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Straddling the Civil/Criminal Divide: The Terrorism Suppression (Control Orders) Act 2019

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The Terrorism Suppression (Control Orders) Act 2019 establishes a regime of judicially-imposed control orders, devices that subject particular individuals to restrictions on their liberty outside of the criminal justice process. This article discusses the impetus for the control order legislation, namely the need to have a means of dealing with certain returnees from the Syrian Civil War, as well as the legislation's key features, which are derived from equivalent laws in the United Kingdom and Australia. The article also considers whether the legislation might breach certain rights under the New Zealand Bill of Rights Act 1990. The overall picture that emerges is that a considerable responsibility and burden is being placed on the courts to remedy, or at least mitigate, the rights concerns that might arise through the operation of this piece of permanent counterterrorism legislation.

I Introduction

The Terrorism Suppression (Control Orders) Act 2019 (TSCOA) establishes a regime whereby the High Court can impose control orders, measures that impose various restrictions upon the affected person — the "relevant person" in the TSCOA's terminology, or the "controlee" in counterterrorism law argot.[1] In effect, control orders allow the state to subject individuals to restrictions characteristic of the criminal justice system without the attendant procedural protections of the criminal justice process.

Although similar regimes have existed overseas for some time, the TSCOA is a novel development in New Zealand. The impetus for the TSCOA's hasty enactment in late 2019 was the prospect of the return of a small number of foreign fighters — individuals who had left New Zealand to join various groups fighting in the Syrian Civil War — and the security risk that some amongst them might pose. Since then, the Act's remit has been expanded by reforms to counterterrorism legislation enacted as a result of the Christchurch mosques attack of 15 March 2019.

The purpose of this article is to explain the broader context behind the enactment of the TSCOA, to explore the comparative law influences on its key features, and to highlight and discuss particular issues with the Act. Part II of the article situates the TSCOA as part of a broader set of responses to the problem of returning foreign fighters, and outlines the circumstances of the TSCOA's enactment. Part III describes the TSCOA's operative provisions and traces its comparative law genealogy, with particular reference to its Australian and British equivalents. Part IV discusses three concerns with the TSCOA: whether the process for imposing control orders is procedurally fair, whether their restrictions might result in arbitrary detention contrary to the New Zealand Bill of Rights Act 1990 (BORA), and whether control orders might amount to a second penalty contrary to the BORA. The overall picture that emerges is that considerable responsibility and faith is being placed in the courts to remedy, or at least mitigate,

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1 Terrorism Suppression (Control Orders) Act 2019 [TSCOA], s 6.

the rights concerns that might arise in respect of a piece of permanent counterterrorism legislation that will likely prove resistant to repeal.

II The Impetus for the TSCOA

A *The foreign fighter problem*

The TSCOA was enacted as a response to the threat posed by the return of foreign fighters, a term referring to "individuals, driven mainly by ideology, religion and/or kinship, who leave their country of origin or their country of habitual residence to join a party engaged in an armed conflict".[2] An unprecedented number of such individuals left their home states and joined various armed groups involved in the Syrian Civil War from 2011.

Foreign fighters are an old problem.[3] Perhaps the most well-known prior instance of mass mobilisation of foreign fighters was during the Spanish Civil War, where some 40,000 volunteers from various countries enlisted in the International Brigades.[4] Indeed, this historical precedent has been invoked in romantic terms during the New Zealand legislative debates concerning foreign fighters.[5] The history, however, is more complicated. Foreign fighters headed to Spain, on paper at least, faced legal jeopardy. The British Government's official position was that volunteering or recruiting fighters for any party to the Spanish conflict was an offence under the Foreign Enlistment Act 1870 (UK) (FEA).[6] The FEA, which applied throughout "all the dominions of Her Majesty",[7] remained in force in New Zealand until 1961.[8] Accordingly, on the same day that the British Government issued an official statement on the FEA's applicability, there was a public notice of this in New Zealand.[9] Thus, New Zealanders, like British volunteers, faced prosecution if an offence could be proved (which it invariably could not).[10] The situation in Canada was similar; the FEA applied there until it was replaced by a local equivalent in 1937.[11] Ultimately no one was charged or prosecuted.[12]

Moreover, returnees from Spain were not considered innocuous by their home states. While little information exists regarding New Zealand returnees,[13] the picture overseas is clearer. Canadian police were suspicious of returnees' communist sympathies, and did not want their return allowed at all. Some

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2 Andrea de Guttry, Francesca Capone and Christophe Paulussen "Introduction" in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds) *Foreign Fighters under International Law and Beyond* (TMC Asser Press, The Hague, 2016) 1 at 2.

3 See David Malet *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford University Press, Oxford, 2013); and Marcello Flores "Foreign Fighters Involvement in National and International Wars: A Historical Survey" in Andrea de Guttry, Francesca Capone and Christophe Paulussen (eds) *Foreign Fighters under International Law and Beyond* (TMC Asser Press, The Hague, 2016) 27.

4 Flores, above n 3, at 40.

5 (9 December 2014) 702 NZPD 1261; and (12 December 2019) 743 NZPD 15937. See generally Marnie Lloydd "Persistent Tensions? International Legal Perspectives on 'Other' Foreign Fighters" (2017) 60 GYIL 539 at 571, fn 143.

6 See SP Mackenzie "The Foreign Enlistment Act and the Spanish Civil War, 1936–1939" (1999) 10 Twentieth Century British History 52 at 58.

7 Foreign Enlistment Act 1870 (UK) 33 & 34 Vict c 90 [FEA], s 2.

8 See Crimes Act 1961, s 412(1) and sch 4.

9 "Public Notice" *Auckland Star* (New Zealand, 11 January 1937) at 7.

10 Mackenzie, above n 6, at 60–64. There has never been a prosecution for illegal enlistment or recruitment under the FEA: Jessie Blackbourn and Clive Walker "Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015" (2016) 79 MLR 840 at 855.

11 Craig Forcese and Ani Mamikon "Neutrality Law, Anti-Terrorism, and Foreign Fighters: Legal Solutions to the Recruitment of Canadians to Foreign Insurgencies" (2015) 48 UBC Law Rev 305 at 351.

12 Tyler Wentzell "Canada's *Foreign Enlistment Act* and the Spanish Civil War" (2017) 80 Labour/Le Travail 213 at 241–243. The enforcement of foreign enlistment law more broadly has historically been influenced by political considerations: see John Ip "Reconceptualising the Legal Response to Foreign Fighters" (2020) 69 ICLQ 103 at 133.

13 At least one New Zealand returnee was questioned by police: Susan Mary Skudder "'Bringing it Home': New Zealand Responses to the Spanish Civil War, 1936–1939" (PhD Thesis, University of Waikato, 1986) at 421.

returnees were able to serve during World War II, but others were rejected because of their activities in Spain. Police files on some returnees were kept open until 1984.[14] In the United Kingdom, some returnees were watched by the security services. Many served during World War II, but the mode and extent of their participation depended to some extent on the view of the security services.[15] Further afield, American returnees, who had been officially discouraged from enlisting to fight in Spain,[16] were able to serve during World War II, although restrictions were placed on those considered possibly "politically unreliable".[17] Many would later be subject to FBI investigation in the febrile atmosphere of Cold War anti-communism.[18]

The more recent mass mobilisation of foreign fighters associated with the Syrian Civil War prompted many states to respond around 2014.[19] In New Zealand's case, this took the form of a few amendments directed at preventing foreign fighters from departing. Looking at the issue two years later, the first independent reviewers of intelligence and security endorsed this parsimonious approach, concluding that the more draconian measures enacted in other jurisdictions — such as citizenship deprivation, special detention powers and criminal offences tailored towards foreign fighting — were inappropriate to the New Zealand context.[20]

By 2018, the geopolitical picture had shifted: Islamic State was on the wane, and many foreign fighters from all over the world were in the custody of various Kurdish militias or were making their way home (or had already arrived home).[21] Accordingly, the foreign fighter problem became more about returnees — namely, what should be done with individuals who travelled to a zone of armed conflict, possibly participated in fighting or training, possibly with a terrorist group, and were now returning (or had returned) to their home state?

In New Zealand's case, the pool of returnees is modest because of the relatively small outflow of foreign fighters to Syria.[22] During the passage of the TSCOA, the Minister of Justice, Andrew Little, referred to a handful of individuals who travelled to Syria and either fought for or supported Islamic State — with the only named individual being Mark Taylor.[23] Other returnees have emerged since. In February 2021, Suhayra Aden, a New Zealand-born woman who had departed from Australia to join Islamic State, was detained with her surviving two children by Turkish authorities. With Australia having revoked her citizenship, the New Zealand Government agreed to accept Aden and her children. They arrived in August 2021.[24] A further individual, known only as R, was in May 2021 the subject of the first ever control order on account of their ties to Islamic State. With their passport and citizenship having been revoked by another unnamed country, R's repatriation was pending.[25]

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14 Phil Gurski *Western Foreign Fighters: The Threat to Homeland and International Security* (Rowman & Littlefield, Lanham, 2017) at 41.

15 Fraser Raeburn "The 'Premature Anti-fascists'? International Brigade Veterans' Participation in the British War Effort, 1939–45" (2020) 27 War in History 408 at 424–425.

16 Robert E Cesner Jr and John W Brant "Law of the Mercenary: An International Dilemma" (1977) 6 Cap U L Rev 339 at 356.

17 Victor Hoar "In Our Time: The Abraham Lincoln Brigade and the Historians" (1970) 22 American Quarterly 112 at 119.

18 Adam Hochschild *Spain in our Hearts: Americans in the Spanish Civil War, 1936–1939* (Houghton Mifflin Harcourt, London, 2016) at 353–357.

