

THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

GEORGE WILLIAMS AO

ANTHONY MASON PROFESSOR
SCIENTIA PROFESSOR
AUSTRALIAN RESEARCH
COUNCIL LAUREATE FELLOW
FOUNDATION DIRECTOR,
GILBERT + TOBIN CENTRE OF
PUBLIC LAW

10 September 2012

Mr Bret Walker SC
Independent National Security Legislation Monitor

Dear Mr Walker

Submission on control orders and preventative detention orders

We attach a submission on control orders and preventative detention orders under the *Criminal Code Act 1995* (Cth).

Our submission addresses Issues for Consideration numbers 41-45 identified in your 2011 Annual Report in turn.

Yours sincerely

Lisa Burton
Research Assistant

Professor Andrew Lynch
Centre Director

Tamara Tulich
PhD Candidate

Rebecca Welsh
PhD Candidate

Professor George Williams

Should anything be done about doubtful aspects of the constitutional validity of control orders and preventative detention orders under the Criminal Code? (Issue 41)

(a) The constitutional validity of executive detention

Preventative detention orders are a form of executive detention. Control orders are not. First, as they are made by Federal courts established under Chapter III of the Constitution, upon application by the executive, control orders are judicially-imposed curtailments of liberty. Secondly, although the imposition of restrictions under a control order is potentially very severe, ostensibly control orders merely restrict an individual's liberty, rather than deprive him or her of it. Although the UK courts have held that control orders which impose measures tantamount to house arrest are subject to the same legal limits as detention,¹ in *Thomas v Mowbray*² the High Court declined to adopt this approach. Instead, a majority of the Court held that interim control orders could not be equated with 'involuntary detention' in the custody of the State.³ The constitutional validity of control orders is further discussed in section (c) of our response to Issue 41.

It is unclear whether preventative detention orders could be impugned on the basis of some implied immunity from executive detention, of the kind articulated in *Chu Kheng Lim v Minister for Immigration*.⁴ Although *Chu Kheng Lim* indicated that Australian citizens can only be detained by order of a court, following a finding of criminal guilt, the High Court has since cast significant doubt on the existence or scope of this immunity.⁵ At the very least, it seems that detention which has a protective (rather than punitive) purpose need not be ordered by a court following a finding of criminal guilt. In *Al-Kateb v Godwin*, a majority of the High Court held that detention is characterised by reference to its purpose, rather than its impact on the detainee.⁶ It may be assumed that preventative detention orders are likely to be characterised as protective in nature (though interestingly the objects clause that commences division 105 of the *Criminal Code* is not as express in this regard as that of division 104 concerning control orders).

Litigation currently before the High Court⁷ may provide further guidance on the constitutional limitations on executive-based detention. Irrespective, the power of any arm of government to detain individuals on the basis of predicted future dangerousness raises serious policy concerns. In the absence of a relevant prior conviction, it seems incongruent with the principles of liberal democracy and risks subverting the integrity of the criminal law. Such powers should not exist unless there is a pressing need for them — which is doubtful (*see Issues 42 and 43*). Further, even if the substance of the orders is constitutional, there are significant doubts about the process by which they are made. We turn now to consider these issues.

(b) The involvement of judges in the preventative detention order regime

Preventative detention orders can be made by a range of people appointed by the Attorney-General to act as 'issuing authorities', including a judge of the Federal Court, Federal

¹ *Secretary of State for the Home Department v JJ and Others* [2006] EWHC 1623 (Admin); *Secretary of State for the Home Department v MB* [2008] 1 AC 440.

² (2007) 233 CLR 307.

³ 330 (Gleeson CJ); 356 (Gummow and Crennan JJ).

⁴ (1992) 176 CLR 1.

⁵ *Al-Kateb v Godwin* (2004) 219 CLR 562; *Re Woolley*; *Ex parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1; *Vasiljkovic v Commonwealth* (2006) 227 CLR 614.

⁶ See eg. (2004) 219 CLR 562, 648-50 (Hayne J), cf. 613 (Gummow J).

⁷ *Plaintiff M47/2012 v Director General of Security & Ors*.

