

## UNDER CONTROL, BUT OUT OF PROPORTION: PROPORTIONALITY IN SENTENCING FOR CONTROL ORDER VIOLATIONS

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### I INTRODUCTION

The use of control orders is among the most significant and controversial elements of the Australian legal response to the threat of terrorism. The logic behind the system is alluringly straightforward. Where concerns are raised that an individual may engage in terrorist activities, courts are empowered to impose, by way of a civil order, such conditions as are reasonably necessary to mitigate the risk of the individual's potentially harmful future conduct. Any breach by that individual of the terms of the order constitutes a criminal offence, punishable by up to five years' imprisonment. While on the surface this system may appear straightforward, it has given rise to an extensive and complex debate about the proper safeguards of individual liberty and the appropriate expansion of the criminal justice system.<sup>1</sup> While the debate has been rich in commentary respecting the constitutional<sup>2</sup> and human rights<sup>3</sup> implications of the system, there has been little analysis of its criminal law implications. The obvious reason for the lack of criminal legal scholarship regarding the control order regime in Australia is that, until 2016, nobody had come before the courts for sanction in relation to a control order violation. However, following two recent decisions of that nature, it is now possible to offer some commentary upon the extent to which the control order regime has been responsive to traditional normative constraints in sentencing within the criminal justice system.

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1 See, eg, Susan Donkin, *Preventing Terrorism and Controlling Risk: A Comparative Analysis of Control Orders in the UK and Australia* (Springer, 2014).

2 See, eg, Andrew Lynch, 'Thomas v Mowbray: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182; George Williams and Hernan Pintos-Lopez, 'Enemies Foreign and Domestic: Thomas v Mowbray and the New Scope of the Defence Power' 27 *University of Tasmania Law Review* 83.

3 See, eg, Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders under Federal Law: The Case for a Bill of Rights' (2007) 31 *Melbourne University Law Review* 1072; Nicola McGarrity, 'From Terrorism to Bikies: Control Orders in Australia' (2012) 37 *Alternative Law Journal* 166.

In 2016–17, the New South Wales District Court has had cause to consider the sentences of two individuals who pled guilty to violations of control orders. These were the first sentences imposed for control order violations since the scheme became operative in 2005. In the first of these cases, *R v MO [No 1]* ('*R v MO*'), the defendant violated a control order by using a public telephone, and an unauthorised mobile telephone, in all instances for non-criminal purposes.<sup>4</sup> He was sentenced to two years' imprisonment.<sup>5</sup> In the second case, *R v Naizmand* ('*Naizmand*'), the defendant accessed a number of YouTube videos containing extremist material associated with the Islamic State terrorist group, in violation of a requirement that he not access any material depicting or describing a suicide attack.<sup>6</sup> Mr Naizmand was sentenced to five years and three months' imprisonment.<sup>7</sup> This article will argue that both cases raise serious concerns regarding the extent to which the courts have logically and persuasively formulated the gravity of the offenders' conduct for the purposes of imposing proportionate sentences. They raise a number of questions about how a general concern that the offender either supports or may support a terrorist organisation may permissibly be used to aggravate sentences imposed upon them for control order violations.

At this early stage, the jurisprudence on sentencing for control order violations is under-developed. Importantly, there has yet to be any appellate consideration of the appropriate approach to sentencing for these offences. It is not, therefore, the purpose of this article to survey or critique the existing first instance decisions in detail. However, reference to the approach taken by the NSW District Court in these cases provides an important illustration of the potential issues which will no doubt confront courts in future consideration of these offences.

Ultimately, this article will argue that the concern that the defendant has (or had) evinced an intention to engage in terrorist conduct may loom overly large in the courts' assessment of proportionality for control order violations. It will argue that the defendant's terrorist associations may only properly be used in a proportionality assessment in two ways. First, they are relevant to understanding the significance of the interests protected by the imposition of a control order. Secondly, they are relevant to understanding the gravity of the offender's conduct in breach of the control order but *only where* the conduct bears a sufficient nexus to the organisation, planning or facilitation of an actual terrorist act. Furthermore, this article will generally make the case for greater specificity and nuance in articulating the gravity of the offender's specific case to ensure that their punishment proportionately reflects the degree of *reprehensibility* of their conduct.

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4 *R v MO [No 1]* [2016] NSWDC 144 (Berman DCJ).

5 Initially, the defendant was sentenced to two and a half years' imprisonment, but was subsequently resentenced due to an error of law in the calculation of the non-parole period. See: *R v MO [No 2]* [2016] NSWDC 145. This article will nonetheless refer to the initial reasons for sentence, which were substantively unchanged in the subsequent hearing.

6 *R v Naizmand* [2017] NSWDC 4 (Scotting DCJ).

7 *Ibid* [78]–[82] (Scotting DCJ).

The discussion in this article is divided into four main parts. Part II will consider the background, purposes and legislative structure of the control order system in Australia. Part III will provide a general theoretical overview of the principled basis for the requirement of proportionality in sentencing, and in particular the bases upon which certain features of a crime may or may not be relevant to this assessment. Parts IV and V will consider two foundational aspects of the proportionality assessment in sentencing control order violations – the significance of the interests protected by the order, and the gravity of the conduct constituting breach.