19 See Ip, above n 12, at 110.

20 Michael Cullen and Patsy Reddy *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand* (29 February 2016) at [8.22].

21 See Eric Schmitt "Defeated in Syria, ISIS Fighters Held in Camps Still Pose a Threat" *New York Times* (online ed, Washington, 24 January 2018).

22 The Soufan Group *Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq* (December 2015) at 9. There is also reportedly one New Zealander who travelled to fight in the Ukraine, a theatre of conflict that has attracted white supremacists: see The Soufan Center *White Supremacy Extremism: The Transnational Rise of the Violent White Supremacist Movement* (September 2019) at 8 and 29.

23 Marc Daalder "New terrorism law raises concerns" (21 October 2019) Newsroom <www.newsroom.co.nz>.

24 Thomas Manch "Islamic State terror suspect Suhayra Aden arrives in New Zealand" (21 August 2021) Stuff <www.stuff.co.nz>.

25 *Commissioner of Police v R* [2021] NZHC 1022, [2021] 2 NZLR 529 at [24].

B *Concerns about foreign fighters, then and now*

The threat posed by returnees from the Syrian conflict is put in terms of the risk they pose to the security of their home states, whereas foreign fighters were traditionally conceived of as free radicals liable to disrupt the orderly conduct of a state's foreign policy.[26] This is a relatively modern shift in framing, with the Spanish Civil War being a significant catalyst.[27] More specifically, the security threat posed by returnees from Syria is framed as the danger that battle-hardened, potentially radicalized foreign fighters might present to civilians in their home states.[28] This threat is sometimes referred to as blowback, with the key concern being the rate of blowback — that is, the proportion of foreign fighters who turn to domestic terrorism. The common figure put forward is one in nine. This alarming statistic, based on the upper estimate from a pioneering study by Thomas Hegghammer that predates the Syrian conflict,[29] has become something akin to received wisdom.[30] The Ministry of Justice posited a somewhat more modest blowback rate of 5–11 per cent,[31] although the study cited, which is based on a dataset of returnees from the Syrian conflict, states a much lower figure (1 in 360, or about 0.28 per cent).[32]

Given that the literature suggests that some (small) proportion of returnees will pose a security risk to their home states, the question then becomes how to manage that threat. In theory, criminal prosecution appeals on account of its legitimacy — the returnee receives the due process attendant with a criminal trial and is only denied their liberty if specific wrongdoing is proven to the criminal standard of proof.

There are certainly criminal offences with which returning foreign fighters could plausibly be charged — in the case of Mark Taylor, for example, the extant offences under the Terrorism Suppression Act 2002 (TSA) of engaging in a terrorist act (s 6A) and participating in a terrorist group (s 13).[33] But these offences would require proof of quite complex elements, including that Taylor acted for certain purposes. Additionally, there is negligible guidance on these offences, since the TSA's offences have sat almost entirely moribund since the aborted prosecution in relation to the Urewera raids in 2007.[34] Another option is the ordinary criminal law. Indeed, Taylor was reportedly charged with threatening to inflict grievous bodily harm to New Zealand police officers and soldiers.[35]

However, the real challenge with criminal prosecution is the sufficiency of evidence given the applicable standard of proof and the practical difficulties of collecting admissible evidence in a foreign war zone. This difficulty explains why rates of prosecution of returnees in comparable jurisdictions has

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26 The need of states to assert centralised control over the use of violence in the international arena being the rationale for the prevalence of laws like the FEA from the 19th century: see Ip, above n 12, at 127.

27 Teemu Tammikko "The Threat of Returning Foreign Fighters: Finnish State Responses to the Volunteers in the Spanish and Syria-Iraq Civil Wars" (2018) 30 Terrorism and Political Violence 844 at 846.

28 At 857; and Gurski, above n 14, at 136.

29 Thomas Hegghammer "Should I Stay or Should I Go? Explaining Variation in Western Jihadists' Choice between Domestic and Foreign Fighting" (2013) 107 American Political Science Review 1 at 10.

30 David Malet and Rachel Hayes "Foreign Fighter Returnees: An Indefinite Threat?" (2020) 32 Terrorism and Political Violence 1617 at 1621.

31 Ministry of Justice *Departmental Report: Terrorism Suppression (Control Orders) Bill* (3 December 2019) at [12].

32 Thomas Hegghammer and Petter Nesser "Assessing the Islamic State's Commitment to Attacking the West" (2015) 9(4) Perspectives on Terrorism 14 at 20. See also Lorenzo Vidino, Francesco Marone and Eva Entenmann *Fear Thy Neighbor: Radicalization and Jihadist Attacks in the West* (Ledizioni LediPublishing, June 2017) at 60–61 (finding a blowback rate of 1 in 500).

33 Those offences being among those to apply to conduct overseas where the alleged acts are done by a New Zealand citizen: see Terrorism Suppression Act 2002 [TSA], s 15(a).

34 The one minor exception being the prosecution of the 15 March attacker for the s 6A offence, to which he ultimately pleaded guilty: see *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15.

35 "Warrant that would stop the man called the Kiwi jihadi at the border" (18 October 2019) Stuff <www.stuff.co.nz>. This offence is punishable by up to seven years' imprisonment: see Crimes Act 1961, s 306(1).

been low.[36] Predictably, this difficulty is repeated, almost ad nauseam, in the legislative material related to the TSCOA.[37]

Consequently, governments have in practice tended to want a back-up plan that prioritizes the imperative of public safety for instances where the criminal process is infeasible.[38] It is reasonable to infer that, in not pursuing any such option in 2014, the New Zealand Government at the time considered prosecution to be sufficient for dealing with returnees. But things had changed some five years later. The first is the 2019 Christchurch Mosques attack, which was clearly on the minds of officials despite the TSCOA not being a specific response to it.[39] Understandably, the 15 March attack fundamentally altered perceptions of the potential seriousness of domestic terrorism — if nothing else, it demonstrated the magnitude of harm even a lone malign actor can inflict. Second, with Islamic State's fortunes waning, the more foreseeable prospect of returnees motivated the Government to act, as indicated by these comments of the Minister of Justice:[40]

> At the point of the collapse of the caliphate, the Government made the decision that we would put in place as quickly as we could a control orders regime to deal with the possibility of those in that conflict zone with the rights to turn to New Zealand coming back to New Zealand and posing a potential risk to the community.

C *The TSCOA's expedited enactment*

Given these circumstances, it is unsurprising that policy-makers would look to establish a system of non-criminal control measures for dealing with returnees in the form of the TSCOA, which was swiftly enacted in late 2019. This is in keeping with New Zealand's well-documented penchant for legislating in a hurry,[41] as well as the equally well-documented phenomenon of reactive and rushed counterterrorism legislation.[42]

The latter reflects the powerful pull that political incentives exert on politicians and officials. Something must be done,[43] and legislation — a relatively uncostly and visible response — is often that thing.[44] Avoiding the political risk of being perceived as responsible for failing to prevent a future terrorist attack is paramount.[45] To be clear, the concern is not that the executive is drawing up plans for legislation on the back of a proverbial envelope. As Clive Walker observes, counterterrorism legislation is often "revealed and passed in emergency circumstances, but it has almost certainly been drafted in

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36 See Christophe Paulussen and Kate Pitcher *Prosecuting (Potential) Foreign Fighters: Legislative and Practical Challenges* (International Centre for Counter-Terrorism, January 2018) at ch 4.3; and Clive Walker "Foreign Terrorist Fighters and UK Counter Terrorism Laws" in David Anderson "The Terrorism Acts in 2015: Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006" (December 2016) 97 at 109.

37 Ministry of Justice "Regulatory Impact Statement: Control Orders" (17 July 2019) at 1; and Terrorism Suppression (Control Orders) Bill 2019 (183-1) (explanatory note) at 1.

38 Clive Walker "Terrorism prosecutions and the right to a fair trial" in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (2nd ed, Edward Elgar Publishing, Cheltenham (UK), 2020) 384 at 387.

39 See, for example, Ministry of Justice, above n 37, at 9.

40 (24 October 2019) 742 NZPD 14686.

41 See generally Claudia Geiringer, Polly Higbee and Elizabeth McLeay *What's the Hurry?: Urgency in the New Zealand Legislative Process 1987–2010* (Victoria University Press, Wellington, 2011).

42 Andrew W Neal "Terrorism, Lawmaking, and Democratic Politics: Legislators as Security Actors" (2012) 24 Terrorism and Political Violence 357 at 358; Alan Greene "Questioning executive supremacy in an economic state of emergency" (2015) 35 LS 594 at 613; and Philip A Thomas "September 11th and Good Governance" (2002) 53 NILQ 366 at 368.

43 Andrew W Neal *Security as Politics: Beyond the State of Exception* (Edinburgh University Press, Edinburgh, 2019) at 135–136.

44 Elena Pokalova "Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation?" (2015) 27 Terrorism and Political Violence 474 at 480–481.

45 David Cole "No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint" (2008) 75 U Chi L Rev 1329 at 1345; and Laura K Donohue *The Cost of Counterterrorism: Power, Politics, and Liberty* (Cambridge University Press, Cambridge (UK), 2008) at 12.

non-emergency circumstances".[46] Rather, the concern about hasty and reactive legislating is how the lack of time undermines the capacity of the legislative process to function meaningfully.