Magistrates Court, or a State or Territory court. The power is conferred *persona designata*. By virtue of the constitutional separation of the judicial power, the power to make a preventative detention order can only be conferred on a judge if it is compatible with their judicial role.⁸

There are indications that this power would be considered compatible. Broadly speaking, the High Court has rarely found powers to be incompatible with the judicial function — though recent decisions concerning State laws such as those considered in *International Finance Trust Company Limited v New South Wales Crime Commission*,⁹ *South Australia v Totani*¹⁰ and *Wainohu v New South Wales*¹¹ suggest a renewed vigour to the incompatibility doctrine. The power to make a preventative detention order bears similarities to other powers upheld by the High Court as compatible with judicial power. The power requires the assessment of an application made by the AFP in closed proceedings in chambers, like the power to issue telecommunications interception warrants upheld in *Grollo v Palmer*. The power requires assessment of a similar set of criteria to that upheld as validly ‘judicial’ in *Thomas v Mowbray*, in respect of interim control orders. The task of making a preventative detention order is exercised independently and does not incorporate the judge into the executive branch of government, the basis of the finding of incompatibility in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.¹² It should also be noted that the power to make a preventative detention order based solely on the predicted dangerousness of an individual rather than past wrongdoing is not necessarily incompatible with the judicial power. Such powers were upheld in *Fardon v Attorney-General (Qld)*¹³ and *Baker v The Queen*.¹⁴

However, there are also indications to the contrary. The Court has traditionally considered imprisonment to be particularly deserving of a fair and proper process, as the involvement of judges in ordering imprisonment outside the criminal trial process poses a unique risk to judicial independence and integrity.¹⁵ The extent to which a power complies with the hallmarks of due process is pivotal to determining whether it is compatible with judicial power; this was a basis on which the preventative detention scheme in *Kable v Director of Public Prosecutions (NSW)* was invalidated and the scheme in *Fardon* upheld.¹⁶ In the recent case of *Wainohu*, the High Court confirmed that a power which can be exercised in a manner contrary to the core elements of procedural fairness may be incompatible with judicial power. Thus both the power to declare that a certain organisation was a ‘declared organisation’ and the subsequent Supreme Court decision to issue control orders with respect to members of the ‘declared organisation’ were incompatible because there was no obligation to provide reasons for the decision.¹⁷

The process by which a preventative detention order is made lacks the hallmarks of procedural fairness. Orders are made in a closed proceeding to which the rules of evidence do not apply. The issuing authority is not able to hear directly from the detainee; the detainee can only make submissions via the detaining officer. The decision to make a preventative detention order may

⁸ *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348.

⁹ (2009) 240 CLR 319.

¹⁰ (2010) 242 CLR 1.

¹¹ (2011) 243 CLR 181.

¹² (1996) 189 CLR 1.

¹³ (2004) 223 CLR 575.

¹⁴ (2004) 223 CLR 513.

¹⁵ See, eg, *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 23 (Brennan CJ, Deane and Dawson JJ), [128] (Gummow J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 106-107 (Gaudron J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 612 [79] (Gummow J) citing *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161, 178-179 [56] (Kirby J).

¹⁶ *Fardon v Attorney-General (Qld)* 655 (Callinan and Heydon JJ).

¹⁷ [99], [103].

be based on secret evidence, which is never disclosed to the detainee and which the detainee is given no opportunity to challenge. The issuing authority need only provide a summary of the grounds on which the order was made, not a detailed set of reasons. Once again, information the disclosure of which might prejudice national security need not be included in this summary, meaning the detainee could never know the reason why they were detained.

This is a far greater departure from ordinary judicial standards than those powers considered in *Fardon*, and even in *Kable*. Those pieces of legislation permitted the detainee to contest their detention in an open hearing, with full legal representation and sufficient notice or information to enable him or her to build and put a case. Further, a preventative detention order has more severe consequences for individual liberty than many other non-judicial functions which have previously been upheld by the Court as not incompatible with judicial power — greater consequences, for example, than the issue of a phone tapping warrant which itself imposes significantly on the privacy and property rights of the individual.¹⁸ These distinctions could support a finding that preventative detention orders go too far; that by enabling serving judges to order preventative incarceration in proceedings lacking qualities of fairness, openness and equality of arms the provisions are repugnant to the separation of powers. It should also be noted that the standard of compatibility against which *persona designata* functions conferred upon members of the federal judiciary are assessed may be higher due to the strictness of the constitutional separation of judicial power at the Commonwealth level. The application of the incompatibility limit to the functions of judges of State and Territory Courts has only been recently given authority and remains undeveloped.¹⁹ On the other hand the incompatibility limit is well established and has applied with respect to federal judges for some time.²⁰ It is conceivable that the conferral by the legislation of these powers upon State judges is constitutionally valid while the attempt to do so in respect of federal judges is not.

