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NSWCCL SUBMISSION

PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

REVIEW OF THE COUNTER-TERRORISM AND OTHER LEGISLATION AMENDMENT BILL 2023

6 October 2023

Acknowledgement of Country

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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1. EXECUTIVE SUMMARY

The New South Wales Council for Civil Liberties (**NSWCCL**) strongly opposes the Counter-Terrorism and Other Legislation Amendment Bill 2023 (the **Bill**) and considers the Bill to be a serious threat to civil liberties and the rule of law in Australia. The NSWCCL is concerned that the Bill seeks to extend the operation of two highly problematic regimes: the secrecy provisions and the control orders. Both of which have been widely criticised for undermining fundamental rights and principles of justice.

Having regard to the serious implications the Bill has to the rule of law and to the principle of democracy, the NSWCCL submits that the Bill is unjustified, disproportionate, and should be rejected in its entirety. We are not persuaded by the arguments put forward by the government to justify the continuation or extension of these regimes. These arguments fail to show that the Bill is necessary, proportionate or effective in addressing the threat of terrorism.

In this submission, we focus on two key aspects of the Bill: the secrecy provisions and control orders. We have narrowed our submission to these two issues only, as we believe they are the most urgent and contentious matters that represent the most significant concern to civil liberties.

The **secrecy provisions** criminalise the unauthorised disclosure of information by current or former Commonwealth officers under section 122.4 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**), regardless of the public interest or the harm caused by such disclosure. The NSWCCL strongly opposes the Bill's proposal to extend the sunsetting date of section 122.4 by 12 months to December 2024. The NSWCCL also strongly opposes the continuation of the secrecy provisions in their current form and urges the complete repeal or, at the very least, the incorporation of substantive safeguards following the forthcoming findings of the Attorney-General's Department's Review of Secrecy Provisions, namely, to introduce an express harm requirement. We are concerned that the secrecy provisions are easily abused for political ends, prescribe a misguided objective, and fail to provide adequate protections that would ensure open and fair justice.

The **control order provisions** in Division 104 of the Criminal Code aim to prevent the commission of terrorist acts by imposing wide-ranging restrictions which result in the controlee living in circumstances akin to house arrest. The control order provisions do not contain essential safeguards developed by the criminal law aimed at protecting the right to be free of arbitrary detention and the unlawful deprivation of liberty. These provisions are unnecessary considering the wealth of alternative tools for preventing terrorist acts, including Extended Supervision Orders (**ESOs**) under Division 105A of the Criminal Code and Part 5.3 offences relating to preparatory acts. We recommend that these latter tools be the only mechanisms used to manage the risk of terrorist acts in the context of post-sentence and preparatory conduct. The NSWCCL therefore strongly opposes the Bill's proposal to extend the operation of Division 104 by a further three years until 7 December 2026.

2. INTRODUCTION

The NSWCCL welcomes the opportunity to make a submission on the Bill.

The NSWCCL recognises the importance of ensuring the safety and security of all Australians from the threat of terrorism and other forms of serious crime. The NSWCCL also acknowledges the complex and evolving nature of the national security environment and the challenges it poses for law enforcement and intelligence operations.

However, the NSWCCL is opposed to the Bill on the grounds that it fails to strike an appropriate balance between the protection of national security and the protection of human rights and the rule of law. The NSWCCL submits that the Bill contains provisions that are disproportionate, unjust, and ineffective in achieving the stated objectives of the Bill. The NSWCCL submits that the Bill poses serious risks to the rights and liberties of individuals and groups who may be subject to the control order regime or secrecy offences. Further, the NSWCCL submits that the Bill poses risk to public interest owing to the lack of transparency, accountability, and scrutiny of government actions.

In light of these concerns, the secrecy provisions and control orders that are sought to be extended by the Bill should be rejected in their entirety, or at the very least, be substantially amended. In the event that the provisions are not repealed by the current Parliament, the NSWCCL submits alternative recommendations in order to introduce more robust and meaningful safeguards, oversight, accountability and transparency mechanisms. These alternative recommendations focus on the inclusion of a requirement to identify a serious harm caused by the unauthorised disclosure of information. Adding such a safeguard to the legislative framework would ensure consistency with Australia's international legal obligations.

3. RECOMMENDATION 1: COMPLETE REPEAL OF SECRECY PROVISIONS

The NSWCCL believes that unconstrained secrecy is incompatible with open justice, a fundamental pillar of Australia's democracy. Secrecy can undermine the public's right to know, the media's role in holding the government to account, and the courts' ability to ensure due process and fair trials. As such, transparency and public scrutiny becomes crucial in guarding against abuses of government powers that could run unchecked when hidden behind closed doors. The NSWCCL therefore advocates for a robust and balanced legislative framework that adequately balances the need to ensure open and fair justice, and national security considerations, as required by Australia's domestic and international human rights obligations.

The NSWCCL strongly opposes the Bill's proposal to extend the sunsetting date of section 122.4 of the Criminal Code by 12 months to December 2024. The NSWCCL sees no justification for this extension, given that the review of the secrecy provisions has already been provided to the government. The NSWCCL contends that the extension would only prolong the problems and harms caused by the existing criminal liability regime, which imposes harsh penalties and creates legal uncertainty for those who seek to reveal or challenge government wrongdoing or misconduct.

The NSWCCL also strongly opposes the continuation of the secrecy provisions in their current form and urges the repeal or, at the very least, the reforming of the current secrecy provisions to incorporate substantive safeguards following the findings of the Attorney-General's Department's Review. The NSWCCL considers the current provisions are overly broad, vague, and disproportionate, creating a chilling effect on legitimate whistleblowing, reporting, and advocacy.

The NSWCCL calls on the government to carefully consider the review's recommendations and to ensure that any future legislation on secrecy is consistent with Australia's international obligations and commitments to transparency, accountability and the rule of law.