It is important to acknowledge two limitations in the scope of the present article at the outset. First, it will not directly consider the merits of the control order system. This question has been the subject of extensive and persuasive scholarly consideration elsewhere.<sup>8</sup> However, the criminal justice implications of the system – especially the capacity of the regime to accommodate traditional criminal justice principles such as proportionality in sentencing – undoubtedly have some bearing upon the system's overall merits. Secondly, this article is only concerned with the courts' sentencing consideration in relation to *proportionality*. Clearly, the sentences imposed upon an offender will also reflect a range of personal characteristics of the defendant, and other factors such as the need for general and specific deterrence. This article will, therefore, not be in a position to critique the particular sentencing outcomes in the decided cases for control order violations to the extent that they may take account of those additional factors.

## II THE CONTROL ORDER SYSTEM IN AUSTRALIA

The control order system was first introduced in Australia pursuant to the *Anti-Terrorism Act (No 2) 2005* (Cth). At the time the Bill was introduced, then Attorney-General, Philip Ruddock MP, stated that the Bill 'ensures we are in the strongest position possible to prevent new and emerging threats, to stop terrorists carrying out their intended acts'.<sup>9</sup> The regime was initially designed to emulate the system operating at that time in the United Kingdom,<sup>10</sup> which had been described by the Government as best practice in counter-terrorism policy.<sup>11</sup> That system in the United Kingdom has since been subject to amendment due to issues arising in connection with the European Convention on Human Rights.<sup>12</sup> When initially implemented in Australia, the control order system was subject to a

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8 See, eg, Lisa Burton and George Williams, 'What Future for Australia's Control Order Regime?' (2013) 24 *Public Law Review* 182, 182.

9 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (Philip Ruddock, Attorney-General).

10 Burton and Williams, above n 8, 182.

11 John Howard, 'New Counter-Terrorism Laws' (Joint Press Conference with the Attorney-General Philip Ruddock, 8 September 2005).

12 See, eg, *Secretary of State for the Home Department v JJ* [2008] 1 AC 385; *Secretary of State for the Home Department v E* [2008] 1 AC 499; *Secretary of State for the Home Department v MB* [2008] 1 AC 440 ('MB'); *Terrorism Prevention and Investigation Measures Act 2011* (UK).

‘sunset clause’. It was subsequently renewed pursuant to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). In supporting the renewal of the scheme, the Explanatory Memorandum of the Bill noted ‘the enduring nature of the terrorist threat and the important role of control orders in mitigating and responding to that threat’.<sup>13</sup> This Part will set out the key features of the control order system in Australia, as amended from time to time.

The control order system is a significant component of Australia’s legal response to the threat of terrorism. The objects of the system are said to be the protection of the public from a terrorist act, the prevention of the provision of support for or the facilitation of a terrorist act, and the prevention of the provision of support for, or the facilitation of engagement with, hostile activity in a foreign country.<sup>14</sup>

An application for a control order is made by a senior officer of the Australian Federal Police (‘AFP’). Prior to seeking a control order, that officer must also acquire the consent of the Commonwealth Attorney-General. The senior AFP officer may only seek the consent of the Attorney-General on the basis of one of a prescribed list of relevant suspicions. The bases for seeking a control order are that the AFP officer:<sup>15</sup>

- (a) suspects on reasonable grounds that the order in the terms to be requested would substantially assist in preventing a terrorist act; or
- (b) suspects on reasonable grounds that the person has:
  - (i) provided training to, received training from or participated in training with a listed terrorist organisation; or
  - (ii) engaged in a hostile activity in a foreign country; or
  - (iii) been convicted in Australia of an offence relating to terrorism, a terrorist organisation (within the meaning of subsection 102.1(1)) or a terrorist act (within the meaning of section 100.1); or
  - (iv) been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism offence (within the meaning of subsection 3(1) of the Crimes Act 1914); or
- (c) suspects on reasonable grounds that the order in the terms to be requested would substantially assist in preventing the provision of support for or the facilitation of a terrorist act; or
- (d) suspects on reasonable grounds that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country.

As originally enacted, the system required the AFP officer to *consider* on reasonable grounds that one of the relevant bases existed, however that threshold was lowered to the officer *suspecting* on reasonable grounds under the 2014 amendment. The Explanatory Memorandum stated that the amendment responded to advice from law enforcement that the previous threshold placed too

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13 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 128, 134.

14 *Criminal Code Act 1995* (Cth) sch 1 (‘*Criminal Code*’) s 104.1.

15 *Criminal Code* s 104.2.

high an evidentiary burden on the requesting officer.<sup>16</sup> If these conditions are satisfied, the AFP may apply to a court for the issuing of a control order. A control order may be sought against any person older than 14 years of age.<sup>17</sup>

The court may make a control order only if satisfied, on the balance of probabilities, that one of the relevant bases exists.<sup>18</sup> The court must also be satisfied, again on the balance of probabilities, that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, to achieve the objects of the control order system.<sup>19</sup>

The Commonwealth *Criminal Code* prescribes exhaustively the obligations, prohibitions and restrictions which may be imposed on an individual pursuant to a control order. However, it is clear that there remains a broad discretion on the part of the court as to the precise content of the order. It is also significant to note that, at least in its initial form, the terms of the order are drafted by the AFP at the stage that consent is sought from the Attorney-General. In a submission to a parliamentary review on the renewal of the regime, the AFP submitted that '[t]he advantage of the control order regime is that it is a preventative measure which has the flexibility to be tailored (through specifically imposed conditions) to the particular threat the individual is suspected of posing to the community'.<sup>20</sup> The specified obligations and prohibitions capable of being imposed pursuant to a control order are as follows:<sup>21</sup>