Therefore, there is some doubt as to whether the involvement of judges in the preventative detention order regime is constitutionally valid. This cannot necessarily be remedied by giving the power to a federal court instead; this would simply shift the constitutional question to whether the power to make a preventative detention order is judicial. This may be considered preferable in that it would make the preventative detention regime consistent with the use of courts to make control orders, arguably capitalising on the benefits to human rights protection identified by Chief Justice Gleeson as ensuing from such an approach.²¹ However, there is a simpler, more modest, solution. As Senator Linda Kirk recommended in her separate comments accompanying the 2005 Senate Legal and Constitutional Affairs Committee inquiry on Anti-Terrorism Bill (No 2) 2005,²² the power to appoint sitting judges as issuing authorities could be removed, ensuring only former judges or members of the AAT could perform this function. Former judges are likely to retain the same skills of impartiality, objectivity and critical analysis that current judges are hoped to bring to the role, while avoiding any compromise of judicial integrity. It would strengthen the constitutional basis of the regime.

¹⁸ *Grollo v Palmer*. McHugh J drew specific attention to this in his Honour's dissent in that matter, [26].

¹⁹ *Wainohu v New South Wales* (2011) 243 CLR 181.

²⁰ *Hilton v Wells*; *Grollo v Palmer*.

²¹ Gleeson CJ flagged this issue in *Thomas v Mowbray*, where he stated '[t]he advantages, in terms of protecting human rights' of vesting the power to make control orders in the executive rather than the judiciary 'are not self-evident': [17].

²² Senate Legal and Constitutional Affairs Committee, *Provisions of the Anti-Terrorism Bill (No. 2) 2005* (2005), 200.

(c) The involvement of federal courts in the control order regime

Control orders are made by ‘issuing courts’. The Federal Court, Federal Magistrates Court, and Family Court can all act as issuing courts. These Federal courts can only exercise judicial power, and thus the power to make control orders is only constitutionally valid if it can be classified as judicial. In contrast to the test for valid conferral of preventative detention orders upon judicial officers acting *persona designata*, it is not enough that the power is compatible with judicial power.

In *Thomas v Mowbray*, a majority of the High Court concluded that the power to make interim control orders was judicial and not otherwise contrary to the separation of judicial power.²³ However, *Thomas* did not determine the constitutional validity of the process by which a control order is confirmed.²⁴ In light of the apparent trend in decisions such as *International Finance Trust*, *Totani* and *Wainohu*, there is reason to query whether the confirmation hearing process is constitutional. The interaction of provisions of the *Criminal Code 1995* (Cth) and *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) permit a control order to be confirmed — in an ostensibly adversarial confirmation hearing — on the basis of evidence which is kept secret. The power to confirm a control order on the basis of evidence of which the controlee is never informed, and is afforded no opportunity to challenge, may be so repugnant to judicial process as to be unable to be classified as judicial power, and thus unable to be conferred on a Chapter III court.

In order to address these doubts, the *Criminal Code* might be amended to remove the apparent tension within existing provisions over the minimum level of disclosure to which a controlee is entitled. This would involve the addition of an express stipulation that those provisions which permit the AFP to withhold intelligence (s 104.12A(3)) are constrained by those that require sufficient disclosure for the person to understand and respond to the case to be put for confirmation of the order (s 104.12A(2)(a)(iii)). Currently, that priority is the reverse. A clear legislative direction that would not permit a control order to be confirmed without informing the controlee of the core (or ‘gist’) of the case against him or her would bring the Australian control order scheme more clearly into line with the changes wrought to its UK antecedent through decisions of the European Court of Human Rights and the UK Supreme Court.²⁵ It would then have to be determined whether such an obligation renders the regime unworkable.

(d) The legislative basis of the regimes

Thomas v Mowbray held that the legislation which permits the making of interim control orders was a valid exercise of the defence power. The same conclusion would probably have been reached regarding the rest of the control order regime and the preventative detention regime. It must be noted that the defence power waxes and wanes in accordance with the defence needs of the nation. Thus the fact the control order regime was found to be within power in 2007 does not necessarily mean it is within power today. However, it is unlikely that the defence needs of the nation have significantly diminished since 2007; for example, our terrorist threat alert level has remained at medium ever since and Australia remains in the same fields of combat (namely Afghanistan and Iraq).