The TSCOA was drawn up from existing plans. The Minister of Justice stated that "the review of New Zealand's terrorism laws had begun in September 2018 and that the law was largely drafted by the end of August".[47] Thus, the Bill that became the TSCOA was the product of a longer policy development process, and was some two months old when introduced. From there, the process was swift. The key expediting device was the short reporting deadline of 3 December set for the Foreign Affairs, Defence and Trade Committee (FADT Committee).[48] The Bill was referred to the FADT Committee on 5 November and the Committee set a closing date for submissions of 10 November,[49] leaving little time for concerned parties to make submissions. In the end, even without the invocation of urgency, the Bill proceeded from introduction to royal assent in some two months.

Expediting the legislative process not only curtails opportunities for meaningful external input, but also reduces the time available for legislative scrutiny, deliberation,[50] and the drafting of amendments.[51] All of this compounds the risk of errors and omissions, which in the case of counterterrorism legislation like the TSCOA can have serious consequences for those affected by its provisions. Both the FADT Committee itself and virtually all submitters commented negatively on the expedited process and its effect on the time available for public input and legislative scrutiny.[52]

III What Does the TSCOA Do?

A *The TSCOA's control order framework*

As noted earlier, the TSCOA was originally sold as a means of imposing control over those few New Zealanders who have engaged in terrorism-related activities overseas.[53] However, even its original scope was somewhat broader. Control orders may be imposed on an individual who the court is satisfied is a relevant person,[54] defined as someone aged 18 years or more, who is or may be coming to New Zealand or has arrived in New Zealand, and who prior to their arrival: (1) engaged in terrorism-related activity in a foreign country; (2) travelled or attempted to travel to a foreign country to engage in such activity; (3) was convicted in a foreign country of an offence for terrorism-related activity; (4) was deported, had a visa cancelled, passport revoked or citizenship revoked on the grounds that they posed a security risk because of their involvement in terrorism-related activity in a foreign country; or (5) was subject to something like a control order regime because of involvement in terrorism-related activity in a foreign country.[55]

The TSCOA creates two kinds of control order, interim and final. Interim control orders are envisaged as a preliminary measure, to be applied for either before the relevant person's arrival or within 12 months of their arrival. The Commissioner of Police must believe on reasonable grounds that

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46 "Memorandum by Professor Clive Walker, School of Law, University of Leeds" in House of Lords Select Committee on the Constitution *Fast-track Legislation: Constitutional Implications and Safeguards* (HL Paper No 116–II, 10 July 2009) 178 at [7]. The Prevention of Terrorism (Temporary Provisions) Act 1974 (UK), famously enacted in three days, was derived from existing Home Office plans based on terrorism legislation operating in Northern Ireland: see David Bonner "Responding to Crisis: Legislating Against Terrorism" (2006) 122 LQR 602 at 604–605.

47 Daalder, above n 23.

48 (24 October 2019) 742 NZPD 14685. On this practice, see Geiringer, Higbee and McLeay, above n 41, at 136.

49 Terrorism Suppression (Control Orders) Bill 2019 (183-2) (select committee report) at 10.

50 House of Lords Select Committee on the Constitution *Fast-track Legislation: Constitutional Implications and Safeguards* (HL Paper No 116–I, 7 July 2009) at [33].

51 At [42].

52 Ministry of Justice, above n 31, at [15]; and Terrorism Suppression (Control Orders) Bill (select committee report), above n 49, at 2.

53 See Andrew Little "Keeping New Zealanders safer with better counter-terrorism laws" (press release, 16 October 2019).

54 TSCOA, s 12(1). The term, as discussed further below, is now "relevant returner".

55 Sections 6 and 8.

it is necessary and appropriate that the interim control order is made as soon as practicable in order to manage the security risk posed by the relevant person.[56] An application for an interim control order must presumptively be made and determined by the court without notice to the relevant person when the application is made prior to their arrival in New Zealand.[57] Where the relevant person has arrived, the application may also be made and must be determined by the court without notice if the Commissioner reasonably believes this is necessary and appropriate.[58]

Final control orders may be applied for in three circumstances: (1) where no interim control order was applied for, and the application is made no more than 12 months after the relevant person's arrival in New Zealand; (2) where an interim control order was made, and the application for a final control order is made after the relevant person's arrival in New Zealand and within a specified period of time after the relevant person was served with the interim order (presumptively 3 months);[59] or (3) where an application for an interim control order was declined, and the application for a final control order is made no more than 12 months after the relevant person's arrival in New Zealand because of a material change in circumstance since the declining of the earlier application.[60] Unlike an application for an interim control order, an application for a final order must be made on notice to the relevant person. A court hearing must also occur as soon as practicable.[61] However, the documents to be served on the relevant person are limited to what the court categorizes as disclosable supporting information.[62]

For a control order to issue, in addition to an application from the Commissioner of Police,[63] the Court must be satisfied on the balance of probabilities that: the relevant person poses a real risk of engaging in terrorism-related activities in a country; and the specific restrictions imposed by the control order are necessary and appropriate to achieve the statutory purposes set out in s 3 of the Act, namely to protect the public from terrorism, to prevent engagement in terrorism-related activities in any country, and to support the relevant person's reintegration or rehabilitation.[64]

The suite of restrictions (termed "requirements") that may be imposed by a control order are wide-ranging. They include:[65]

- Prohibiting or restricting presence at specified places without police escort;
- Prohibiting or restricting departure from New Zealand or possessing any passports or other international travel documents;
- Prohibiting or restricting communications or association with certain individuals;
- Prohibiting or restricting the person from having access to forms of communication such as telephone and the Internet;
- Prohibiting the person from using or possessing certain things, holding financial accounts, or carrying out certain activities;
- Requiring the person to reside at a certain address and to remain there for up to 12 hours a day;
- Requiring the person to report to police at specified times and places;
- Submission to searches by the police and to electronic monitoring; and
- Requiring the undertaking of alcohol and drug assessments, and rehabilitative or reintegrative needs assessments.

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56 Section 15(1)(b).

57 Section 15(2)(a).

58 Section 15(2)(b).

59 An interim control order expires upon the service of a final control order, if no application for a final control order is made within a presumptive three month period, or if the application is withdrawn or refused by a court. See s 25.

60 Section 16(1).

61 Section 16(2).

62 Section 16(3).

63 Section 14.

64 Sections 12 and 31.

65 See s 17. The first control order issued included various prohibitions and restrictions on travel, associating with specific persons, communications and banking. The controlee was also required to reside at a specified address and report to police periodically. See *Commissioner of Police v R*, above n 25, at [30].

Once issued, final control orders last for up to two years,[66] and can be renewed twice.[67] Thus, without the state having to prove the commission of a criminal offence, a relevant person can be subject to highly invasive restrictions for up to six years. And breach of those restrictions, absent reasonable excuse, constitutes an offence punishable by up to one year of imprisonment or a $2,000 fine.[68]

The recently enacted Counter-Terrorism Legislation Act 2021 (CTLA), which responds to the Royal Commission report into the 15 March Christchurch Mosques attack, amends several statutes including the TSCOA. More specifically, it extends the scope of the control order regime by expanding the definition of relevant person to include not only those persons already covered (relabelled "relevant returners"), but also persons who have completed sentences for specified terrorism-related offences (termed "relevant offenders").[69] Control orders can be imposed on relevant offenders in a similar fashion to how they can be imposed on relevant returners, with one difference being that the application must be made after the person becomes a relevant offender and while they are still subject to their sentence.[70]

B *The Act's comparative law genealogy*

The TSCOA's control order regime is not original, and draws inspiration from equivalent regimes in Commonwealth jurisdictions, particularly the United Kingdom and Australia.[71] Indeed the TSCOA's framework can fairly be described as a hybrid of the British and Australian regimes. In general terms, the grounds for the issue of a control order under the TSCOA are similar to those in the United Kingdom's Prevention of Terrorism Act 2005 (PTA) and Terrorism Prevention and Investigation Measures Act 2011 (TPIMA). By contrast, the process for imposing control orders, in particular the locus of primary decision-making being the court, is similar to the Australian control order legislation.[72] Below I explore further features of the TSCOA in light of its comparative law influences.

(1) Reach of the regime

Much has been written about the scope and potential overbreadth of counterterrorism law that relies on broad, generic definitions of terrorism.[73] But the triggers for control order regimes are broader still. The British TPIMA, like the PTA before it, relies on the Home Secretary having the requisite level of confidence that the person concerned is involved in terrorism-related activity (TRA),[74] and that the terrorism prevention and investigations measure (TPIM) is needed to protect the public.

Notably, TRA is a term that extends much further than simply "the commission, preparation or instigation of acts of terrorism".[75] Indeed, as the Independent Reviewer of Terrorism Legislation observed, TRA as originally defined in the TPIMA was so broad as to cover someone "whose connection with an act of terrorism could be as remote as the giving of support to someone who gives

66 Section 25.

67 Section 26.

68 Section 32.

69 These being offences under the TSA and offences relating to the possession, display and distribution of terrorist propaganda under the Films, Videos, and Publications Classification Act 1993. See Counter-Terrorism Legislation Act 2021 [CTLA], ss 44–45 and 47.

70 CTLA, s 51.

71 Terrorism Suppression (Control Orders) Bill (select committee report), above n 49, at 1.

72 Criminal Code Act 1995 (Cth), s 104.4. See also Susan Donkin *Preventing Terrorism and Controlling Risk: A Comparative Analysis of Control Orders in the UK and Australia* (Springer, New York, 2014) at 8.