- (a) a prohibition or restriction on the person being at specified areas or places;
- (b) a prohibition or restriction on the person leaving Australia;
- (c) a requirement that the person remain at specified premises between specified times each day, or on specified days, but for no more than 12 hours within any 24 hours;
- (d) a requirement that the person wear a tracking device;
- (e) a prohibition or restriction on the person communicating or associating with specified individuals;
- (f) a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet);
- (g) a prohibition or restriction on the person possessing or using specified articles or substances;
- (h) a prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
- (i) a requirement that the person report to specified persons at specified times and places;
- (j) a requirement that the person allow himself or herself to be photographed;

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16 Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 128, 123.

17 *Criminal Code* s 104.28.

18 *Criminal Code* s 104.4.

19 *Criminal Code* s 104.4.

20 Australian Federal Police, Submission No 36 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, [21].

21 *Criminal Code* s 104.5(3).

- (k) a requirement that the person allow impressions of his or her fingerprints to be taken;
- (l) a requirement that the person participate in specified counselling or education.

We may note two matters in relation to the possible obligations and prohibitions which may be imposed that will be relevant to the proper approach to proportionate sentencing. First, the above list of prohibitions clearly contemplates an expansive intrusion into the privacy and liberty of any person who is subject to a control order. The possible controls are extensive. Some have argued that the nature of the possible controls is such that they appear to be more punitive in character than straightforwardly diversionary.<sup>22</sup> This was the genesis of one of the problems under the system in the United Kingdom in terms of compliance with obligations under the European Convention on Human Rights.<sup>23</sup> Secondly, it is important to note that the possible orders empower the court to restrict a person's engagement in otherwise lawful activities. There is no requirement, *per se*, that the restrictions relate specifically to behaviour connected to the planning or facilitation of a terrorist act – so long as the court believes that the relevant prohibition is reasonably necessary to prevent a terrorist act. Consider the capacity of the court to order 'a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet)'.<sup>24</sup> Clearly enough, this restriction is targeted at the risk that the individual would, using one of the specified forms of telecommunication or other technology, encourage, plan or facilitate a terrorist act. However, in practice there is no requirement that the order be limited to the use of that technology *for that proscribed purpose*, and may extend to a prohibition on the use of that technology *for any purpose*. Such a prohibition would be entirely lawful under the *Criminal Code* and, from the decided cases considered below, would appear to be a common feature of the control order regime in practice.

In the first instance, the court has the power to make an *interim* control order. It must then be served on the controlee within 48 hours, and its effect must be explained to them.<sup>25</sup> The order is effective upon the controlee from this time. However, for the order to have an ongoing effect, the AFP must elect to confirm the control order, and apply to do so to the court.<sup>26</sup> Only at this stage does the controlee have the right to make submissions to the court as to why the order, as initially made on an interim basis, ought not be confirmed.<sup>27</sup> The control order may then be confirmed for a period not to exceed 12 months from the date of the interim order.<sup>28</sup>

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22 See, eg, Lucia Zedner, 'Preventive Justice or Pre-punishment? The Case of Control Orders' (2007) 60 *Current Legal Problems* 174, 196.

23 *MB* [2008] 1 AC 440.

24 *Criminal Code* s 104.5(3)(f).

25 *Criminal Code* s 104.12.

26 *Criminal Code* s 104.12A.

27 *Criminal Code* s 104.14.

28 *Criminal Code* s 104.16(1)(d).

A person commits an offence where, while a control order is in force in relation to them, they contravene any obligation imposed under the order.<sup>29</sup> They are liable to punishment by up to five years' imprisonment.<sup>30</sup> It is notable that, as a maximum sentence, five years' imprisonment is considerably lower than the other offences contained within Part 5.3 of the Commonwealth *Criminal Code*, containing offences in relation to terrorism.

It would be remiss to speak of the control order system in Australia without remarking upon the relative infrequency of its use. After the system became operative in 2005, only two high profile individuals were subject to control orders in its first two years of operation – Joseph Thomas, known in the media as 'Jihad Jack,' and David Hicks.<sup>31</sup> Both men had been accused of activities indicating their support for the Al-Qaeda terrorist network. In both cases, the control orders were put in place following criminal proceedings, rather than in anticipation of specific future conduct. Information about the subsequent operation of the control order system is available from annual reports published by the Attorney-General's Department. They indicate that three interim orders were made during the time of the 2014–15 report.<sup>32</sup> No report after 2015 is publicly available at present. It perhaps suffices to observe that the relatively limited use of the control order regime is surprising given the strong imperative arguments made for the necessity of the introduction, and then continuation, of the system by both the government and the AFP. It was argued at the time of the renewal by Bret Walker SC, who had then recently finished his service as the Independent National Security Legislation Monitor, that the relatively infrequent use of the system was one indicator of the need for reform.<sup>33</sup> However, ultimately, both major political parties remained persuaded of the need to continue the system.