²³ This finding has been analysed, and criticised, at length elsewhere. See for example Andrew Lynch, ‘Thomas v Mowbray: Australia’s “War on Terror” Reaches the High Court’ (2008) 32 *Melbourne University Law Review* 1183.

²⁴ [31] (Gleeson CJ), [122-25] (Gummow and Crennan JJ), [364-65] (Kirby J).

²⁵ *A v United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 3455/05, 19 February 2009) and *Secretary of State for the Home Department v AF (No. 3)* [2009] UKHL 28.

Do international comparators support or oppose the effectiveness and appropriateness of control orders and preventative detention orders? (Issue 42)

Control orders were modelled on the measure of the same name enacted in the UK, which is the first and only other comparable country to have created such a measure. The UK introduced its regime in March 2005 as a legislative response to the decision of the House of Lords in *A v Secretary of State for the Home Department*.²⁶ The fact the UK had introduced control orders was seen as an example of international ‘best practice’ which ought be copied in Australia in the wake of the London bombings of July 2005.²⁷ However, the UK did not create control orders in response to the London bombings; rather, it created them to control those individuals which it could neither ‘detain nor deport’ due to limitations imposed by the European Convention on Human Rights (‘ECHR’) and could not prosecute under the criminal law.

The UK could not deport non-citizens thought to pose a security risk to countries where they faced a real risk of torture, nor keep those foreign nationals in indefinite immigration or preventative detention. This would breach either Article 3 (the prohibition against torture and inhumane or degrading treatment) or, in the absence of a valid derogation, Article 5 (the right to liberty) of the ECHR.²⁸ Further, intercept evidence is inadmissible in criminal proceedings in the UK²⁹ and, when control orders were introduced, the UK did not yet have preparatory terrorism offences as broad as those which have existed in Australia since 2002. Therefore, these individuals could also not be prosecuted because they had not yet committed a crime or because the only evidence that a crime had been committed was inadmissible.

In Australia, this problem simply does not exist. The *Criminal Code* establishes a broad range of preparatory terrorism offences, including section 101.6, which criminalises ‘any act (done) in preparation or planning a terrorist act’, even if no terrorist act ever occurs. Inchoate liability also attaches to these preparatory offences. For example, it is an offence to attempt to do an act in preparation for a terrorist act.³⁰ Intercept evidence is admissible in criminal proceedings,³¹ and there is no Australian equivalent to the ECHR which would prevent the Australian government from either deporting non-citizens thought to pose a security risk, nor detaining them indefinitely. In fact, the High Court upheld the constitutional validity of indefinite detention of non-citizens in *Al-Kateb v Godwin*. The constitutional validity of preventative detention in non-immigration contexts has also been upheld (*see Issue 41*).³²

The claim that control orders represented international ‘best practice’ has since proved false. UK control orders ‘were widely condemned on human rights grounds and ... subject to many

²⁶ [2004] UKHL 56.

²⁷ John Howard, ‘New Counter-terrorism Laws’, Joint Press Conference with the Attorney-General, Parliament House, Canberra, 8 September 2005.

²⁸ *Chahal v United Kingdom* [1996] ECHR 54; *A v Secretary of State for the Home Department* [2004] UKHL 56. In *A v Secretary of State*, the UK House of Lords considered the validity of a derogation which had been entered to excuse the preventative detention of those individuals the UK could not deport on national security grounds. The preventative detention measure applied only to non-citizens. However, the evidence showed that the security risk posed by citizens was just as great (see eg [32]). Therefore, the House of Lords concluded that the measures were not adequately tailored to counter the terrorist threat and not ‘strictly required by the exigencies of the situation’.

²⁹ *Police Act 1997* (UK) pt 1.

³⁰ *Criminal Code Act 1995* (Cth), ss 11.1 and 101.6.

³¹ *Telecommunications (Interception and Access) Act 1979* (Cth), parts 2-6.