73 See, for example, Alan Greene "Defining Terrorism: One Size Fits All?" (2017) 66 ICLQ 411; *Regina v Gul (Mohammed)* [2013] UKSC 64, [2014] AC 1260; and *Regina (Miranda) v Secretary of State for the Home Department (Liberty intervening)* [2016] EWCA Civ 6, [2016] 1 WLR 1505.

74 Reasonable suspicion under s 2 of the Prevention of Terrorism Act 2005 (UK) [PTA]. The standard has varied with respect to the terrorism prevention and investigations measures, most recently having been returned to reasonable belief by s 34 of the Counter-Terrorism and Sentencing Act 2021 (UK).

75 Terrorism Prevention and Investigation Measures Act 2011 (UK) [TPIMA], s 4(1)(a).

encouragement to someone who prepares an act of terrorism".[76] The TPIMA's scope was narrowed in 2015, so that the current definition of TRA only covers a person two steps removed from an act of terrorism.[77]

If anything, the scope of the Australian control order legislation is even broader. For the Federal Court to make an interim control order, it must first be satisfied on the balance of probabilities that one of several criteria are met. Some of these are tied to terrorism — for example, that making the order would substantially assist in preventing a terrorist act or preventing the provision of support for or the facilitation of a terrorist act, or that the person has provided training to or received training from a listed terrorist organisation, or that the person has been convicted in Australia of a terrorism offence, or convicted overseas of an offence that would be tantamount to a terrorism offence in Australia. There are additional possibilities based on the individual engaging in hostile activity in a foreign country or supporting or facilitating such activity.[78] Second, the Court must be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions imposed is reasonably necessary and appropriate for protecting the public and preventing the conduct in question.[79]

Like the British legislation, the TSCOA uses TRA as a key trigger for its application, with TRA being defined more broadly than committing an act of terrorism. A person can engage in TRA in two ways. The first is by "carr[ying] out terrorism (whether as a or the principal party, any other party, or an accessory after the fact)",[80] with "terrorism" having the same meaning as "terrorist act" under the TSA.[81] Carrying out terrorism is further defined as not only the completed act, but also planning or preparation, a credible threat or an attempt.[82] Second, an individual who "facilitates or supports materially the carrying out of terrorism" also engages in TRA.[83] Facilitation or material support requires actual or constructive knowledge that terrorism is facilitated or materially supported. The import of this seems to be that it is enough for an individual to know in general terms that a terrorist plot is in train, even if they are unaware of the specifics.[84] What it means to "facilitate" or "support" is not further defined. But the comments of the FADT Committee indicate that the wording "is deliberately broad", and suggests that support is meant to encompass, for example, "those who knowingly spread terrorist propaganda".[85] Notably, the one known control order under the TSCOA was imposed on the basis that the individual posed a risk of providing financial support to Islamic State and promoting its cause.[86]

However, the scope of the TSCOA remains significantly narrower than its British and Australian counterparts in that the High Court can only make a control order if it is satisfied that an individual who qualifies as a relevant person poses a real risk of engaging in TRA in a country, and that the requirements imposed are necessary and appropriate to protect the public from terrorism and prevent engagement in TRA.[87] Notably, in order to qualify as a relevant person, an individual must either: satisfy one of the limbs of s 6(1), all of which contain reference to TRA, and qualify as a relevant returner; or have been sentenced to a determinate sentence upon conviction for a terrorism-related New Zealand offence (mostly offences under the TSA), and qualify as a relevant offender under s 6(5).

By contrast, the British legislation refers to TPIMs being imposed on individuals,[88] without any necessary precondition of having engaged in TRA overseas or having been convicted of offences related

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76 David Anderson "Terrorism Prevention and Investigation Measures in 2013: Second Report of the Independent Reviewer on the Operation of the Terrorism Prevention and Investigation Measures Act 2011" (March 2014) at [6.14] (emphasis omitted).

77 Counter-Terrorism and Security Act 2015 (UK), s 20(2).

78 Criminal Code Act (Cth), s 104.4(1)(c).

79 Section 104.4(1)(d).

80 TSCOA, s 8(1)(a).

81 Section 5 definition of "terrorism".

82 Section 8(2).

83 Section 8(1)(b).

84 Section 8(3).

85 Terrorism Suppression (Control Orders) Bill (select committee report), above n 49, at 3.

86 *Commissioner of Police v R*, above n 25, at [29(c)(iv)].

87 TSCOA, s 12(2).

88 TPIMA, ss 2–3.

to terrorism. Indeed TPIMs have been issued in respect of persons acquitted of terrorism-related charges.[89] Similarly, the Australian legislation refers to making control orders in respect of persons.[90] It is clear that Australian authorities have contemplated using control orders in a wide variety of circumstances, including when there was insufficient evidence to prosecute terrorist offences, after criminal charges were withdrawn, after conviction and after acquittal.[91]

(2) Control orders as civil orders with criminal law-like effects

Control orders share similarities with situational crime prevention measures.[92] As described by Susan Donkin, these aim "to reduce crime by increasing the perceived efforts and risks involved in committing crime, as well as reducing perceived rewards, excuses and provocations for doing so".[93] Prohibiting or restricting access to certain items (for example certain chemicals) increases required effort from the would-be perpetrator; travel restrictions, curfews and reporting duties reinforce surveillance measures and increase the risk of detection; restrictions on communications also increase required effort, and, assuming monitoring of permitted channels of communication, increase risk of detection; prohibiting or restricting associations with certain persons or access to certain material reduces provocations.[94] But the key difference is that situational crime prevention measures operate generally with respect to any potential offender. Control orders, by contrast, offer a suite of preventive measures tailored to particular individuals who may be punished for violating their terms.[95]

The obligations and restrictions imposed by control orders can also be likened to strict bail conditions. Unlike bail, however, control orders operate outside the criminal justice system. Accordingly, like its Australian and British cousins, a key feature of the TSCOA's regime is that control orders are civil orders — notably, the TSCOA stipulates that the standard of proof for questions of fact in control order proceedings is the civil standard of the balance of probabilities.[96] But at the same time, control orders permit the imposition of a variety of restrictions on the liberty of the affected person.[97] This basic structure is shared by a wider family of preventive civil orders, with the most well-known of these being the British Anti-Social Behaviour Order (ASBO). These were civil orders that forbade their subject from engaging in anti-social behaviour in the future.[98] Breach of the order constituted a criminal offence punishable by up to five years' imprisonment, a penalty much more severe than if the underlying conduct had been prosecuted in the first place.[99] ASBOs are perhaps the paradigm example of what Andrew Simester and Andrew von Hirsch term two-step prohibitions (TSPs):[100]

> [TSPs] involve the issuance of (nominally) civil prohibitory orders against persons who have been found engaged in, or are expected to engage in, undesired conduct; where a breach of the order becomes a criminal offence. The content of the order can vary considerably: it may require the actor to cease and desist from further conduct of the same kind, or it may contain other substantive content, including access

89 See, for example, *D v Secretary of State for the Home Department* [2014] EWHC 3820 (Admin), [2015] 1 WLR 2217 at [5]; and *Secretary of State for the Home Department v AY* [2012] EWHC 2054 (Admin) at [35].

90 Criminal Code Act (Cth), s 104.4.

91 Bret Walker *Independent National Security Legislation Monitor: Declassified Annual Report* (Commonwealth of Australia, 20 December 2012) at 13.

92 See Donkin, above n 72, at chs 7.2.1–7.3.

93 At 72.

94 At 81.

95 At 87.

96 TSCOA, s 31.

97 See Criminal Code Act (Cth), ss 104.5(3)(a)–104.5(3)(l); and TPIMA, sch 1.

98 Crime and Disorder Act 1998 (UK).

99 Andrew Lynch "Control Orders in Australia: A Further Case Study in the Migration of British Counter-Terrorism Law" (2008) 8 OUCLJ 159 at 175.

100 AP Simester and Andrew von Hirsch "Regulating Offensive Conduct through Two-Step Prohibitions" in Andrew von Hirsch and AP Simester (eds) *Incivilities: Regulating Offensive Behaviour* (Hart Publishing, Oxford, 2006) 173 at 174. See also Andrew Ashworth and Lucia Zedner *Preventive Justice* (Oxford University Press, Oxford, 2014) at ch 4.2.

> prohibitions designed to prevent him from entering certain places where he might engage in that kind of conduct or other conduct that is deemed undesirable.

The prime attraction of these orders is that they alleviate the difficulties of proving to the criminal standard the commission of the underlying conduct (anti-social conduct in the case of ASBOs, terrorism in the case of control orders).[101] Instead, the order can be imposed on the basis of the more lenient civil standard.[102] Once it is in place, prosecutors have only the straightforward task of proving that the terms of the order were breached.[103] With TPIMs (and also control orders under the PTA), the only avenue for avoiding liability for breach is the presence of a "reasonable excuse".[104] As a strict liability offence, the issue is usually one of sentencing.[105] The same is likely under the TSCOA, which similarly provides that it is an offence to breach a requirement in a control order "without reasonable excuse",[106] although the maximum penalty for breach is comparatively light.[107]

In sum, control orders provide an avenue for imposing restrictions characteristic of a criminal sanction without the attendant procedural protections of the criminal process. In its submissions on the Bill that became the TSCOA, the New Zealand Law Society expressed concern about this:[108]

> Given how closely the conditions of control orders match the sentences regularly imposed in criminal law, it is concerning that the protections of the criminal law process do not apply.

But in relation to control orders, and indeed TSPs more generally, this is a feature, not a bug.