The relative infrequency with which control orders have been sought in Australia is also significant in the approach of this article to understanding how the courts have determined proportionate sentencing. To date, only two individuals have been subject to proceedings for breach of a control order. In both instances, the matter came for sentencing before the District Court of New South Wales. Furthermore, the issue of the appropriate principles for sentencing control order violations has yet to be the subject of appellate consideration. In that context, it is perhaps more important to give critical evaluation to the reasoning of the available decisions, in the hope that it may inform future approaches to this question in the event that the regime becomes a more popular law enforcement tool.

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29 *Criminal Code* s 104.27.

30 *Criminal Code* s 104.27.

31 Bronwen Jagers, 'Anti-Terrorism Control Orders in Australia and the United Kingdom: A Comparison' (Research Paper No 28, Parliamentary Library, Parliament of Australia, 29 April 2008).

32 Attorney-General's Department, 'Control Orders and Preventative Detention Orders, Annual Report 2014–15' (2016) <<https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Control-Orders-and-Preventative-Annual-Report-2014-15.pdf>>.

33 Evidence to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 8 October 2014 (Bret Walker SC).

### III PROPORTIONALITY IN SENTENCING

The contours of the concept of proportionality in sentencing are well established, both normatively and legally. Proportionality operates as a moral and legal constraint upon judges in making sentencing decisions.<sup>34</sup> The ‘desert rationale’ in sentencing is premised upon the idea that a penal sanction should fairly reflect the degree of *reprehensibleness* (that is, both harmfulness and culpability) of the defendant’s conduct.<sup>35</sup> Von Hirsch and Ashworth argue that such a notion ‘comports with common-sense notions of justice, that how severely a person is punished should depend on the degree of blameworthiness of his [or her] conduct’.<sup>36</sup> For Ashworth, proportionality is a function of three criteria.<sup>37</sup> First, each offender should receive an equally severe sentence as those who committed offences of equal seriousness (the principle of parity). Secondly, each offender should receive a sentence that is more severe than those who committed less serious offences, and less severe than those who committed more serious offences (the principle of rank ordering). Thirdly, each offender should receive a sentence that is more or less severe than other sentences in proportion to the degree of seriousness of the offence (the principle of spacing).

This article is concerned with ‘proportionality’ in the sense of what von Hirsch and others have usefully described as *ordinal* (or relative) proportionality. Ordinal proportionality ensures that persons convicted of crimes of comparable seriousness should receive punishments of comparable severity.<sup>38</sup> In the context of the present discussion, then, we are concerned with understanding how particular approaches to the assessment of proportionality affect our view of the seriousness of control order violations *relative to* the seriousness of other criminal offences.

The precise manner in which understandings of proportionality should be integrated into the determination of a final sentence is a matter of considerable debate. Sentencing rationales may differ regarding the emphasis they place upon proportionality analysis relative to other considerations.<sup>39</sup> There is good reason to believe that additional sentencing considerations, such as incapacitation, deterrence, and rehabilitation will play a prominent role in sentencing for any terrorism offences. In particular, it will be readily apparent that deterrence – both in the sense of specific deterrence to ensure the defendant’s future compliance with a control order, and general deterrence to reduce the likelihood of other

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34 Carol Steiker, ‘Proportionality as a Limit on Preventive Justice’ in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 194, 195.

35 Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 4.

36 *Ibid.*

37 Malcolm Thorburn, ‘Proportionate Sentencing and the Rule of Law’ in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press, 2012) 269, 270.

38 Andrew von Hirsch, ‘Proportionality and the Philosophy of Punishment’ (1992) 16 *Crime and Justice* 55, 76.

39 *Ibid.* 56.

individuals preparing for or planning future attacks – will be prominent considerations in sentencing offences of the kind discussed in this article. These are legitimate additional concerns, and indeed reasonable minds may differ as to their relative significance in the determination of a sentence.

Despite these additional considerations, proportionality is foundational to contemporary sentencing practice in Australia. Any determination of proportionality in sentencing rests upon a consideration of a number of factors which, together, dictate the seriousness of the crime – including the nature of the criminal conduct, its impact upon any victims, the degree of participation of the offender, and their mental state at the time of the conduct. Appropriately delineating those factors which properly constitute the *gravity* of the offence is essential, therefore, to conducting a proper proportionality assessment for the purposes of sentencing. One of the most significant tasks of the sentencing judge is to determine *what counts* for the purposes of a proper proportionality assessment.

Intuitively, we can understand that this task will be more complicated in respect of some offences than others. Additional complications arise, for example, in an assessment of proportionality in relation to offences targeting inchoate harms. In these circumstances, the sentencing judge must determine, normatively and legally, the extent to which an offender's conduct is rendered more serious by its connection to a probable future harm. Zedner explains that this assessment is further complicated by the fact that proportionality in penal theory is a backward looking principle that cannot readily be applied to future and as yet unknown harms. She explains that a possible approach to proportionality in this regard is to consider that:<sup>40</sup>

The burdens imposed should be proportionate, first, to the gravity of the harm threatened. And secondly, they should be proportionate to the likelihood of that harm eventuating. Or to put it another way, the burdens imposed must be proportionate to the potential danger, discounted by the likelihood of its occurrence.

What, then, can be said of the proper approach to proportionality for control order violations? What *counts* for the purposes of the proportionality assessment? This article argues that proportionate sentencing in relation to control order violations should be understood as a function of two criteria:

- first, the significance of the interests protected by the order; and
- secondly, the gravity of the conduct constituting breach, including both its harmfulness and the defendant's degree of culpability.