³² *Thomas v Mowbray*, 328, adopting statement of McHugh J in *Fardon v Attorney-General (Qld)*. Note other judges have expressed different views – see for example Gummow J in *Fardon*, 612.

successful court challenges'.³³ In 2011, a comprehensive review by the UK government concluded that control orders were too intrusive and untargeted.³⁴ At first glance, this suggests Australia should repeal its regime too. However, the comparison is not so clear cut. The UK abolished control orders, but replaced them with something similar: Terrorism Prevention and Investigation Measures ('TPIMs').³⁵ This was again justified on a basis that does not exist in Australia: although broad preparatory offences were introduced in 2006, the ban on intercept evidence remains in place and the deportation restrictions under the ECHR are an immutable constraint. Further, though the Australian regime was inspired by the UK regime, the two were in fact quite different in operation.³⁶ For example, UK control orders were executive orders subject to judicial review, rather than judicial orders. Further, the grounds upon which a UK control order could be made were narrower than those which apply to the Australian regime, requiring proof of individual involvement in terrorism related activity.

Far from sustaining the Australian control order regime, the UK precedent actually serves to undermine it. Australia does not face the same problems which necessitated the creation of control orders in the UK, or their replacement by the TPIM regime. The UK has found that control orders are not 'best practice'; rather, they are unnecessarily invasive and in need of repeal. If Australia only adopted control orders to follow the example of a country which has since found them to be unsatisfactory, is there some other reason that might be given for their retention? The former Attorney-General Phillip Ruddock justified control orders on the basis that they are more cost-effective than surveillance.³⁷ Similar statements have recently been made in the UK.³⁸ This is a remarkably poor justification for extraordinary powers which permit such significant restrictions of individual liberties. Thus, international comparisons strongly suggest the Australian regime is unnecessary and unjustified and should be repealed.

Does non-use of control orders and preventative detention orders suggest they are not necessary? (Issue 43)

The fact powers are rarely used does not necessarily mean they will not be needed in the future. It is very difficult for outsiders to judge why the AFP has not chosen to utilise the regimes. However, what can be claimed without controversy is that control orders and preventative detention orders have not proven necessary to date.

Only two interim control orders have ever been made, and only one of those was confirmed. The first was made against Jack Thomas immediately after his successful appeal against conviction for a number of terrorism offences, using the very evidence from his trial which had been ruled inadmissible on appeal.³⁹ The second was also unusual. After over five years detention in Guantanamo Bay, David Hicks was convicted after pleading guilty to a crime in proceedings before a US military commission. Having served out the remainder of his sentence in a South Australian jail, Hicks was placed under a control order which he did not seek to

³³ Clive Walker and Alexander Horne, 'The Terrorism Prevention and Investigation Measures Act 2011: One Thing but Not Much the Other?' (2012) *Criminal Law Review* 421 422-423.

³⁴ UK Government, *Review of Counter-terrorism and Security Powers* (2011).

³⁵ *Terrorism Prevention and Investigation Measures Act 2011* (UK).

³⁶ See further Andrew Lynch, 'Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law' (2008) 8 *Commonwealth Law Journal* 159.

³⁷ Andrew Lynch, Ben Saul and George Williams, Submission to the Senate Inquiry on the *Anti-Terrorism Bill [No 2]* 2005 (Cth), 10.

³⁸ UK Government, *Review of Counter-terrorism and Security Powers* (2011), 38.

³⁹ *Jabbour v Thomas* [2006] FMCA 1286.

challenge.⁴⁰ One cannot help but suspect that the making of a control order against Hicks was driven by political, not legal, concerns. It is instructive that in both cases the control orders were applied as a postscript to some other legal proceeding – this is quite distinct from their justification in the UK and Australia at the time of their introduction as a measure to be used when there was an insufficiency of evidence or some other obstacle to the bringing of criminal charges.

No control order has been made since the control order over Hicks was confirmed in 2008 and no preventative detention order has ever been sought. Yet, Australia's terrorism alert level has remained at medium and the Director-General of ASIO has recently stated: 'each year ASIO responds to literally thousands of counterterrorism leads ... we are currently involved in several hundred counterterrorism investigations and inquiries.'⁴¹ The fact control orders and preventative detention orders remain unused in such a climate suggests they are not a useful or necessary tool.

In comparison, 52 control orders were made in the UK over a comparable length of time. This appears to support our claim that the need for such orders which may have existed in the UK does not exist in Australia. Based on the limited Australian experience, the only role which control orders can play in Australia is a dangerous one; permitting the AFP to 'forum shop' and impose restrictions on individuals who may have been acquitted of any criminal charges, or to engage in political posturing.⁴² If the only role that control orders are likely to play is to subvert the integrity of the law, they should be repealed.