(3) Control orders as a quasi-permanent warehousing measure

As enacted, the British TPIMA limited the duration of a TPIM to two years (one year plus a further one-year renewal). This was a point of difference from the predecessor control order regime under the PTA, where repeated renewals after an initial one-year period could and did occur. Four individuals were subject to control orders that lasted between three and four years, and three individuals were subject to control orders that lasted between four and five years.[109] This ameliorative reform has, however, recently been undone, with TPIMs now renewable up to four times for a maximum duration of five years.[110] The position under the Australian control order legislation remains similar to that under the PTA, with control orders lasting up to one year,[111] and successive control orders being issued in respect of the same person being possible.[112]

Under the TSCOA, as noted, a control order can last for up to two years and may be renewed up to two times.[113] In comparative terms, this maximum six-year duration for control orders under the TSCOA represents something of a compromise between the various positions that exist or have existed in the British and Australian legislation over time. Whether this finite but lengthy six-year term is

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101 Simester and von Hirsch, above n 100, at 175–176.

102 Ashworth and Zedner, above n 100, at 88. In the New Zealand context, see TSCOA, s 31.

103 Simester and von Hirsch, above n 100, at 176.

104 TPIMA, s 23(1)(b). There is no equivalent language in the Australian legislation: see Criminal Code Act (Cth), s 104.27.

105 Ashworth and Zedner, above n 100, at 88.

106 TSCOA, s 32(1)(b).

107 One year of imprisonment or a $2,000 fine, compared to five years' imprisonment: see PTA, s 9(4); TPIMA, s 23(3); and Criminal Code Act (Cth), s 104.27(1).

108 New Zealand Law Society "Submission to the Foreign Affairs, Defence and Trade Committee on the Terrorism Suppression (Control Orders) Bill 2019" at [7.9].

109 PTA, s 2(4). Fifteen individuals were subject to control orders for more than two years: see David Anderson *Control Orders in 2011: Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (March 2012) at [3.47].

110 Counter-Terrorism and Sentencing Act (UK), s 35(3).

111 Criminal Code Act (Cth), ss 104.5(1)(f) and 104.16(1)(d).

112 Sections 104.5(2) and 104.16(2).

113 TSCOA, ss 25–26.

sufficient to deal with the threat of returnees was also a point of some contention during the TSCOA's enactment — indeed, the Bill was opposed by the political opposition partly for this reason.[114] David Malet and Rachel Hayes' study, based on a dataset of 134 returnees to Western countries, found that the typical time lag between a foreign fighter's return and a turn to domestic terrorism was less than a year, and almost always within three years.[115] This suggests that the TSCOA's provision for a maximum of six years should be sufficient.

IV Due Process, Human Rights and the TSCOA

In this part, I highlight three issues with the TSCOA. The first is whether control order proceedings can be procedurally fair given the use of information not disclosed to the controlee. The second concerns whether a controlee is subject to detention. The third concerns the possible double jeopardy problem arising out of the control order regime. Because of how the TSCOA assigns decision-making responsibility, it is primarily the courts that have to thread the needle and issue control orders while also ensuring those orders and their associated proceedings are rights-compliant to the extent the legislative framework allows.

A *The problem of natural justice and secret evidence*

The TSCOA plainly contemplates the possibility of police applying for and getting a control order on the basis of information not disclosed to the affected person. The Act for this reason distinguishes between disclosable and non-disclosable supporting information.[116] In permitting the use of what is sometimes loosely referred to as secret evidence — that is, allowing the state to rely on information that it is unwilling to disclose to the affected person and their legal representatives — the TSCOA is unexceptional; the use of such information is commonplace in proceedings concerned with national security and terrorism. But it stands at odds with natural justice, a right affirmed in s 27 of the BORA.[117]

A device to mitigate the prejudice of non-disclosed information is a closed material procedure (CMP), whereby the government relies on closed material that is not disclosed to the affected person, but that it instead discloses to a security-cleared special advocate. The special advocate has the function of advocating for greater disclosure of material and representing the interests of the affected person during closed proceedings from which they and their legal representatives are excluded.[118]

CMPs are a feature of control order and TPIM proceedings overseas. In the United Kingdom, control orders were routinely imposed without disclosing to controlees the full case against them because of the need to safeguard information from sensitive intelligence sources.[119] Thus, in control order proceedings under the PTA, limited (or in some cases no) disclosure was made to the controlee. Full disclosure was instead made to the special advocate.[120] The TPIMA similarly provides for closed material procedures and the use of special advocates,[121] although with the proviso that at least the gist of the allegations against the affected person is disclosed.[122]

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114 See, for example, (12 December 2019) 743 NZPD 15928–15929.

115 Malet and Hayes, above n 30, at 1631.

116 Disclosable supporting information is defined in s 5 of the TSCOA as "all information supporting the application that can be disclosed in accordance with all current directions, orders or other relevant decisions, if any, of the court". This issue did not arise in *R* as no non-disclosable information was relied on: see *Commissioner of Police v R*, above n 25, at [27].

117 The non-criminal nature of control order proceedings mean that fair trial rights are inapplicable: see generally Catherine Hensen "Meeting the Challenge of the Preventive State: Due Process Rights and the Terrorism Suppression (Control Orders) Act 2019" (2021) 52 VUWLR 59.

118 See generally John Jackson *Special Advocates in the Adversarial System* (Routledge, Oxford, 2020).

119 Anderson, above n 109, at [3.69].

120 PTA, sch. See also Anderson, above n 109, at [3.71]–[3.72].

121 TPIMA, sch 4.

122 Anderson, above n 76, at [1.2] and [4.4]. This is the result of various judicial decisions, the most significant of which is discussed further below.

Under the Australian legislation, an interim control order is made by the court on an ex parte basis. The order itself, which has to be served on the controlee,[123] must include a summary of the grounds on which it is made.[124] This does not, however, require the disclosure of sensitive information.[125] The interim control order is then subject to confirmation on an inter partes basis.[126] The confirmation hearing must be preceded by notice and disclosure of relevant documents and:[127]

> … 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.

But again, this does not include the disclosure of sensitive information.[128] A 2016 amendment drawing on the British provisions described above added provision for the use of CMPs.[129] The amendment accordingly provides for special advocates to operate under the same general parameters as British special advocates in terms of their functions and relationship to the controlee.[130]

(1) The TSCOA's minimalist approach

The Bill that became the TSCOA originally made no provision for a CMP or special advocates. This left the regime to operate either without resort to non-disclosable material, which would be puzzling given that the impetus behind establishing a control order regime was said to be a lack of admissible evidence, or with the courts having to improvise and create a CMP out of whole cloth. That the Chief Justice considered it necessary to make a late submission to the FADT Committee on this aspect of the Bill suggests that the judiciary was less than enamoured with the prospect of this buck-passing by Parliament.[131]

The judiciary's desire for a clear legislative framework is understandable given the incongruence between the common law's emphasis on natural justice and the use of closed material. Many submitters raised concerns about natural justice, which led to the addition of cl 35.[132] This clause, which became s 36 of the TSCOA, provides limited protection for natural justice by making provision for a special advocate. Section 36(2)(c) provides that the special advocate's function is "to act in the interests of the person who is or may be a relevant person, and to present arguments on the relevance and reliability of the supporting information". In the Chief Justice's view, however, this language was insufficient, and compared poorly to several existing statutory models providing for the use of CMPs and special advocates.[133] In particular, the Chief Justice considered the description of the special advocate's role overly narrow, and she suggested that it "should extend to challenging the classification of the

123 Criminal Code Act (Cth), s 104.12(1).

124 Section 104.5(1)(h).

125 Section 104.5(2A).

126 James Renwick *Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (Commonwealth of Australia, September 2017) at [3.3].

127 Criminal Code Act (Cth), s 104.12A(2)(a)(iii).

128 Section 104.12A(3).

129 Jessie Blackbourn, Deniz Kayis and Nicola McGarrity *Anti-Terrorism Law and Foreign Terrorist Fighters* (Routledge, New York, 2018) at 50.

130 See National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth), pt 3A(3)(C) ("Special advocates in control order proceedings"), as inserted by Counter-Terrorism Legislation Amendment Act (No 1) 2016 (Cth), sch 15, cl 41. The National Security Information (Criminal and Civil Proceedings) Act has since been amended by the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021 (Cth).

131 Helen Winkelmann "Submission to the Foreign Affairs, Defence and Trade Select Committee on the Terrorism Suppression (Control Orders) Bill 2019". Making submissions on bills affecting the judiciary is one of the lesser known roles of the Chief Justice: see Richard Cornes "A Point of Stability in the Life of the Nation: The Office of Chief Justice of New Zealand — Supreme Court Judge, Judicial Branch Leader, and Constitutional Guardian and Statesperson" [2013] NZ L Rev 549 at 564–565.

132 Terrorism Suppression (Control Orders) Bill (select committee report), above n 49, at 5.

133 Such as the Immigration Act 2009 and the Passports Act 1992: see Winkelmann, above n 131, at 2.

information as non-disclosable".[134] Notably, the language of s 36 does not clearly permit special advocates to play this crucial role.[135]

Moreover, s 36's authorization for the use of special advocates only applies when the court is considering making any order, direction or decision that information supporting a control order application is not disclosable.[136] Section 36, as noted, was specifically added to address concerns about natural justice. The FADT Committee's report specifically described the purpose of cl 35 as allowing the appointment of a special advocate to represent the interests of someone who has been subject to a control order but is unable to see the non-disclosable information against them. It observed that "[t]he special advocate would have access to all the information supporting the application, and could present arguments about the reliability and relevance of any non-disclosable supporting information."[137] Clause 35 was supported by the Labour Party and Green Party members of the Committee on the basis that its inclusion "would respond to the natural justice concerns *should the court rule that information supporting an application is not disclosable*".[138] This suggests that cl 35 was intended to allow special advocates to operate similarly to how they operate in equivalent proceedings overseas.