This approach is similar, though admittedly not in terms, to that advocated by the Sentencing Advisory Council (Victoria) in respect of offences for breach of family violence prevention orders. The Council proposed an approach reflecting both the immediate context of the breach, and the original behaviour

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40 Zedner, above n 22, 198.

which provides a background to the making of the order.<sup>41</sup> This approach was subsequently endorsed by the Australian Law Reform Commission.<sup>42</sup>

The following two Parts of this article will detail how consideration should be given to these criteria in sentencing for control order violations. In so doing, the article will also discuss how these factors have been (or, perhaps more accurately, have not adequately been) considered in the two decided cases of control order violation to date.

#### IV PROPORTIONALITY ASSESSMENT – INTERESTS PROTECTED BY THE ORDER

In sentencing any offender for breach of an order of a court, the significance of the interests protected by that initial order will invariably form part of the assessment of the appropriate sentence. Breaching an order which protects higher order interests represents a greater moral wrong than breaching an order protecting lesser interests. This understanding of the rank ordering of breaches exists independently of any consideration of the particular wrongness occasioned by the conduct constituting breach. The relevance of this latter consideration will be discussed in the following Part.

Consider the range of interests protected by various civil orders available to the court. Protected interests range from the physical integrity of vulnerable persons (for example, by the making of an apprehended violence order pursuant to the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)), the fidelity of court proceedings (for example, by the imposition of bail conditions pursuant to the *Bail Act 2013* (NSW)), or the expeditious resolution of civil disputes (for example, through various orders under the *Uniform Civil Procedure Rules 2005* (NSW)). One would expect, all other things being equal, sentences imposed for breaches of these various types of orders to reflect the relative significance of the interests protected. Furthermore, as a matter of logic, it must be the case that orders of a similar type may nonetheless protect interests of varying degrees of significance. For instance, where the protected person under an apprehended violence order includes particularly vulnerable persons, such as children, we may consider a breach of that order, all things being equal, to be more severe than in cases where the protected persons are adults.

Clearly, control orders protect significant interests. Taken at its highest, a control order is designed to avert the possibility of a potentially catastrophic terrorist attack, causing significant harm to a large number of innocent people, and to the state more broadly. In that respect, we might assume that concern for the protection of these interests would loom large in any assessment of proportionality. This certainly appears to have been the case in the two cases decided to date. In *R v MO*, the sentencing judge noted that ‘the aim of the

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41 Sentencing Advisory Council (Victoria), ‘Sentencing Practices for Breach of Family Violence Intervention Orders’ (Final Report, June 2009) [5.16].

42 Australian Law Reform Commission, *Family Violence: A National Legal Response*, Report No 114 (2012) vol 1, 555 [12.180].

control order was to protect the public from terrorist acts',<sup>43</sup> and further that '[t]he ability of the authorities to combat terrorism is significantly enhanced if control orders are followed by those subject to them'.<sup>44</sup> In *Naizmand*, the sentencing judge explicitly took account of 'the background to the making of the Control Order'.<sup>45</sup>

In approaches to sentencing terrorism offences generally, terrorism is universally regarded as an act of singular violence.<sup>46</sup> McGarrity, writing generally about the difficulties faced by Australian courts in sentencing terrorist offences, identified two salient differences between terrorism and ordinary criminal offences relevant to an assessment of their gravity.<sup>47</sup> 'First, a terrorist's intention extends beyond the commission of an individual act of violence for a personal reason', to 'a more systematic and public agenda'. Secondly, 'terrorist acts have the potential ... to endanger large sections of the community and to cause ... [significant] loss of life'. However, as McGarrity explains, acknowledging these unique features of terrorism offences does not account for how courts are to distinguish between different terrorism offences.<sup>48</sup> Indeed, the difficulty of this latter assessment has been the subject of rich scholarship to date.<sup>49</sup>

The two cases considered in this article demonstrate the need for greater nuance and specificity in articulating the gravity of the interests protected by the control order. Regrettably, the reasons for sentence in *R v MO* do not articulate the circumstances of the making of the initial control order. They do not explicitly take account of the nature of the risk posed by the defendant at the time the initial order was made, nor the relative significance of the interests that the order sought to protect. In that respect, though consideration was explicitly given to the *general* significance of the control order regime, it is notable that the reasons for sentence do not account for the interests protected by the particular control order at issue. Conversely, in *Naizmand*, the sentencing judge explained the context of the making of the initial order, being that the defendant had been detained travelling illegally using his brother's passport in the United Arab Emirates after his own passport had been cancelled due to security concerns.<sup>50</sup> His Honour explained the various concerns which gave rise to the making of the initial order, including that the offender was named in an intercepted telephone call concerning the threat of a terrorist act in Australia; he was a member of a

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43 *R v MO [No 1]* [2016] NSWDC 144, [5] (Berman DCJ).

44 *Ibid* [9] (Berman DCJ).

45 *R v Naizmand* [2017] NSWDC 4, [61] (Scotting DCJ).

46 Nicola McGarrity, 'Let the Punishment Match the Offence: Determining Sentences for Australian Terrorists' (2013) 2(1) *International Journal for Crime and Justice* 18, 23, citing *R v Khawaja* (2010) ONCA 862; see also *Lodhi v The Queen* (2007) 179 A Crim R 470; *R v Kahar* [2016] 1 WLR 3156.

