary (HS) believed s 2(1) still applied.¹⁴ Once a NDCO was issued, it needed to be approved by a High Court judge within seven days.¹⁵ The court's function was to determine whether the grounds on which the HS had put forward the proposal were "obviously flawed" (s 3(2)(a)). If it considered the proposal viable, a hearing had to be set up. However, the individual in question was not required/permitted to be present in court (*ex parte*), nor notified of the application being made, nor given the chance to represent himself.¹⁶ If the court found flaws in the HS's reasoning, or the obligations proposed, the order or that particular obligation had to be overturned, otherwise, the order had to be confirmed.¹⁷ Upon confirmation, the individual in question was notified of the order made against him.¹⁸ As for what constituted flaws in the HS's reasoning, the PTA set out that "the principles applicable on an application for judicial review" applied,¹⁹ i.e. illegality, procedural impropriety and irrationality, the so-called Diplock Trilogy (Bonner 2006). In other words, the court had the power to overturn the use of executive powers if they violated basic judicial principles such as due process in a particular case.

Obligations set out in the original NDCO could be modified, both at the suggestion of the controlee, or the HS.²⁰ The HS could also decide to revoke a

NDCO.²¹ Interestingly, s2(9) highlighted that all the imposed obligations did 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 was a civil measure, any breach of obligation left the controlee open to criminal prosecution. Section 9(1) stated:

(1) A person who, without reasonable excuse, contravenes an obligation imposed on him by a control order is guilty of an offence.

Further, more specific breaches were outlined in subsequent sections of the PTA, such as re-entering the United Kingdom after the expiry of an order,²² not reporting to a specified person,²³ or obstructing a designated person from entering his or her house.²⁴ If the controlee was found guilty, he faced imprisonment for up to five years and/or a fine.²⁵

3.2.2 Appeal Process

A controlee could appeal if their NDCO was renewed, or his or her obligations were amended without notification. Section 10(1)(b) actually stated “an obligation imposed by such an order has been modified *without the consent* of the controlled person” but I would assume most controlees didn’t actually consent to any of these restrictions being imposed on them (without due process). The function of the court in such cases was identical to the initial hearing, where it had to determine any flaws in the Home Secretary’s reasoning and to prevent the controlee from

engaging in terrorism-related activities.²⁶ Had his or her reasoning been flawed, the court had 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.²⁷ Otherwise, the appeal had to be dismissed. Finally, section 11(1) stated that control order decisions could only be questioned in court or on appeal from court.

Due to the ATCSA 2001 focus on deporting foreign suspects, an appeal process to the Special Immigration Appeals Tribunal (SIAC) was introduced, subsequently amending the tribunal’s operation (Smith 2007). Although control order cases were heard by the High Court, the sensitive nature of the supporting materials led

² S 7(2). S 9(2)

¹ (b). S 9(2)(d). S

² 9(3). S 9(4)(a).

² S 10(4) and (5).

² S 10(7).

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to SIAC procedures being adopted by the High Court, incorporating²⁸ measures of non-disclosure of sensitive information, closed proceedings and the appointment of Special Advocates (Bonner 2007; Ip 2007; 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”.²⁹

In summary then, the British control order system, despite not having resorted to derogations under emergency provisions, was not only a hybrid between the civil and the criminal systems, but also incorporated proceedings based on immigration administration, which had 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.

3.3 Australian Adaptation of Control Orders

The Australian system of control orders was introduced as part of the *Anti-Terrorism Act (No. 2) 2005*,³⁰ imposing a variety of obligations, prohibitions and restrictions on a person³¹ 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.³²

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.

3.3.1 The Interim Control Order

In circumstances where the Australian Federal Police (AFP) either

- (a) considers on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act; or
- (b) suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation,³³

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.³⁴ Furthermore, each obligation needs to be justified, listing any known reasons against imposing such restrictions.³⁵ 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.³⁶ Previous requests or orders do not preclude the individual from being issued a new iCO.³⁷ The final inclusions relate to a suspect's age³⁸ 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).³⁹ 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.⁴⁰ 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.⁴¹ Subject to the AG's consent, the AFP requests an

issuing court's approval,⁴² providing the same documents, which are either sworn or affirmed, as well as a copy of the AG's consent.⁴³

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:

1. that making the order would substantially assist in preventing a terrorist act; or
2. 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.⁴⁴

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.⁴⁵ It is not bound by the AFP's obligations and can decide not to impose certain restrictions.⁴⁶

An iCO must adhere to the following elements⁴⁷:

- (a) state that the court is satisfied of the matters mentioned in paragraphs 104.4(1)(c) and (d); and
- (b) specify the name of the person to whom the order relates; and
- (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
- (d) state that the order does not begin to be in force until it is served personally on the person; and
- (e) specify a day on which the person may attend the court for the court to:
 - (1) confirm (with or without variation) the interim control order; or
 - (2) declare the interim control order to be void; or
 - (3) revoke the interim control order; and

- (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 made⁴⁸; and
 - (g) state that the person's lawyer may attend a specified place in order to obtain a copy of the interim control order; and
 - (h) set out a summary of the grounds on which the order is made.⁴⁹
- A controlee must be served at least 48 h before the date of commencement.

3.3.1.1 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.⁵⁰ The person may also need to participate in counselling or education programs.⁵¹ 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.

3.3.2 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.⁵² 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 individuals⁵³ 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.⁵⁴ 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.⁵⁵ Any changes to or revocations of the cCO must be served to the 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.⁵⁶

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.⁵⁷ 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.⁵⁸

3.4 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. Much of the analysis employs the terminology set out in [Sect. 2.5](#) 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. In essence, these obligations and restrictions are designed to affect the controlees' routine by removing the opportunities to engage in terrorism-related activity. 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 were 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 were reactively preventive. However, in NDCO cases, the Home Secretary only needed 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 [Sect. 4.3](#).

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 were meant to be consulted throughout about whether or not sufficient evidence existed to prosecute an individual. Moreover, continual monitoring was 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 the controlee from engaging in further conduct. The actual control order, however, was 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 have included 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 remained unaltered; their Australian counterparts, however, require judges to be satisfied *on the balance of probabilities*.

Whereas the UK's procedures were generally *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 were not privy to.

Because of the PTA forerunner's association with immigration law, control order proceedings in the UK appropriated certain practices from the SIAC hearings. Closed hearings and Special Advocates were 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 arose 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.⁵⁹ 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; Jagers 2008; Michaelsen 2005).

The person in question was notified of the control order against him or her only after it was 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 found that the Home Secretary's decision to make the control order was obviously flawed, it was obliged to quash the order. The same principle applied to flawed obligations. Modifications of the sometimes very restrictive obligations

were permitted and were 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.

While the British control order provisions incorporated a more judicial approach compared to previous executive measures (Walker 2011), they did not provide the same oversight or indeed procedural safeguards as the Australian regime. 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, important concerns have none-theless been raised. In total, 52 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.