However, it is not obvious that s 36 encompasses such a broad remit. As the Chief Justice describes it, the text "sets out requirements … to be applied by a court when deciding whether supporting information is not disclosable".[139] This can be contrasted with the broader language employed elsewhere to describe the remit of special advocates. For example, in the Immigration Act 2009, the special advocate's role is described as "represent[ing] a person who is the subject of … a decision made involving classified information" or "proceedings involving classified information".[140] Likewise, broader language is used in the equivalent British and Australian legislative provisions.[141]

Next, the provision for communications, while sparse, is quite restrictive. Section 36(2)(d) requires only that the court allow the special advocate to receive instructions from the representative of the person who is or may be a relevant person. It is not stated whether this provision governs all of the interactions between the special advocate and the affected individual's representative, or whether they can communicate freely prior to the special advocate becoming privy to the non-disclosed supporting information. The phrase "receive instructions" might also suggest that communication is unidirectional. If so, the special advocate would only be able to receive instructions from a person who is unaware of the content of the information at issue. The probability that this would assist them in their task of scrutinising the relevance and reliability of supporting information is not high.[142]

Finally, there is no provision for a summary of the non-disclosed information. This is at odds with existing statutory regimes establishing CMPs and the Law Commission's general view that a summary ought to be provided as a safeguard.[143] With the TSCOA, while various provisions speak of excluding any information that is non-disclosable supporting information from the affected person, they do not include provision for a summary of that information so as to give the affected individual sufficient disclosure about the allegations against them and enable a genuine opportunity for rebuttal.[144]

An important and related issue that follows from this is the content of a summary — more specifically, whether there is a minimum core of disclosure that must be met for the proceedings to be fair.[145] This was a key issue in the British control order litigation. The seminal decision of *Secretary of*

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134 Winkelmann, above n 131, at 2.

135 Law Commission *The Crown in Court: A Review of the Crown Proceedings Act and National Security Information in Proceedings* (NZLC R135, 2015) at [9.26]; and Jackson, above n 118, at 162.

136 TSCOA, s 36.

137 Terrorism Suppression (Control Orders) Bill (select committee report), above n 49, at 5.

138 At 5 (emphasis added).

139 Winkelmann, above n 131, at 1.

140 Immigration Act, s 263(1).

141 TPIMA, sch 4 cl 10; and National Security Information (Criminal and Civil Proceedings) Act (Cth), s 38PA.

142 Special advocates in the United Kingdom have consistently identified restrictions on communications as a key obstacle to their effectiveness: Jackson, above n 118, at 143–144.

143 Law Commission, above n 135, at [7.26].

144 TSCOA, ss 15(3), 16(3), 26(6) and 27(4).

145 See Jackson, above n 118, at 51–56.

State for the Home Department v AF (No 3) established that art 6 of the European Convention on Human Rights (ECHR) required an irreducible minimum of disclosure to the affected person in control order proceedings so as to allow that person to give effective instructions to the special advocate.[146] Lord Phillips put it this way:[147]

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

What has since become known as *AF (No 3)*'s "gisting requirement" was discussed in *A v Minister of Internal Affairs*,[148] which concerned a ministerial decision to suspend and subsequently cancel a passport on security grounds.[149] Under the relevant legislative regime, the High Court had the task of approving the summary to be provided to A.[150] While Dobson J did not go so far as to insist on a minimum level of disclosure, he stated that "the Court should be firm in requiring content of the summary that affords the reasonable gist".[151] Notably, Dobson J recognized that the cancellation of a passport was less onerous than the deprivation of liberty.[152] This is consistent with the position in the United Kingdom, where the *AF (No 3)* requirement does not apply in every context, but it is accepted to apply in relation to control orders and TPIMs.[153] Since the imposition of a control order significantly restricts the liberty of the controlee — including, as discussed further below, what may legally amount to detention — there is a stronger case for saying that a standard of disclosure analogous to that of *AF(No 3)* ought to apply to the TSCOA's control order regime.

(2) The incoming legislative fix

In late 2022, the Security Information in Proceedings Legislation Bill was enacted as two separate Acts (although neither has yet entered into force). The main Act sets out a general framework governing the use of security information in court proceedings.[154] A subsidiary Act amends or repeals several other Acts; among the repealed provisions is s 36 of the TSCOA.[155]

Under the new legislative regime, control order proceedings are instead to be dealt with as a subset of civil proceedings.[156] Section 32 allows the Crown in civil proceedings to make an SI (security information) application requesting the court to make orders protecting the confidentiality of certain information. The court must make certain security information orders[157] to protect the confidentiality of the information if it is satisfied that the information that is the subject of the application is national security information,[158] or if the Crown has gone through a certification process with respect to that information.[159]

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146 *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269.

147 At [59].

148 *A v Minister of Internal Affairs* [2018] NZHC 1328, [2018] 3 NZLR 583.

149 See also *A v Minister of Internal Affairs* [2017] NZHC 746, [2017] 3 NZLR 247.

150 *A v Minister of Internal Affairs*, above n 148, at [13].

151 At [76].

152 At [76].

153 *Secretary of State for the Home Department v BM* [2012] EWHC 714 (Admin), [2012] 1 WLR 2734 at [21].

154 See Security Information in Proceedings Act 2022 [SIPA].

155 Security Information in Proceedings (Repeals and Amendments) Act 2022, s 104.

156 SIPA, s 29(b). See also s 4 definition of "civil proceeding", para (b).

157 Section 31(1).

158 Section 36(2)(b).

159 Sections 36(2)(a) and 40–41.

Among the possible security information orders that can be made is a special procedures order,[160] which in essence establishes a CMP. There is accordingly provision for the appointment of special advocates, closed hearings, the provision of summaries and so on. These provisions are substantial improvements on s 36 of the TSCOA, but problems remain. More specifically, the role and function of special advocates is defined broadly to include examining witnesses and making submissions; it is presumptively likened to the functions the controlee's lawyer has.[161] The provisions regarding communications have been clarified — when the restriction on communications applies, and which parties and entities can be communicated with (and under what conditions) once the restriction does apply.[162] One such condition is giving the Crown opportunity to make submissions on a special advocate's application for the court's direction to communicate with the affected person. Since this necessarily entails the Crown being notified, this may well deter use of this provision.[163]

Regarding the summary, the Crown must provide a written summary of the security information to the other party, the court and the special advocate.[164] The court does have the power to modify the summary,[165] and it is envisaged that special advocates will have a role in arguing for greater disclosure to the controlee. Given the inherent institutional interests and potential biases in play, a more robust judicial role and allowing input from a broader array of actors into the content of the summary is desirable, and accords with the Law Commission's recommendation for ensuring meaningful disclosure.[166]

Problematically, however, the requirement of a summary can be waived by the court.[167] Indeed, this is representative of several other provisos, whereby the special advocate need not be given access to the security information if the court considers this would not cause unfair prejudice,[168] or the appointment of the special advocate can be waived altogether if the court is satisfied that non-disclosure of the security information would not cause unfair prejudice.[169] The operation of these provisos would seriously undermine (or even potentially completely remove) the ability of special advocates to function as any kind of safeguard against the prejudice of non-disclosed information.

B *Could control orders result in arbitrary detention?*

In providing its advice about the compatibility of the Bill that became the TSCOA with the BORA, the Crown Law Office considered that control orders would not violate the right against arbitrary detention in s 22 because the threshold for detention was not met.[170] This conclusion relied on British case law concerning whether certain control orders violated the equivalent right in the ECHR, art 5, which protects the liberty and security of the person. In the leading decision of *Secretary of State for the Home Department v JJ*, the majority of the House of Lords concluded that control orders which included electronic tagging and 18-hour curfew in small flats amounted to a deprivation of liberty for the purposes of art 5.[171] Further, consistent with Lord Brown's suggestion in *JJ* that the tipping point for a curfew was 16 hours,[172] the House of Lords rejected art 5 challenges to other control orders with 12-

160 Sections 8–9.
161 Section 20.
162 Section 22.
163 Law Commission, above n 135, at [9.22]–[9.23].
164 SIPA, ss 13(1)–13(2).
165 Section 13(4).
166 Law Commission, above n 135, at [9.32].
167 SIPA, s 14(1).
168 Section 12(3).
169 Section 10(2).
170 Crown Law Office *Terrorism Suppression (Control Orders) Bill (version 22) — Advice regarding consistency with the New Zealand Bill of Rights Act 1990* (7 October 2019) at [6]–[7].
171 *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385.
172 At [105].

hour and 14-hour curfews.[173] Whether intended or not, Lord Brown's 16-hour standard was enthusiastically adopted by the Government, which subsequently boosted the curfew period of some control orders to 16 hours.[174] However, in the subsequent case of *Secretary of State for the Home Department v AP*,[175] the United Kingdom Supreme Court ruled that a control order that included a 16-hour curfew and relocation to another part of the country was a deprivation of liberty.