47 McGarrity, 'Let the Punishment Match the Offence', above n 46, 23.

48 *Ibid*.

49 See, eg, Marieke de Goede and Beatrice de Graaf, 'Sentencing Risk: Temporality and Precaution in Terrorism Trials' (2013) 7 *International Political Sociology* 313; Anthony Pyne 'The Mood and Temper of the Public: *R v Lodhi* and the Principles of Sentencing in the War on Terror' (2011) 23 *Current Issues in Criminal Justice* 163.

50 *R v Naizmand* [2017] NSWDC 4, [5]–[8] (Scotting DCJ).

group of men who strongly supported the ideology and activities of Islamic State; and that he had a close association with the activities and intentions of his brother-in-law, who had been charged with various terrorism offences.<sup>51</sup> These considerations provide robust support for the conclusion that the control order was designed to protect significant interests.

Clearly, there is a need for precision in determining the interests to be protected by the relevant control order, and their relative significance, in order to conclude a thorough analysis of proportionality in sentencing. In assessing the significance of the interests protected by the control order, it is insufficient to simply reason that the general regime exists in order to prevent a terrorist attack. Greater regard must be given to the particular circumstances of the making of the initial order, so as to accurately assess the significance of the interests thereby protected.

The need for greater nuance in the analysis of the significance of the interests protected by a control order is underscored by the range of circumstances in which a control order may be sought by the AFP. The relevant bases for seeking and making a control order were set out in Part II above.

These give rise to two distinctions which factor into an understanding of the significance of the interests protected by a control order. First, the *Criminal Code* distinguishes between orders sought in respect of *specific anticipated conduct*, and those associated with *completed offences* (which may give rise to a concern about the offender's general predisposition towards terrorist criminal activity, but which is not connected with a specific plan or act). Secondly, the *Criminal Code* details a spectrum of activities associated with terrorist conduct which may be a basis for the making of a control order, ranging from direct participation in terrorist activity, to the provision of support and assistance. Both of these factors affect the relative significance of the interests protected by an order. For instance, there is a different magnitude of severity between an order designed to prevent an individual providing non-material support to the engagement of hostilities in a foreign country, and an order to prevent an individual from actually carrying out a terrorist attack within Australia. This latter distinction appears particularly relevant in light of the prevailing concern regarding the Islamic State terrorist organisation. Concern over affiliation to this organisation ranges, as above, from individuals providing non-material and ideological support for recruitment in foreign hostilities in Iraq and Syria, to the commission of terrorist attacks in Australia. However, in some cases, as was the case in *Naizmand*, the order may be sought on a number of bases under the *Criminal Code*. Nevertheless, it remains important to explicitly distinguish between the various interests protected by the control order to make an accurate assessment as to proportionality.

A second feature which complicates the assessment of the significance of interests protected by a control order is that the order may relate to abstract future harms. This difficulty in sentencing is common to a large number of inchoate

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51 Ibid [8] (Scotting DCJ).

terrorism offences.<sup>52</sup> At the time of the making of a control order, though the AFP is required to demonstrate that the order would substantially assist ‘in preventing a terrorist act’, given the preventive nature of the orders the substance of the threat posed by the defendant will be, to some extent, uncertain. Assessing the interests protected by the order furthermore demands an understanding of the potential future harms risked by the defendant, in circumstances where their capacity to concretely threaten such a risk was (notionally) thwarted by the intervention of the control order itself. This process of reasoning suffers from the same difficulties, canvassed above, encountered by courts in assessing prospective harm for sentencing inchoate offences. There is a strong argument, therefore, that proportionality ought to be understood by reference to the potential harm, discounted by the likelihood of the occurrence of that harm. This replicates the controlled proportionality assessment advocated by Zedner in respect of other anticipated risks.<sup>53</sup>

Therefore, it can be seen that future sentencing decisions for control order violations ought to take account of the significance of the interests protected by the particular control order at issue. In particular, it is important that such an assessment be undertaken by reference to the nature of the interests protected, the potential harm of the risks posed by the conduct of the defendant to those protected interests, and the likelihood that such harm would actually be occasioned.

## V PROPORTIONALITY ASSESSMENT – CONDUCT CONSTITUTING BREACH

The actual conduct engaged in by the defendant constituting the breach of the control order is bound to figure significantly in any assessment of the severity of the control order violation. So much is clear from the nature of the offence. This may include a consideration of the particular mental state of the offender at the time of the conduct, the duration or persistence of the conduct, and the nature of any harm actually caused, or potentially risked, by the conduct. In that respect, there is again a need for nuance and precision in determining the gravity of the control order violation.

The decided cases reveal a tendency to conflate the approach properly taken to assessing the significance of the interests protected by the order, with the approach properly taken to assessing the gravity of the conduct actually constituting breach. This tendency is manifested in the blanket treatment of all conduct constituting a violation of a control order as intrinsically serious by reason of its connection to the previous terrorism-related activities of the defendant. Such an approach is unsustainable as a matter of logic. As discussed in Part II above, the potential prohibitions and restrictions imposed pursuant to a

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52 McGarity, ‘Let the Punishment Match the Offence’, above n 46, 24. See, eg, *Lodhi v The Queen* (2007) 179 A Crim R 470, [106] (Spigelman CJ).