3.1 Section 122.4 of the Criminal Code should be allowed to lapse

The NSWCCL submits for the automatic termination of section 122.4 of the Criminal Code on 30 December 2023, as stipulated by its current sunsetting provision, eliminating criminal liability for the 296 non-disclosure duties while awaiting the outcome of the Secrecy Provisions Review.

This section, which was enacted as part of the *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) (**Espionage and Foreign Interference Act**), replaced the former general secrecy offence in section 70 of the *Crimes Act 1914* (Cth) (**Crimes Act**) and applies to a wide range of non-disclosure duties across various legislation.

The initial drafting of the section did not include a sunsetting provision, on the proviso that the secrecy frameworks would be subject to a review that would determine whether each duty should be converted into a specific secrecy offence or decriminalised. The Explanatory Memorandum for the Espionage and Foreign Interference Act stated:

> *"The offence in section 122.4 is intended to preserve the operation of those specific secrecy frameworks, until such time as each duty can be reviewed to determine whether it should be converted into a stand-alone specific secrecy offence, or whether criminal liability should be removed. Given the number and diversity of such duties, this review will be conducted as each duty is next considered, rather than within a specific period of time. Accordingly, this offence is not subject to a sunset provision."*[1]

However, following a report to the Parliamentary Joint Committee on Intelligence and Security the Bill was amended to incorporate a sunset period of five years to the offence at section 122.4, limiting the application of the section 122.4 to a defined period. The intention of this report was to highlight that this review should not be allowed to go on indefinitely.[2]

3.2 Secrecy provisions in general should be repealed

The NSWCCL has long advocated for the repeal of the Commonwealth secrecy provisions, which it considers to be an unjustified and disproportionate restriction on the right to information and freedom of expression in Australia. The current secrecy framework, as at the start of this year, consists of a complex and overlapping array of offences and duties that criminalise the disclosure of a wide range of information held by the Commonwealth. These include:[3]

- 11 general secrecy offences in the Criminal Code;
- 542 specific secrecy offences in 178 Commonwealth laws;
- 296 non-disclosure duties in 107 Commonwealth laws that attract criminal liability; through the operation of section 122.4 of the Criminal Code; and
- 21 override provisions in 18 Commonwealth laws that operate to exclude secrecy provisions in other Commonwealth laws.

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[1] Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p 272 [1589] <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6022_ems_e4d3fac9-e684-40c4-b573-c000e7a32b03/upload_pdf/655771.pdf>.

[2] Supplementary Explanatory Memorandum, National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, p 82 <https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6022_ems_c0670f8e-b255-487c-aa0a-df608c6db06a/upload_pdf/676941.pdf>; Parliamentary Joint Committee on Intelligence and Security, Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (June 2018), p 141, 153 <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024152/toc_pdf/AdvisoryReportontheNationalSecurityLegislationAmendment(EspionageandForeignInterference)Bill2017.pdf>.

[3] Attorney General's Department, Review of Secrecy Provisions, Consultation Paper (March 2023) p 21 <https://consultations.ag.gov.au/crime/review-secrecy-provisions/user_uploads/review-secrecy-provisions-consultation-paper.pdf>.

This is a sweeping regime that is excessive, inconsistent and incompatible with the principles of transparency and democratic accountability that underpin a free and open society. It therefore calls for a comprehensive reform of the secrecy framework based on clear, limiting, and proportionate criteria that balance the legitimate interests of the Commonwealth with the public's interest in access to information.[4]

(a) Transparency vs Secrecy – an unbalanced equation

Australia has a long history of recognising the importance of an open government, with transparency and public accountability acting as key pillars of effective governance.[5] However, these pillars, as well as democracy and human rights, can be undermined by excessive and unjustified secrecy.

The NSWCCL acknowledges that secrecy is at times a necessary and proper part of democracy to protect public interests such as individual privacy and national security.[6] However, the current balance between secrecy and transparency is unjustifiably and undemocratically tilted in favour of secrecy, as evidenced by the surfeit of secrecy provisions, 849 in total, across Australian federal law.[7]

The breadth and depth of these provisions have, individually and collectively, created a significant chilling effect on the free flow of information and public discourse about the government. They degrade the freedom of information regime, provide insufficient protections for press freedom and whistleblowers and undermine open justice. These laws allow government wrongdoing and human rights violations to go hidden, while brave whistleblowers are punished and even prosecuted for speaking out.

Foremost is the case of Witness J, or the pseudonym Alan Johns, where secrecy provisions under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (**NSI Act**) were used to prosecute and imprison a former intelligence officer in absolute secrecy and with no clear consideration of the public interest in open justice. The prosecutions of Bernard Collaery, Witness K and David McBride had also seen the NSI Act invoked to enforce extreme secrecy in cases of clear public interest, particularly the public interest in exposing serious wrongdoing on the part of the Australian government.

The NSWCCL is particularly concerned about the non-disclosure offences criminalised by section 122.4 of the Criminal Code, which is derivative of the now-repealed section 70 of the Crimes Act. Concerns as to the similarities between these provisions were raised by several submissions, including one by the Human Rights Law Centre (**HRLC**), when section 122.4 was being considered as part of the *National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (Cth).[8] The HRLC stated that though it recognised that a functioning government relies on select information remaining confidential, it is also vital to recognize that whistleblowers are a "necessary aspect to the integrity of Commonwealth public service".[9]

A failure to recognise the importance of transparency through overly punitive secrecy offences may disproportionately impede the implied freedom of political communication, especially when it

[4] Australia's Right to Know, Submission to Secrecy Provisions Review, p 2 <https://consultations.ag.gov.au/crime/review-secrecy-provisions/consultation/view_respondent?uuId=720456830>.

[5] *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211, 264-265. See also HRLC, Secrecy Offences: The Wrong Approach to Necessary Reform, Submission to the Inquiry into the national Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (22 January 2018) [2].

[6] HRLC, Transparency International Australia and the Centre for Governance and Public Policy Griffith University, Submission to Secrecy Provisions Review, p 1 <https://consultations.ag.gov.au/crime/review-secrecy-provisions/consultation/download_public_attachment?sqId=question-2022-01-06-6908678210-publishablefilesubquestion-1&uuId=638488631>.