Based on these decisions, the Crown Law Office concluded that "a control order with a 12-hour overnight curfew at a person's own home does not amount to a deprivation of liberty", and that a control order issued under the TSCOA that imposed various restrictions including a 12-hour curfew would not "invariably amount to detention, such that s 22 of the Bill of Rights Act would be engaged".[176] So far as the British case law is concerned, this is a defensible conclusion.[177] But important context is missing. The high threshold for finding a deprivation of liberty follows the approach of the European Court of Human Rights. But the Strasbourg Court's approach is premised on the assumption that the right to freedom of movement covers lesser intrusions. The United Kingdom, however, has not ratified the instrument protecting this right.[178]

Moreover, it does not follow that, because a particular control order does not amount to a deprivation of liberty under the ECHR, it also does not amount to a detention for the purposes of the BORA. The case law on the meaning of detention under s 22 of the BORA is different. Where an individual has a reasonably held belief induced by official conduct that they are not free to leave, and where the restraint on their liberty is more than a fleeting check, there is detention for the purposes of s 22.[179] As the Law Society observed in light of the relevant New Zealand law:[180]

> It is very difficult to accept that a control order requiring the respondent to be electronically monitored and not to leave their residence for 12-hour periods could be anything other than detention …

The better view, then, is that a person subject to a control order that includes a curfew period has been subject to detention for the purposes of s 22. The question then becomes whether such detention is arbitrary. Interestingly, the Crown Law Office conceded that if this point were reached then it would.[181] This point is worth examining in more detail.

Statutory powers of arrest and detention in the abstract, as well as particular arrests and detentions carried out by agents of the state, can be evaluated with respect to s 22.[182] Here, the relevant question is whether the TSCOA's framework in general (as opposed to a particular use of it) is arbitrary. On this issue, Andrew and Petra Butler set out a laundry list of rule of law considerations — whether there is a legal framework for regulating the use of the power, proper process and so on.[183] General Comment 35

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173 *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440; and *Secretary of State for the Home Department v E* [2007] UKHL 47, [2008] 1 AC 499.

174 Andrew Lynch and Jessie Blackbourn "Special measures: terrorism and control orders" in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (2nd ed, Edward Elgar Publishing, Cheltenham (UK), 2020) 449 at 458.

175 *Secretary of State for the Home Department v AP* [2010] UKSC 24, [2011] 2 AC 1.

176 Crown Law Office, above n 170, at [7].

177 Even so, circumspection is required. In the seminal case on which the British control order cases rely, a nine-hour curfew, together with other restrictions, was found to amount to a deprivation of liberty: see *Guzzardi v Italy* (1981) 3 EHRR 333 (ECHR). See generally Helen Fenwick "Designing ETPIMs around ECHR Review or Normalisation of 'Preventive' Non-Trial-Based Executive Measures?" (2013) 76 MLR 876 at 900.

178 Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1496 UNTS 263 (opened for signature 16 September 1963, entered into force 2 May 1968). See Ed Bates "Anti-terrorism control orders: liberty and security still in the balance" (2009) 29 LS 99 at 124.

179 *Everitt v Attorney-General* [2002] 1 NZLR 82 (CA) at [7]; and Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [19.6.2]–[19.6.3].

180 New Zealand Law Society, above n 108, at [8.5].

181 Crown Law Office, above n 170, at [14]. The Law Society agreed with this point: New Zealand Law Society, above n 108, at [8.6].

182 Butler and Butler, above n 179, at [19.8.1].

183 At [19.8.6].

of the Human Rights Committee (HRC) on art 9 of the International Covenant on Civil and Political Rights (ICCPR) provides further guidance as to the meaning of arbitrary:[184]

> The notion of "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality.

The HRC's specific comment on security detention is also relevant. It states that a system of security detention would only be justifiable in exceptional circumstances. The state would need to demonstrate that: the affected individuals represent "a present, direct and imperative threat" that cannot otherwise be dealt with; the "detention does not last longer than absolutely necessary"; the overall length is limited; and there are procedural protections in place, such as review before an independent court, access to legal advice, and "disclosure to the detainee of, at least, the essence of the evidence on which the decision is taken".[185]

In coming to its conclusion based on the factors set out by the HRC, the Crown Law Office highlighted the low standard for imposing control orders, meaning that their ambit might extend beyond the narrow category referred to by the HRC, and their potential six-year duration.[186] However, it is not entirely obvious that the TSCOA fails to address the matters raised by the HRC. The TSCOA sets out the purposes for which the power to detain can be exercised, and requires that that power be exercised in accordance with those purposes.[187] Its framework regulates the exercise of the detention power; provisions stipulate, for example, the conditions for the exercise of the power and the restrictions that may be imposed. Notably, the court must be satisfied that the controlee "poses a real risk of engaging in terrorism-related activities", and that the restrictions imposed are only those that are necessary and appropriate to prevent that activity and protect the public.[188] The TSCOA limits the duration of a control order, and also states that a court is not to impose a longer duration than it considers necessary to meet the Act's purposes.[189] While renewal is possible, this requires a fresh application and a further decision from the court.[190] Importantly, there are various procedural safeguards.[191] Most obviously, the decision to make a control order rests with the courts. A relevant person also can challenge an application for a final control order at a hearing,[192] and control orders can be varied or discharged either on application, or on the court's own initiative.[193] Regarding the HRC's specific point about minimum disclosure, there will be a stronger case for saying that the TSCOA's control order regime is compliant once the Security Information in Proceedings Act 2022 enters into force.

In any event, as noted earlier, the decision to issue any control order and what restrictions to include rests with the High Court. Section 12(3)(b) of the TSCOA requires the court, "[i]n determining any requirements imposed", to consider whether those requirements are justified limits on rights and freedoms in the BORA. Section 6 of the BORA is of similar effect: the court's power to make a control order imposing certain requirements on a relevant person would presumptively be interpreted as only permitting requirements that did not unjustifiably limit rights.[194] So, if a court were to conclude that this

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184 United Nations Human Rights Committee *General comment No 35: Article 9 (Liberty and security of person)* UN Doc CCPR/C/GC/35 (16 December 2014) at [12] (footnotes omitted).

185 At [15].

186 Crown Law Office, above n 170, at [12].

187 TSCOA, ss 3 and 12(2).

188 Sections 12(2)(a)–12(2)(b).

189 Section 25(2).

190 Section 26.

191 On the importance of these, see Fiona de Londras "Counter-terrorist detention and international human rights law" in Ben Saul (ed) *Research Handbook on International Law and Terrorism* (2nd ed, Edward Elgar Publishing, Cheltenham (UK), 2020) 371 at 375–376.

192 TSCOA, s 16.

193 Section 27.

194 See also *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [101]–[102]; and *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [118]–[119].

was not the case in respect of a control order imposing a 12-hour curfew (in the context of s 22, this would be simply that arbitrary detention would result), the court would be obliged not to impose an order with such a restriction.

C *Might control orders violate double jeopardy?*

As discussed earlier, perhaps the prime attraction of control orders is that they are civil orders that permit the imposition of onerous restrictions without the need to observe the rigours of the criminal process. A further implication of control orders being civil in nature is that their introduction does not violate rules against retrospective punishment or double jeopardy. This at least was the view of the Crown Law Office, which concluded that a control order was not a criminal sanction, and hence was not a retrospective penalty for the purposes of s 25(g) of the BORA or a form of punishment implicating the right against double jeopardy in s 26.[195]

The Crown Law Office again relied on the British case law — this time the House of Lords' decision in *Secretary of State for the Home Department v MB*,[196] which held that control orders did not involve the determination of a criminal charge in the context of finding that certain additional protections under art 6 of the ECHR were inapplicable.[197] There was also discussion of the New Zealand Court of Appeal's discussion in *Belcher v Chief Executive of the Department of Corrections*,[198] which held that the imposition of extended supervision orders (ESOs) — orders introduced by the Parole (Extended Supervision) Amendment Act 2004 that allow convicted child sex offenders to be subject to monitoring for up to ten years after serving their custodial sentences — "amounts to punishment and thus engages ss 25 and 26 of the NZBORA".[199]

There have been subsequent developments in the case law. In *Chisnall v Attorney-General*, the Court of Appeal held that ESOs, operating under an amended regime post-*Belcher*, amounted to a penalty for BORA purposes.[200] The Court also considered public protection orders (PPOs) under the Public Safety (Public Protection Orders) Act 2014, which may be issued by the High Court in respect of individuals thought to pose a very high risk of imminent and serious sexual or violent offending. The Court noted that the impact of a PPO was even more severe than an ESO: it lasts indefinitely, and subjects a person to detention on prison grounds.[201] Although the process for imposing a PPO operates under the High Court's civil processes, the Court noted that the trigger for a PPO, like an ESO, was conviction for specified criminal offences.[202] Ultimately, the Court held that a PPO was also a penalty.[203]

In *D (SC 31/2019) v New Zealand Police*,[204] the issue arose in respect of registration orders imposed under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016. The order issued against D made him a registered child sex offender subject to various periodic reporting obligations. While these obligations were recognized as being relatively minor, the Supreme Court noted that the trigger for the making of an order was a sentence following criminal conviction, that the appeal process was based on the Criminal Procedure Act 2011, and that failure to comply with the reporting obligations without reasonable excuse was an offence. Accordingly, the Court concluded that a registration order was a penalty for the purposes of s 25 of the BORA.[205]

There seem to be two broad criteria relied on by the courts: the onerousness of the attendant obligations or restrictions and the degree of connection to the criminal justice system. Registration

195 Crown Law Office, above n 170, at [21]–[26].

196 *Secretary of State for the Home Department v MB*, above n 173.

197 See Bates, above n 178, at 109–110.

198 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 (CA).