53 Zedner, above n 22, 198.

control order may control the extent to which the defendant engages in otherwise perfectly lawful activities. In those circumstances, the connection between the conduct constituting breach and the defendant's otherwise terrorism-related activities must be proved, rather than merely assumed. Importantly, though the defendant's terrorism-related activities are clearly and in every case relevant to an assessment of the significance of the interests protected by the relevant order, the same cannot be said for an assessment of the gravity of the conduct constituting breach.

Consider the case of *R v MO*. There, the defendant was prohibited by a control order from using unauthorised telecommunication devices. Clearly enough, the prohibition was justified by reference to the need to mitigate the risk that he would, by telephone, conspire in the planning or commission of a terrorist act, or the facilitation of support for terrorist activities. However, the actual unauthorised use of telephones for which he came to be sentenced was, by concession of the Crown, 'trivial'.<sup>54</sup> The contents of the defendant's unauthorised telephone conversations were monitored by the AFP and, on their evidence, bore no relationship to terrorist activity.<sup>55</sup> Of what relevance, then, are the defendant's terrorism-related activities, which justified the imposition of the initial order, to the understanding of the gravity of his otherwise anodyne telephone conversations?

The sentencing judge stated, on this point, that '[t]he fact that no terrorist act was mentioned in the telephone calls does not really help the offender. Were such conversations to have taken place he would have faced further charges'.<sup>56</sup> With respect, such a conclusion must be incorrect. The fact that no terrorist act was mentioned in the telephone calls must 'help' the defendant (if we are determined to express it in such terms) to the extent that it bears upon the gravity of his breach of the control order requirement. Plainly, in addition to facing further charges, were the conversations of such a nature that they related to his terrorism-related activities which gave rise to the initial order, that would render his violation of his control order *more serious*.

However, this analysis so far has avoided a particularly difficult question that it is necessary now to answer: what relationship is necessary between the conduct constituting a breach of a control order and the offender's previous terrorism-related activities to warrant the attribution of the conduct with the gravity of a 'terrorist act'? This issue is brought into stark relief in *Naizmand*. There, the sentencing judge concluded that the graphic terrorist content of the videos accessed by the defendant was probative of the fact that 'the offender accessed the videos because he believed in the extremist ideology underlying them and the activities of Islamic State'.<sup>57</sup> However, is a connection of that kind sufficient to attribute to the conduct the significant gravity of terrorist activity? Plainly, the conduct constituting breach is not trivial, as in *R v MO*, but equally 'believing in the extremist ideology of Islamic State' is relatively far removed from any

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54 *R v MO [No 1]* [2016] NSWDC 144, [4] (Berman DCJ).

55 *Ibid.*

56 *Ibid* [5] (Berman DCJ).

57 *R v Naizmand* [2017] NSWDC 4, [61] (Scotting DCJ).

activities associated with the planning, commission or facilitation of a terrorist activity. Objectionable though ideological support for terrorist organisations may be, it hardly rises to the level of criminality of even the earliest-biting preparatory terrorist offence provisions of the Commonwealth *Criminal Code*.

In those circumstances, it seems reasonable to impose a nexus requirement such that only conduct done with the intention of planning, preparing, facilitating or committing a terrorist act may be attributed with the significant gravity of terrorist activity. The effect of such a requirement would likely be that neither *R v MO*, nor *Naizmand*, would demonstrate a sufficient nexus – though the latter is plainly more wrongful than the kind of trivial breach contemplated in cases such as *R v MO*. It is furthermore likely that conduct satisfying this requirement would, itself, rise to the level of an offence pursuant to either section 101.4 (‘Possessing things connected with terrorist acts’), section 101.5 (‘Collecting or making documents likely to facilitate terrorist acts’) or section 101.6 (‘Other acts done in preparation for, or planning, terrorist acts’) of the Commonwealth *Criminal Code*. However, contrary to a suggestion made by the sentencing judge in *R v MO*, it is suggested that this is no barrier to the consideration of such a requirement in determining a proportionate sentence. In fact, the entire context of the control order system, including its stated legislative purpose, relates to the prevention of potentially serious criminal behaviour. It is logically no issue, then, that breach of one or more of the prohibitions contained in the control order would involve the commission of some other, more serious, criminal offence.

The nexus requirement proposed above is justified for at least three reasons. First, this requirement solves the problem of remoteness. Remoteness, in this sense, is a difficulty created by the ‘distance’ between the conduct actually engaged in by the defendant and the ‘harm-to-be-prevented’.<sup>58</sup> The objection, here, is both pragmatic and normative. It is logically impossible to accurately calculate the extent of harm risked by the defendant’s conduct where that harm is indeterminate, contingent and remote. Further, it is unfair under the principles of a traditional liberal sentencing policy to attribute to the conduct of a defendant the quality of the seriousness of harms which are overly remote from conduct she has actually engaged in. This criticism is particularly relevant to the reasoning of the court in *Naizmand*. It may well be that Mr Naizmand’s conduct was sufficient to indicate his belief in the extremist ideology of Islamic State. However, without evidence of positive conduct towards particular action on the basis of that general belief, it is impossible to appropriately determine, let alone to attribute to Mr Naizmand, the potential impact of the harm of terrorist activity actuated by that belief.