[7] Ibid.

[8] Human Rights Law Centre, Secrecy Offences: The Wrong Approach to Necessary Reform, Submission to the Inquiry into the national Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017 (22 January 2018), p 2-6.

[9] Ibid p 2-6.

affects whistleblowers or journalists. The Australian government is committed to transparency and freedom of expression which is enshrined in several of its obligations under international law. The most notable example of this is Article 19(2) of the *International Covenant on Civil and Political Rights* (**ICCPR**) which requires States party to guarantee the right to freedom of expression, including the right to seek, receive and impart information and ideas of all kinds regardless of frontiers. States which withhold information from its constituents must justify that as an exception to the right.[10]

(b) Failure to incorporate an express harm requirement

Although the NSWCCL maintains its primary position in advocating for secrecy provisions to be wholly repealed, in the event that the government does not adopt this position, the NSWCCL submits that substantive safeguards need to be implemented in any future iterations of such provisions. This is because in order to strike an appropriate balance between the need for both transparency and secrecy in government affairs, there should be appropriate mechanisms in legislative frameworks, which have a clear focus on preventing serious harm to public interest and/or the national security of Australia.[11]

A common critique and a glaring shortcoming of section 122.4 of the Criminal Code is its breadth and vagueness, as it lacks an express serious harm requirement. That is, section 122.4 does not explicitly require an outcome which has caused, or has the potential to cause, serious harm to the function of government or national security. For example, under section 122.4A, anyone who deals with or communicates information with a security classification of 'secret' is liable for an offence – even where there has been no actual or potential harm as a result of such actions. Additionally, anyone who communicates information obtained by reason of their employment in their capacity as a Commonwealth officer, with the duty to not disclose information which arises under a law of the Commonwealth, may face a maximum term of imprisonment of 2 years, as it is a strict liability offence. This provision could apply to any form of disclosure of even the most mundane government information and serves to be entirely disproportionate, especially when other administrative remedies are available to address such circumstances.

In theory, and upon simple interpretation of the words, section 122.4 may apply to any form of disclosure of the most negligible government information. This makes the current version of section 122.4 too broad, and accordingly overly punitive in effect. It criminalises disclosure of information even in instances where it would not be necessary, as some instances may be highly unlikely to pose serious harm to the functioning of government or national security. The broad-brush nature of the language in its legislative framework means that currently, far too many arguably harmless instances are captured by the Criminal Code. In effect, this means that section 122.4 of the Criminal Code provides an insufficient focus on the requirement for actual or potential serious harm to the public interest and/ or national security – an aspect of the provision which should serve as its primary purpose.

Therefore, in the event that our primary submission is not accepted, and secrecy provisions are deemed essential by the government following its review of the latest report by the Attorney-General's Department, we submit that general secrecy provisions should be revised to include an explicit serious harm requirement. Adding such a safeguard to the legislative framework of secrecy provisions would ensure consistency with Australia's international legal obligations, and would enable secrecy provisions the best chance at deterring and punishing offences which pose actual or potential harm to public interest and/or national security.[12]

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[10] Ibid 4.

[11] Human Rights Committee, General Comment No 34: Article 19: Freedoms of Opinion and Expression, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [30] – [35]. See also: Human Rights Law Centre, Transparency International Australia and the Centre for Governance and Public Policy, Griffith University Submission into the Review of Secrecy Provisions (12 May 2023), p 5.

[12] HRLC, Transparency International Australia and the Centre for Governance and Public Policy Griffith University, Submission to Secrecy Provisions Review, p 5-6 <https://consultations.ag.gov.au/crime/review-secrecy-provisions/consultation/download_public_attachment?sqId=question-2022-01-06-6908678210-publishablefilesubquestion-1&uuId=638488631>.

4. RECOMMENDATION 2: COMPLETE REPEAL OF CONTROL ORDERS

In this section we outline why the recommended repeal of control orders is warranted. The section outlines how the current provisions work and then demonstrates how control orders are a restriction on civil liberties. In addressing how civil liberties are restricted, this section first demonstrates how control orders cut against the right to unlawful deprivation of liberty, second, it demonstrates the risk of the control orders in relation to restrictions being imposed based on possible future conduct, and third, it demonstrates the danger related to there being no limitations to the amount of extensions available for control orders. This section then demonstrates how control orders function independently of the right to due process and a fair trial. This issue is addressed through demonstrating the risk of control orders as seen through first, ex parte hearings, second, risks associated with the fact no reasons or evidence needs to be provided to the controlee when a decision is made, third, that a lower standard of proof is required, and fourth, that there are limited avenues of review available to the controlee. With this framework built out, the final section then recommends that the control orders be repealed. In doing so it highlights how ESO's are suitably adapted to address possible risks posed by released offenders, and how there are already sections in the Criminal Code that are appropriate to address preparatory related offences.

4.1 Control orders impose unacceptable restrictions on a range of civil liberties

(a) Operation of the legislation

To understand the flaws in the operation of the legislation we briefly outline how these provisions operate in practice.