199 At [49].

200 *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [131]–[138].

201 At [148].

202 At [154].

203 At [162].

204 *D (SC 31/2019) v New Zealand Police*, above n 194.

205 At [55]–[59], [161] and [278].

orders are relatively non-onerous but are closely connected to the criminal justice process — indeed they are made at the time of sentencing and are stated to be a sentence.[206] ESOs are onerous, and last for at least 10 years. They are predicated on a conviction for a qualifying offence. They require a separate application, but these are criminal proceedings.[207] PPOs might be sought by way of civil proceedings, but they are predicated upon conviction for a qualifying offence, last indefinitely, and are particularly onerous.[208] Indeed, the draconian consequences that flow from a PPO seemed to weigh on the Court of Appeal in *Chisnall* most of all.[209]

Based on the foregoing, it is difficult to be too confident about pronouncing whether a control order is a penalty. Their duration, while lengthy, is less than that of ESOs and PPOs. PPOs result in the affected individual being detained on prison grounds and being subject to search, monitoring and restrictions including seclusion and restraint.[210] The standard conditions of ESOs include reporting and notification obligations, and restrictions on association and contacting people. Additional special conditions may be imposed by the Parole Board, including electronic monitoring and residential restrictions, which can "require the offender to stay at a specified residence at all times for a period of up to 12 months".[211] The Court may also require the Parole Board to impose an intensive monitoring condition that subjects the individual to 24-hour monitoring for up to 12 months.[212] Further, in contrast to the Parole Board's more open-ended power to impose special conditions,[213] the list of restrictions under s 17 of the TSCOA is closed. In sum, even the most burdensome control order that included restrictions such as curfew and electronic monitoring would seem to fall short of the onerousness of PPOs and ESOs.

Additionally, control orders require a separate application via civil proceedings where the standard of proof is accordingly the balance of probabilities. And, as enacted, control orders under the TSCOA were not predicated on conviction — indeed the original premise for the establishment of the regime was that criminal prosecution was infeasible. This suggests that the control orders originally available under the TSCOA would not be a penalty. However, as outlined earlier, the CTLA 2021 extends the control order regime to cover relevant offenders — persons convicted of specified terrorism-related offences — as well as relevant returners. As the advice from the Crown Law Office acknowledges, this complicates the picture since eligibility here is predicated on conviction for certain offences, much like PPOs and ESOs. Nevertheless, the Crown Law Office concluded that a control order imposed on a relevant offender would not invariably amount to a penalty.[214] Several of the reasons given are those already discussed above relating to duration, the civil nature of control order proceedings and the variability of the restrictions.[215] Two further reasons put forward are dubious. The first is that the conviction for the specified offences is a necessary but not sufficient condition for the imposition of a control order. While true, the same goes for PPOs and ESOs.[216] The second is that a control order "may not involve detention in prison or in a prison-like institution", whereas "both the ESO and PPO involve detention".[217] It is true that a control order does not entail detention in prison. But neither does an ESO. Moreover, as argued in the previous section, the claim that a control order categorically does not involve detention is suspect.

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206 Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 9(4).

207 *Chisnall v Attorney-General*, above n 200, at [115] and [131].

208 At [148] and [154].

209 At [155].

210 At [5].

211 At [35(b)]. See also Parole Act 2002, ss 15, 33 and 107K.

212 Parole Act 2002, s 107IAC.

213 Section 15(3).

214 Crown Law Office *BORA Vet Advice: Counter-Terrorism Legislation Bill (PCO 22558/1.41) – Consistency with the New Zealand Bill of Rights Act 1990* (6 April 2021) at [39]–[46].

215 At [45].

216 See Parole Act 2002, s 107I; and Public Safety (Public Protection Orders) Act 2014, s 13.

217 Crown Law Office, above n 214, at [45.5].

The Crown Law Office conceded that, if a court were to conclude that a particular control order was a penalty, issues would arise.[218] The right against retrospective punishment is not implicated because the amendment is prospective, requiring a relevant offender to have committed and been convicted of a qualifying offence on or after the commencement date of the CTLA.[219] However, this still leaves the right against double jeopardy in s 26(2) of the BORA. The advice here was that, if a Court were dealing with a case where it considered s 26(2) to be implicated, it would then consider whether the limitation on the right was justified in the circumstances.[220] In *Chisnall*, the Court of Appeal took this approach. Having held that both PPOs and ESOs amounted to penalties, thus limiting the double jeopardy right under s 26(2), the Court turned to consider reasonable justifications under s 5.[221] While the right was not of the type that could not be subject to reasonable limitation,[222] it was nonetheless fundamental, meaning that departure from it required strong justification.[223] The Court accepted that the legislative objectives underlying PPOs and ESOs were important, but held that the limit on s 26(2) was not demonstrably justified because there was insufficient material to support the proportionality limb of the s 5 analysis.[224]

Based on the foregoing, a control order is probably not a penalty for the purposes of the BORA. This conclusion can be less surely stated in respect of control orders imposed on relevant offenders. However, were a court to conclude that a particular control order was a penalty and was an unjustified limit on the s 26(2) right, then it would be obliged not to impose that particular order, and it would likely vary the onerousness of the restrictions in such a way that the control order no longer amounted to a penalty. As noted earlier, s 12(3)(b) of the TSCOA requires the court in exercising its power to issue a control order to consider whether the requirements are justified limits on BORA rights, and s 6 of the BORA presumptively permits only requirements that do not unjustifiably limit rights.

V Conclusion

As this article has discussed, the TSCOA is a novel addition to New Zealand law — a response to the problem of potentially dangerous returnees from foreign battlefields that deliberately straddles the boundary between civil and criminal law and sits in tension with various BORA rights. In large part, the TSCOA places the courts at the heart of the control order regime. This is not undesirable: facility for independent oversight and scrutiny of the executive's claims of what security requires is welcome. But it does place the courts in the unenviable position of being heavily involved in the issue of control orders, while also trying to reconcile certain intractable features of control order regimes — their legal hybridity and use of non-disclosed information in particular — with due process and other important rights.

The background context to the TSCOA was also discussed, including its swift enactment as a response to the concrete prospect of returnees from the Syrian Civil War. While the expedited timetable attracted negative comment from the relevant Select Committee and the public, all this handwringing about the process was ultimately for naught. Moreover, with a proposal to include a sunset clause also rejected,[225] the TSCOA is permanent legislation. And permanent counterterrorism legislation is notoriously resistant to repeal. There is provision for a review once the TSCOA has been in force for two years.[226] But it would be folly to expect too much to come from this. Security bureaucracies are

218 At [49].

219 CTLA, s 45(3), which inserted TSCOA, s 6(5)(a).

220 Crown Law Office, above n 214, at [50].

221 *Chisnall v Attorney-General*, above n 200, at [177].

222 Compare New Zealand Bill of Rights Act 1990, s 9: see *Fitzgerald v R*, above n 194.

223 *Chisnall v Attorney-General*, above n 200, at [190].

224 At [217]–[220] and [223]–[226].

225 Terrorism Suppression (Control Orders) Bill (select committee report), above n 49, at 7. The record of the effectiveness of sunset clauses is in any case spotty: see John Ip "Sunset Clauses and Counterterrorism Legislation" [2013] PL 74.

226 TSCOA, s 38.

naturally averse to reducing their available tools — an institutional manifestation of the endowment effect or loss aversion, whereby security agencies, having acquired a new power, become unwilling to relinquish it.[227] Further, as Andrew Lynch and Jessie Blackbourn observe, "[i]t is a truism that regardless of their actual utility, measures introduced to respond to terrorism prove very difficult to withdraw".[228] This is because the preventive nature of counterterrorism measures like control orders makes their effectiveness difficult to assess empirically.[229] In lieu of data, the irresistible logic of security fills the void. If, after two years, it turns out that control orders have been used, then that will likely be relied on as evidence that they are valuable security measures to be maintained. But even if they have not been used much,[230] this does not entail repeal. TPIMs in the United Kingdom and control orders in Australia have only been sparingly employed.[231] But this can be spun as suggesting not desuetude, but deliberation and discretion.[232]

Writing about control orders and TPIMs in Australia and the United Kingdom, Clive Walker concludes that "the endurance of terrorism and the limited appetite for accepting risk suggest that pre-emptive executive orders of this kind will endure".[233] Having followed our Commonwealth cousins this far, there is little reason to think New Zealand will be any different. Indeed, the TSCOA, although novel and, as yet, barely used, has already been expanded; control orders are, in all likelihood, here to stay.

227 See generally Michael J Glennon "Who's Checking Whom?" in Karen J Greenberg (ed) *Reimagining the National Security State: Liberalism on the Brink* (Cambridge University Press, Cambridge (UK), 2020) 3 at 5.

228 Lynch and Blackbourn, above n 174, at 464.

229 Bérénice Boutin *Do Counter-Terrorism Measures Work? Appraising the Long-Term and Global Effectiveness of Security Policies* (Asser Institute, Policy Brief 2018-03, November 2018) at 5.

230 As of July 2022, the one known control order was issued in *Commissioner of Police v R*, above n 25.

231 Jonathan Hall *The Terrorism Acts in 2018: Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006* (March 2020) at [8.8]; and Renwick, above n 126, at xi.

232 For example, with respect to the minimal use of control orders in Australia: see Renwick, above n 126, at [8.17]; and Parliamentary Joint Committee on Intelligence and Security *Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime* (Commonwealth of Australia, February 2018) at [3.56].

233 Clive Walker "The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!" (2013) 37 MULR 143 at 183.