Should control orders be more readily available? (Issue 44)

This is difficult to assess, given so few control orders and no preventative detention orders have been sought. The fact so few orders have been sought signals they are unnecessary, rather than too difficult to obtain — as the discussion above in respect of Issue 43 supports.

Should control orders and preventative detention orders require a relevant prior conviction and unsatisfactory rehabilitation? (Issue 45)

(a) Control orders

To the extent that control orders are to be retained, this suggested limitation has some merit. We have explained that, at present, control orders can be used as a fall-back device when criminal prosecutions fail, which is unsatisfactory for numerous reasons. Requiring a relevant prior conviction and unsatisfactory rehabilitation would align the control order regime with state-based schemes for dangerous sex offenders. It diminishes the concerns raised above, about the power of the state to restrict the liberty of an individual not convicted of any wrongdoing. It would also introduce express consideration of the kind of risk posed by the individual; though

⁴⁰ *Jabbour v Hicks* (2007) FCMA 2139; *Jabbour v Hicks* [2008] FMCA 178. Federal Magistrate Warren Donald was reported as lamenting the fact that the order was issued on the basis of evidence from only one-side: ABC Radio, 'Hicks fails to appear at control order hearing', *PM*, 18 February 2008 (Warren Donald FM).

⁴¹ *Ibid.*

⁴² Andrew Lynch, 'Thomas v Mowbray: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1183, 1188, quoting Lucia Zedner, 'Seeking Security by Eroding Rights: The Side-Stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007) 257, 265; Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's Criminal Code Since September 11, 2001' (2007) 16(1) *Griffith Law Review* 27, 50.

of course, such an order would still turn on a prediction of future behaviour. Depending on how these criteria are incorporated, it would also diminish the concerns about the uncertainty and breadth of the criteria by which a control order is made, as (unsuccessfully) challenged in *Thomas v Mowbray*. If this proposal were adopted, then the decision to make a control order following the completion of an individual's sentence would ideally be made in an open and contested forum.

However, this proposal also poses significant risks. Post-sentence preventative measures in other contexts (such as those which can be imposed against sex offenders) have been controversial. Predictions about the future risks an individual poses are inherently fallible. Imposing additional, civil preventive measures upon individuals who have already 'served their time' risks distorting the integrity of the criminal justice system. These difficulties would be compounded in the control order context, where 'a relevant prior offence' may include a preparatory offence, or an inchoate offence that attaches to a preparatory offence. These types of offences are not common to the criminal law, with criminal responsibility arising 'at an earlier stage than is usually the case for other kinds of criminal conduct, eg well before an agreement has been reached for a conspiracy charge'.⁴³ A person may thereby be subject to significant restrictions on liberty pursuant to a control order when the offence for which they were convicted was far removed from a terrorist act and itself an exceptional measure in Australian criminal law.

It could also be argued that a prior conviction and unsatisfactory rehabilitation requirement would undermine the purpose and utility of control orders. We have already submitted that there is no obvious need for control orders in Australia. The criminal offences established by the *Criminal Code* are sufficient to control a wide range of terrorist-related activity, including that which is preparatory to a terrorist act. Imposing a prior conviction and unsatisfactory rehabilitation requirement may make the measures both too narrow and available too late in the piece. Control orders would have no power to prevent terrorist acts committed by individuals with no relevant prior convictions, and yet it is these people (and for this very reason) who are generally favoured by terrorist organisations to carry out their work.⁴⁴ The extent to which it is possible to rehabilitate convicted terrorists is a vexed question.⁴⁵ However, there has been no suggestion that convicted terrorists have recidivism rates high enough to justify or require such a measure.

(b) Preventative detention orders

It would be far more problematic to include a prior conviction and unsatisfactory rehabilitation requirement in the preventative detention order regime. This would fundamentally alter the purpose and scope of the regime; from a system of brief, emergency orders designed to prevent an imminent act, to a scheme for prolonged, ongoing detention on a preventative basis. The present ground on which the orders may be issued would no longer seem appropriate, and it is not clear what grounds would be introduced or how these would be justified. We would not support such a change.

⁴³ *Lodhi v R* [2006] NSWCCA 121 at [66] per Spigelman CJ.

⁴⁴ Andrew Lynch, 'Thomas v Mowbray: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1183, 1187.

⁴⁵ Nicola McGarrrity, "'Let the Punishment Match the Offence": Determining Sentences for Australian Terrorists' (2012-2013) *International Journal of Crime and Justice* (forthcoming).