Under Division 104 of the Criminal Code, control orders may be imposed on any person over the age of 14 for the following purposes:

a. protecting the public from a terrorist act;

b. preventing the provision of support for, or the facilitation of a terrorist act; or

c. preventing the provision of support for, or the facilitation of, the facilitation of the engagement in a hostile activity in a foreign country.[13]

To obtain a control order, a senior AFP member must first seek the AFP Minister's written consent.[14] The senior AFP member may seek such consent where he or she:

a. suspects 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:

   i. provided training to, received training from or participated in training with a listed terrorist organisation; or

   ii. engaged in a hostile activity in a foreign country; or

   iii. been convicted in Australia of an offence relating to terrorism, a terrorist organisation (within the meaning of subsection 102.1(1)) or a terrorist act (within the meaning of section 100.1); or

[13] *Criminal Code Act 1995* (Cth) s 104.1 ('*Criminal Code*').
[14] *Criminal Code* s 104.2 (1).

iv. been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence (within the meaning of subsection 3(1) of the Crimes Act); or

c. suspects on reasonable grounds that the order in the terms to be requested would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or

d. suspects on reasonable grounds that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country.[15]

However, in urgent circumstances, a senior AFP member may request an interim control order without first obtaining the AFP Minister's consent.[16] These urgent circumstances are ill-defined, with the senior AFP member only required to consider an interim control order 'necessary to use such means because of urgent circumstances'[17] and to provide an 'explanation as to why the making of the interim control order is urgent.'[18]

A court may impose a long list of obligations, prohibitions and restrictions on a person pursuant to a control order which can place a person in a situation akin to house arrest. These include:

> *a prohibition or restriction on the person being at specified areas or places; a prohibition or restriction on the person leaving Australia; requirement that the person remain at specified premises between specified times each day, or on specified days, but for no more than 12 hours within any 24 hours; a requirement that the person be subject to electronic monitoring (for example, by wearing a monitoring device at all times), and comply with directions given by a specified authority in relation to electronic monitoring; a requirement that the person carry at all times a specified mobile phone, and the person be available to answer any call from a specified authority or, as soon as reasonably practicable, return a call that the person was unable to answer; and the person comply with specified directions, or any directions given by a specified authority; a prohibition or restriction on the person communicating or associating with specified individuals; a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet); a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation); and a requirement that the person report to specified persons at specified times and places.[19]*

The proposed section 104.5A as modified by the Bill includes a similarly long list of conditions, generally of the same nature as the current section 104.5(3), that may be imposed on a controlee.[20] The Bill does not limit the conditions that the issuing court may impose on a person, but rather, according to the Explanatory Memorandum, seeks to 'offer clarity about the types of conditions that may be appropriate to achieve the order's purpose and which are enforceable by police'.[21] In other words, the list of conditions it enumerates is non-exhaustive, and a court may impose other conditions on an individual the subject of a control order.

(b) Restrictions on civil liberties

Evidently, the conditions that can be imposed on a person pursuant to a control order are substantial impositions on the liberty of the person subject to the order.[22]

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[15] Ibid s 104.2 (2).
[16] Ibid s 104.6 (1).
[17] Ibid s 104.6 (1)(a).
[18] Ibid s 104.6 (4)(b).
[19] *Criminal Code* s 104.5(3).
[20] Counter-Terrorism and Other Legislation Amendment Bill 2023, cl 11.
[21] Explanatory Memorandum, Counter-Terrorism and Other Legislation Amendment Bill 2023, [34].
[22] *Thomas v Mowbray* (2007) 233 CLR 307, [175] (per Kirby J) ('*Thomas v Mowbray*').

As noted in the Explanatory Memorandum, the Bill's control order provisions engage several human rights enshrined in the ICCPR. Most notably, these are the right to liberty (Article 9 of the ICCPR), the right to freedom of movement (Article 12 of the ICCPR), the right to a fair trial, the right to minimum guarantees in criminal proceedings and the presumption of innocence (Article 14 of the ICCPR), the right to freedom of expression (Article 19), and the right to freedom of association (Article 22 of the ICCPR). The conditions contemplated by the Bill, which mirror the obligations, prohibitions and restrictions that may be imposed by a control order under the current section 104.4 of the Code, infringe all of these rights.[23]

The right of individuals to be free of arbitrary detention and the unlawful deprivation of liberty, protected by Article 9 of the ICCPR, is especially engaged by the control orders regime. The Explanatory Memorandum notes that this is in large part because the measures in the Bill amending the control order regime include new section 104.5A which would permit an issuing court may impose a condition by a control order that the person must remain at specified premises between specified times each day, or on specified days, but for no more than 12 hours within any 24 hours (subsection 104.5A(5) of the Criminal Code), as is the case under the current section 104.5(3) of the Code.[24]

While the conditions available under a control order do not constitute a deprivation of liberty in the sense of imprisonment in a state facility, several sources point out that control orders may restrict a person's liberty to the point of virtual house arrest.[25]

(c) The right against unlawful deprivation of liberty is not adequately protected by control orders

The right against unlawful deprivation of liberty traditionally benefits from more significant safeguards than other civil liberties. This is the case in most advanced democracies. For instance, though the constitutional systems in Australia and the United States differ, both systems share the same vigilance 'to the dangers of civil commitment that deprives persons of their liberty.'[26]

A corollary of this vigilance is that deprivation of liberty is 'ordinarily one of the hallmarks reserved to criminal proceedings conducted in the courts, with the protections and assurances that criminal proceedings provide.'[27] We develop this point further below.

Under the ICCPR, the only acceptable limitations on the rights to liberty are those provided for in Article 9 itself, namely that deprivations are permitted but only in accordance with procedures established by law.[28] A measure amounting to a deprivation of liberty may still be contrary to Article 9, even if it is provided for by domestic law, if it is arbitrary. Such arbitrariness may result from the vagueness of the law or the fact that it allows for the exercise of powers in broad circumstances that are not sufficiently defined.[29]

The Explanatory Memorandum notes that the restrictions imposed by the control order regime are proportionate to achieving the outcome of preventing a terrorist act primarily because, before imposing a condition which may restrict liberty of a controlee under a control order, the court must be satisfied that the condition is reasonably necessary, and reasonably appropriate and adapted for the purposes of protecting the public from a terrorist act, preventing the provision of support

[23] Ibid [379] (per Kirby J).
[24] Explanatory Memorandum, Counter-Terrorism and Other Legislation Amendment Bill 2023, [72].
[25] *Criminal Code* s 104.5(3); Rebecca Ananian-Welsh and Geroge Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia,' (2014) 38(2) *Melbourne University Law Review* 362, 369; *Thomas v Mowbray* [354] (per Kirby J).
[26] *Thomas v Mowbray* [352] (per Kirby J).
[27] Ibid.
[28] 'Right to security of the person and freedom from arbitrary detention (public sector guidance sheet),' Australian Government Attorney-General's Department (Web Page) <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-security-person-and-freedom-arbitrary-detention>.
[29] Ibid.

for or the facilitation of a terrorist act and preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

In relation to the above criteria of reasonable necessity and appropriateness, Kirby J has noted in his dissenting judgement in *Thomas v Mowbray*, that the control orders regime is based entirely on a prediction of what is "reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act". This is a vague, obscure and indeterminate criterion that is unsuitable where a person's liberty is at stake. The judicial process, said to be enlivened by section 104.4, is not therefore refined because it is capable of arbitrary and capricious interpretation.[30]

The Explanatory Memorandum further notes that the Bill introduces 'additional safeguards to ensure that an offender cannot be subject to conditions under a control order that are akin to detention'.[31] In particular, the Explanatory Memorandum points to new paragraph 104.4(1)(d), which 'provides that a court must consider each individual condition of a control order as well as the combined effect of all proposed conditions of the control order to ensure the necessity and proportionality of those conditions'.[32]

This new 'safeguard' is entirely predicated on the same 'vague, obscure and indeterminate' predictions of what is necessary and proportionate found in the current version of Division 104 and which Kirby J pointed to in his dissenting judgment in *Thomas v Mowbray*. As his Honour rightly pointed out, 'if the community of nations, with all of its powers and resources, cannot agree on what precisely 'terrorism' is (and how it can be prevented), how can one expect a federal magistrate or court in Australia to decide with consistency and in a principled (judicial) way what is reasonably necessary to protect the public from a terrorist act?'.

(d) Restrictions based on possible future conduct

One of the most striking aspects of the control orders regime is that it may form the basis for a substantial restriction of liberty based on possible future conduct (not necessarily one to be committed by the person subject to the proposed order[33]), rather than based on evidence of past conduct. Indeed, it is past conduct which traditionally forms the basis for which the judiciary in Australia under federal law may deprive individuals of their liberty. [34]

Control orders may be sought in a range of situations, one of which is once a terrorist offender has been released from prison, in circumstances where they are still considered to pose an unacceptable risk to the community.[35] However, control orders may also be sought as an alternative to prosecution, for instance where a person cannot be arrested because there is no reasonable basis to suspect that they have been involved in a terrorist act or there is no reasonable prospect of conviction, or even as a second attempt after an unsuccessful prosecution where the person has been tried and acquitted.[36]

Theorists Andrew Ashworth and Lucia Zedner accept that preventive detention is justified in limited circumstances. Insofar as post-sentence preventive detention is concerned, they indicate the following principles (amongst others) applicable in assessing whether such detention is compatible with human rights:

1. In principle, every citizen has a right to be presumed harmless, and this presumption of harmlessness can be rebutted only in exceptional circumstances (one of which is set out in (2)); and

[30] *Thomas v Mowbray* [354] (per Kirby J).
[31] Explanatory Memorandum, Counter-Terrorism and Other Legislation Amendment Bill 2023, [75].
[32] Ibid.
[33] *Thomas v Mowbray* [357] (per Kirby J).
[34] Ibid.
[35] Australian Human Rights Commission, Submission to the Independent National Security Legislation Monitor, *Review into Division 105A of the Criminal Code (post sentence orders)* (4 February 2022), [264].
[36] Ibid.

2. The state's duty to protect people from serious harm may justify depriving a person of liberty if that person has lost the presumption of harmlessness by virtue of committing a serious violent offence and is classified as dangerous.

We have three observations to make about these principles.

First, we note that restrictions on liberty and deprivation of liberty are of the same essence, in that the difference between a restriction and deprivation of liberty is merely one of degree or intensity rather than one of nature or substance.[37] As such, where restrictions are substantial, such as may be the case in relation to control orders, the same legal principles should apply.

Second, we agree with Ashworth and Zedner as to the circumstances in which post-sentence preventive detention, and thus also substantial restrictions of liberty, will comply with human rights standards. In particular, we approve of their suggestion that regimes that provide for such detention will be compatible with human rights only if such regimes apply only to persons who have been convicted in the past of an offence involving serious violence.

Third, we note that the Division 104 scheme does not comply with the limitations that Ashworth and Zedner identify. In other words, it breaches human rights. This is because Division 104 does not require that the controlee commit any offence, or even be charged with an offence. Under section 104.2(2) which would be unamended by the Bill, a senior AFP member may request an interim control order in relation to a person if the member, among other circumstances: suspects on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act; or suspects on reasonable grounds that the order in the terms to be requested would substantially assist in preventing the provision of support for or the facilitation of a terrorist act. This leaves the door open for the use of control orders as alternatives to prosecution or second attempts at prosecution, which is unacceptable in relation to basic principles of rule of law and the rule against double jeopardy.[38]

(e) No limit on extensions to orders

Another striking aspect of the control orders regime is that there are no limits on seeking consecutive control orders over an individual. The Explanatory Memorandum notes that one of the 'safeguards' ensuring that the control order regime is reasonable, necessary and proportionate is that a control order can only last up to 12 months from the day the interim control order is made, and only three months in the case of young persons between the age of 14 and 17.[39] However, as the Independent National Security Legislation Monitor has rightly pointed out, past proceedings have demonstrated that 'once a person has trained with a terrorist organisation that person will always meet the requirements for a [control order]'.[40] This is but one example which underscores the likelihood and ease with which individuals may be the subject of ongoing control orders.[41]

In contrast, the United Kingdom provides for a 2-year overall limit for Terrorism Prevention and Investigation Measures (**TPIMs**) (which are similar to control orders in Australia).[42] The time period was reduced from 4 years, as it was considered that burden imposed by a 4-year period was excessive in that 'the measures should not be used to warehouse people and should not be imposed indefinitely on individuals who have not been convicted of any crime'. Additional rationale for the new 2-year overall limit was that restrictions and monitoring for two years will have

[37] *Guzzardi v Italy* (European Court of Human Rights, Court (Plenary), Application No 7367/76, 6 November 1980), [93].
[38] *The Queen v Carroll* (2002) 77 ALJR 157.
[39] Explanatory Memorandum, Counter-Terrorism and Other Legislation Amendment Bill 2023, [32].
[40] Independent National Security Legislation Monitor, *Declassified Annual Report* (2012), 24.
[41] Rebecca Ananian-Welsh and Geroge Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia,' (2014) 38(2) *Melbourne University Law Review* 362, 369.
[42] *Terrorism Prevention and Investigation Measures Act* (UK) s 5.

degraded the person's capacity as an active terrorist or give the authorities time to uncover any evidence which they need to prosecute.[43]

As the above observations amply demonstrate, the control orders regime not only imposes significant and unjustified restrictions on civil liberties, and particularly on the right of individuals to be free of arbitrary detention and the unlawful deprivation of liberty but allows for such restrictions on civil liberties to recur overtime without end when certain triggers have been satisfied.

4.2 Control orders function independently of the right to due process and a fair trial

The second area of concern with control orders is the reduction of traditional safeguards that are built into criminal law. The safeguards that were built up over time within the criminal law recognise both the gravity of labelling someone a "criminal" and the severity of criminal sanctions as deprivations of liberty which have ongoing adverse consequences for individuals subjected to them. The use of control orders through the operation of Division 104 substantially subverts or ignores safeguards that are built into not only the Australian judicial systems but features that are common across the world. In demonstrating this issue, we highlight risks associated with ex-parte hearings, risks associated by the fact there is no requirement to provide reasons or evidence for an order to the controlee, a lower standard of proof (balance of probabilities compared to beyond reasonable doubt), and limited avenues of review available for controlees.

(a) Ex-parte hearings

Division 104 provides that interim orders may be issued ex parte and without notice to the affected person, with the interests of the controlee not being represented. Legal proceedings must be conducted according to established principles and procedures, designed to ensure a fair trial. Such procedural fairness is expected when depriving a person of his liberties and that includes a right of the affected party to be heard.

Usually, ex parte orders may be made in exceptional cases, which is not the case in interim control orders. Kirby J in *Thomas v Mowbray and Others* (2007) 237 ALR 194, at [173] (***Thomas v Mowbray***) in his dissenting opinion took issue that while '[a]n application for an interim control order may be made ex parte. Indeed, Division 104 assumes that ex parte proceedings will be routine.' There is no prerequisite for the applicant to satisfy the court that a proceeding ex parte is reasonably necessary in order to avoid an unacceptable risk of a terrorist offence being committed were the respondent to be notified before an interim control order is granted. Kirby J in *Thomas v Mowbray* was severely critical of this 'serious departure from the norm.'[44]

We note that the ex parte procedure contemplated includes that an interim control order may be issued only upon the satisfaction of certain conditions listed in section 104.4 of the Criminal Code; and the order does not begin to be in force until it is served personally on the person to whom it relates[45] and states a summary of the grounds on which the order is made.[46] We submit that these are not adequate protections and endorse Kirby J's view that these procedures 'seriously depart from the basic rights normal to judicial process.'[47] We note that these protections are even less adequate considering that control orders involve a judicial process which constraints an individual's liberty.

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[43] United Kingdom, Parliamentary Debates, House of Commons Public Bill Committee on the Terrorism Prevention and Investigation Measures Bill, 28 June 2011, 6th sitting, col 203 (James Brokenshire, Parliamentary Under-Secretary of State for the Home Department).

[44] *Thomas v Mowbray* 487.

[45] *Criminal Code* s 104.5(d).

[46] Ibid s 104.5(h).

[47] *Thomas v Mowbray* [347] referring to *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 126 [81].

'They can be applied against a person who has been acquitted or who has never been charged. Yet both orders enable significant restrictions on individual liberty. This is more than a breach of the old 'innocent until proven guilty' maxim: it positively ignores the notion of guilt altogether.'[48]

Recognising the prejudice to the controlee, the introduction of a special advocate in the control order regime (**CO regime**) has been suggested as especially relevant where a control order is sought on the basis of information withheld from the controlee.[49] However, this suggestion has not found favour as critics argue that it would 'unnecessarily delay and complicate interim applications'[50] and that 'the risk of inadvertent disclosure of information is too great'[51] and there is no existing or likely provision for a special advocate in the foreseeable future. Thus, the CO regime remains without any protection for the controlee's rights in this respect.

We agree with J Kirby's view that '[t]o expect a court to rely for its decisions solely upon the evidence supplied by the very officers seeking to secure or uphold the control order, is fundamentally inconsistent with the adversarial and accusatorial procedures, observed by the Australian judiciary until now in serious matters affecting individual liberty, as contemplated by Ch III of the Constitution.'[52]

(b) No reasons or evidence for the decision needs to be provided

A person is only entitled initially to receive a summary of the grounds on which the interim control order is issued.[53] The full reasons are not provided, whatever the circumstances or requirement. Further, the information that is likely to prejudice national security (within the meaning of the NSI Act) is not required to be disclosed.[54] This means that substantially very little information may be provided to the controlee on the grounds of national security, even by way of a summary.

The individual who is subject to an application or order may not be informed of particular evidence raised in the case against them and at the time of confirmation of the control order is only required to be provided 'any other written 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.'[55] As in the case of interim control orders, information that is served on the person or relied upon in court may be withheld on the grounds of national security; and additionally on grounds of public interest, risk to ongoing operations by law enforcement or intelligence agencies, or risk to the safety of the community, law enforcement officers or intelligence officers.[56]

In addition, since the notice of the order need only be given 48 hours before a confirmation hearing, it makes it even harder for the individual to contest it.

(c) Burden of proof and balance of probabilities

The presumption of innocence is a fundamental principle of the criminal justice system and a cornerstone of the right to a fair trial.[57] As enshrined in section 13.1 (1) of the Criminal Code '[t]he prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.'

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[48] Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's Criminal Code Since September 11, 2001' (2007) 16(1) Griffith Law Review 27.
[49] Law Council Submission.
[50] Control Order Safeguards Part 2, The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor (2016), para 8.8.
[51] Ibid para 8.10.
[52] J Kirby (dissenting), *Thomas v Mowbray* [365].
[53] *Criminal Code* s 104.5(h).
[54] Ibid s 104.5(2A).
[55] Ibid s 104.12A(2)(iii).
[56] Ibid s 104.12A(3).
[57] *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 481; Article 14(2) of the International Covenant on Civil and Political Rights.

The usual standard of burden of proof in criminal matters is that of *beyond reasonable doubt*. Given that the inferences in control order cases often relate to future conduct and arise in volatile scenarios, a conservative approach is taken as 'in Australia, judges in federal courts may not normally deprive individuals of liberty on the sole basis of a prediction of what might occur in the future.'[58]

The threshold for granting a control order is set to a low standard for an individual, in that if the Commissioner suspects (on reasonable grounds) any of the following, he may apply for a control order:[59]

- granting control order will substantially help prevent a terrorist attack;
- the controlee trained or participated in training with a listed terrorist organisation;
- the controlee engaged in a hostile activity in a foreign country;
- the controlee has been convicted in Australia of an offence relating to terrorism, a terrorist organisation or terrorist act; and
- the controlee has been convicted overseas for an offence that would, if occurred in Australia, be a terrorism offence within the definition of subsection 3(1) the Crimes Act.

The Law Council's submission to the Parliamentary Joint Committee on Intelligence and Security on the *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* dated 3 November 2017 (**Law Council Submission**) recommended that (if the CO regime is not repealed) an inference should only be drawn if it is the only rational inference, this should be compared with civil evidence rule that the inference relied on must be more probable than not.[60]

The disparity of the required standard between control orders and other similar means of preventative restrictions have been noted in that 'the grounds on which preventative detention orders and control orders can be made are defined as terrorism crimes elsewhere in Part 5.3 of the Criminal Code. For example, a control order can be made if the court is satisfied on the balance of probabilities 'that the person has provided training to, or received training from, a listed terrorist organisation'. This is very similar to the offences found in section 102.5 of the Code, except that section 102.5 employs the higher criminal standard of proof- that of 'beyond reasonable doubt'. Similarly, a preventative detention order may be issued where there are merely 'reasonable grounds to suspect' a range of activities that are criminal offences in Division 101.'[61]

This skewed balance of probabilities standard is further exacerbated by the fact that there are no limits on seeking consecutive control orders over an individual.[62] In its 2012 report[63] the Independent National Security Legislation Monitor (**INSLM**) reasoned that *Thomas v Mowbray* demonstrated that 'once a person has trained with a terrorist organisation that person will always meet the requirements for a [control order]'. As noted by Welsh and Williams[64], this 'highlights the likelihood and ease with which consecutive control orders may be obtained.'

Even post-sentence preventative detention and supervision orders operate to a higher standard which affords better protections to an individual subjected to proceedings. An extended

[58] *Thomas v Mowbray* [354].
[59] *Criminal Code* s 104.23.
[60] In a criminal case: *Shepherd v R* (1990) 170 CLR 573, 578. In civil cases: *Richard Evans & Co Ltd v Astley* [1911] AC 674, 687.
[61] Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's Criminal Code Since September 11, 2001' (2007) 16(1) Griffith Law Review 27, 48.
[62] *Criminal Code* s 104.5(2).
[63] Independent National Security Legislation Monitor, Declassified Annual Report (2012).
[64] Ananian-Welsh, Rebecca and Williams, George, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38(2) Melbourne University Law Review 362-408.

supervision or continuing detention order can be made under the Criminal Code if a court is satisfied: (i) 'to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community'; and (ii) 'that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.'[65] This standard of proof has been considered to be above the balance of probabilities test, but below the ordinary criminal standard.[66] Note also that the Court must be so satisfied on the basis of admissible evidence, and must consider whether there are less restrictive measures that could prevent any harm. To avoid doubt, the NSWCCL still considers these safeguards deficient. But nonetheless they better protect the liberty of the individual than the paucity of safeguards that exist under the CO regime.

Practically, the period of restrictions and monitoring should reduce or diminish a person's capacity as an active terrorist and give the authorities time to uncover evidence on which to prosecute, making a reasonable temporal limit on control orders a logical approach.

On the basis of the above submission our view is that control orders abrogate the fundamental principles of criminal justice and should be repealed.

(d) Limited avenues of challenge

In the absence of a constitutional or statutory human rights charter at Commonwealth level in Australia, those who fall within the scope of the Division 104 scheme have limited avenues to challenge their ongoing detention. This, we believe, makes it all the more crucial that we oppose this scheme (which, as we have noted, breaches the human rights of those subject to it, and abrogates fundamental criminal law principles).

Though the Australian regime is modelled on UK Prevention of Terrorism Act 2005, unlike Australia, the UK regime is subject to limitations of the European Convention on Human Rights (**ECHR**) and the Human Rights Act 1998 (UK) in the context of these orders to ECHR limitations. Further, as acknowledged in *Thomas v Mowbray*[67], 'the role of the special advocate has proved instrumental in ensuring that the tribunals and courts established by law can discharge their functions at least with a minimum of informed scrutiny of executive allegations which have in this way sometimes been found unsustainable.'

At the time of enactment of Division 104, the derogation of this section from basic criminal justice principles was justified by the temporary nature of the provisions, as evidenced by the inclusion of the sunset clause.[68] The proposed extension of Division 104 past the sunset date originally envisioned by legislators' flies in the face of this original justification and underscores the need to restore the ordinary protections offered by constitutional and criminal law.

4.3 Control orders are unnecessary in practice

As has been noted above control orders can be sought in a range of scenarios which can primarily be distilled into (a) an alternative to prosecution, (b) a second attempt to restrict a person following an unsuccessful prosecution and (c) to control a person offender once they have been released from prison and still pose an unacceptable risk to society. The sections above have highlighted the multiple issues that control orders create in respect of human rights. This section concludes the submission by demonstrating that in addition to the various human rights issues created by control orders, the control order regime is also ripe to be repealed on the basis that there are other

[65] *Criminal Code* s 195A.7(1).
[66] *Minister for Home Affairs v Benbrika* [2020] VSC 888, [392].
[67] Ibid [377].
[68] *Criminal Code* s 104.32; Rebecca Ananian-Welsh and Geroge Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia,' (2014) 38(2) *Melbourne University Law Review* 362, 367.

more appropriate measures already in place that serve the function that control orders seek to achieve.

The above three reasons for seeking a control order can be separated out into control orders sought against persons based on (a) past conduct in a post-sentence scenario, or (b) based on preparatory activity for anticipated future conduct in relation to terrorist activity. That is, there has already been a conviction, or there is preparatory conduct that is sought to be prevented and controlled. In our view, any conduct which falls short of being captured by either of these other measures is not conduct which warrants coercive intervention from the state.

(a) Post-sentence scenario

In relation to (a), the NSWCCL recommends that ESOs (under Division 105A) should act as the only mechanism for managing a terrorist offender's risk to the community following the expiry of his or her sentence. ESO's can be applied to implement a range of supervision, monitoring and management conditions which are applied to high-risk offenders. ESO's can permit visitation to law enforcement officials, can require the controlee to report regularly, to wear an electronic monitoring device, to not associate or make contact with certain groups or individuals, or to not engage in specific activities. Additionally, from a rehabilitation point of view, an ESO can also require a controlee to engage in interventions to address offending behaviour. The measures implemented by control orders are largely mirrored by ESOs which indicates there is no need for an interoperability scheme with both control orders and ESOs. To be clear, we are not completely comfortable with the ESO regime itself, however, to the extent that it affords more safeguards to individuals subjected to it and has built in proportionality considerations, we consider it the optimal approach to manage people who continue to pose a risk after their sentences for criminal conduct have expired.

(b) Preparatory conduct

In relation to (b) NSWCCL notes that Part 5.3 offences already extend criminal liability to acts of preparation. In turn this demonstrates that in practice there is no need for control orders in relation to preparatory activities as existing avenues to control preparatory conduct already exist. There have been multiple successful prosecutions through these provisions including, notably, *Lodhi v R*[69] (***Lodhi***) and Minister for *Minister for Home Affairs v Benbrika*. (***Benbrika***)[70] For example, in *Benbrika*, upon release from a 15-year sentence, the Supreme Court of Victoria granted a CDO over Mr Benbrika for a period of three years. Lastly, the existing provisions also safeguard against the issues raised in section 4.2 above.

It is important to note that Part 5.3 offences already extend criminal liability in a way which was previously unknown to the criminal law, as the exigencies of modern society changes particularly in the post 9/11 legal landscape.[71] In *Lodhi*, Spigelman CJ observed:

> "*Each of the offence sections is directed to the preliminary steps for actions which may have one or more effects. By their very nature, specific targets or particular effects will not necessarily, indeed not usually, have been determined at such a stage.*
>
> *…*

[69] (2006) 199 FLR 303.
[70] (2021) 272 CLR 68.
[71] See, for example, *State of New South Wales v Cheema (Preliminary)* [2020] NSWSC 876 [84]-[85] (Johnson J) citing *Lodhi v R* (2006) 199 FLR 303, [66] (Spigelman CJ; Sully J agreeing at [111]; *Lodhi v R* (2007) 179 A Crim R 470, [79] (Spigelman CJ); [211] (Barr J); [229] (Price J) with approval; see also, *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, [46] (Kiefel CJ, Bell, Keane and Steward JJ).

> *Preparatory acts are not often made into criminal offences. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct, e.g. well before an agreement has been reached for a conspiracy charge.*"[72]

Elsewhere, Part 5.3 offences have been described by Simester and von Hirsch, in remarks which have been adopted by Gageler J, as:

> *"[P]rophylactic offences" in the sense that the "risk of harm" relevantly from the commission of a terrorist act, "does not arise straightforwardly from the prohibited act" but "only after, or in conjunction with, further human intervention – either by the original actor or by others".*[73]

So even absent the control order regime, other avenues are already available to extent the criminal law and mitigate against the risk of terrorism offences.

In concluding this section, it is worth reiterating what has been highlighted above. In the first decade after control orders were introduced, only six control orders were made and or several years following no control orders were made. Notably, since January 2019, there have been 19 control orders made in relation to 15 different people. 14 of these orders have been made against people that have already been convicted of a terrorism offence. Only 1 control order was sought at the point in time before conviction. The lack of use of control orders, combined with effectiveness of ESOs, further demonstrates that in practice there is no need for control orders.

(c) Recommendation

The NSWCCL recommends that ESOs (Extended Supervision Orders, Division 105A) should act as the only mechanism for managing a terrorist offender's risk to the community following the expiry of his or her sentence. ESOs are an adequate measure for the protection of society such that they can be used in the place of control orders. NSWCCL recommends that because the ESO regime has been introduced, Division 104 of the Criminal Code is no longer needed in the in the original manner that it was introduced for and should therefore be repealed. The ESO regime is designed to target people that have a history of terrorism offences. Not only is the ESO regime better targeted, but the regime also avoids problematic aspects of the control order regime (many of which have been noted above) including ex parte applications, applications based on untested evidence and long delays prior to confirmation hearings. The ESO regime is preferred because the process properly tests the application in court when an order is sought. The regime is appropriately targeted to those with a history of having committed a terrorism offence – therefore the imposition of restriction would be more appropriate. In relation to preparatory offences, sections 101.4, 101.5 and 101.6 of the Criminal Code extend criminal liability to acts of preparation.

[72] *Lodhi v R* (2006) 199 FLR 303, 318 [65], [66].
[73] *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68, [56]; quoting from AP Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs* (Hart Publishing, 1st ed, 2011), 79.