Secondly, the nexus requirement solves an obvious problem of fair labelling. The stigmatising effect of labelling an offender’s conduct as a ‘terrorist act’ is obvious enough. However, the problem of fair labelling in this matter goes beyond mere accurate description of the conduct. To describe the conduct of the offender in breach of the control order as a ‘terrorist act’ has implications

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58 A P Simester, ‘Prophylactic Crimes’ in G R Sullivan and Ian Dennis (eds), *Seeking Security: Pre-empting the Commission of Criminal Harms* (Hart Publishing, 2012) 59, 66–8.

for the likelihood of their release before serving their full term of imprisonment, and conditions imposed on their parole.<sup>59</sup> This problem is, again, not merely theoretical. The sentencing judge in *R v MO* averted to the ‘severe’ conditions of the defendant’s incarceration in that case.<sup>60</sup> Perhaps, on the one hand, cautious treatment by prison services of offenders in these cases is justified on the basis of the interests protected by the imposition of the initial order. Yet it is difficult to see how the ‘trivial’ nature of the breach in the case of *R v MO* would, absent other salient factors, suggest that the offender’s conduct necessitates ‘severe’ conditions upon incarceration. Therefore, applying the nexus requirement described above ensures that the content of the relevant breach is fairly labelled in the approach to sentencing, which may have implications for the manner in which the sentence is served.

Finally, the nexus requirement is particularly important given the fault element of the offence of control order violation. Under section 5.6 of the *Criminal Code*, a fault element of recklessness applies to the circumstances of the offence.<sup>61</sup> That is, the individual must have been aware of a substantial risk that the conduct engaged in was in violation of the terms of a control order and, having regard to the circumstances known to the individual, it was unjustifiable to take that risk. Proportionality in sentencing for these offences may nonetheless take account of the relative culpability of particular offenders depending upon their mental states. Plainly, an offender who intentionally breaches a term of a control order is more culpable than an offender who does so recklessly. This was considered relevant in both *R v MO* and *Naizmand*. However, even within the category of intentional control order violations, there is a logical distinction between intentional breaches which serve a supervening criminal purpose and those which do not. The nexus requirement provides a basis upon which this latter distinction may appropriately be drawn.

Therefore, it can be seen that there is a considerable need for nuance and precision in the assessment of the gravity of the conduct on the part of the defendant constituting a breach of the terms of a control order. In particular, such conduct may only reasonably be ascribed the severity of the defendant’s supervening terrorism-related activities where the conduct constituting breach is done with the intention of planning, preparing, facilitating or committing a terrorist act.

## VI CONCLUSION

In conclusion, this article has contributed to the rich debate regarding the control order regime in Australia, specifically in relation to its criminal justice implications. Assisted by recent evidence in sentencing practice for control order violations from the District Court of New South Wales, it has provided both a

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59 See, eg, *Crimes (Administration of Sentences) Act 1999* (NSW) s 159C.

60 *R v MO [No 1]* [2016] NSWDC 144, [7] (Berman DCJ).

61 See Explanatory Memorandum, Anti-Terrorism (No 2) Bill 2005 (Cth) 35.

doctrinal and normative discussion of the proper approach to proportionality in sentencing for control order violations.

Ultimately, what can be said of the decisions in *R v MO* and *Naizmand*? In many respects, one must have sympathy for the sentencing judges applying, as they were, traditional normative constraints of sentencing to offences which are, in their very nature, unique within the criminal justice system. Undoubtedly, sentencing practice in this regard weighs important competing principles: both the respect for the liberty and dignity of the individual defendants, and the need to provide adequate protection for the community at large. They also clearly take place within a particularly fraught political environment which no doubt weighs to some extent on the application of the principles of sentencing. Nonetheless, this article has made the case for the need for greater nuance and precision in determining the precise nature of the gravity of control order violations for arriving at proportionate sentencing practices.

Specifically, this article has outlined the case for an understanding of proportionality as a function of two important criteria. First, proportionality should be understood as a function of the significance of the interests protected by the particular control order. In particular, that such an assessment ought to account for the nature of the interests protected, the potential harm of the risks posed by the conduct of the defendant to those protected interests, and the likelihood that such harm would actually be occasioned. Secondly, it has argued for an understanding of proportionality as a function of the gravity of the conduct constituting the breach. In that regard, this article has advocated for the adoption of a nexus requirement in ascribing the conduct constituting breach with the severity of the defendant's supervening terrorism-related activities.

This analysis has several implications for the merits of the control order regime more generally. First, it remains an open question to what extent this regime is compatible with the traditional liberal foundations of the Australian criminal justice system. The High Court of Australia, in considering the constitutionality of the control order system, found by majority that the imposition of a control order was not incompatible with the exercise of judicial power *per se*.<sup>62</sup> Nonetheless, the difficulties canvassed above in relation to the proper approach to proportionality in sentencing raise issues as to the compatibility of the system more generally with requirements of remoteness and fair labelling. Secondly, concerns about the basis of criminal liability in the event of breach ought to inform the types of conditions imposed pursuant to control orders in the first instance. If, as has been argued in this article, proportionality in sentencing is in part a function of the interests protected by the order, it is imperative that the order is confined so as to be particularly responsive to the protection of those interests.

Given the substantial and credible concern regarding terrorist activities in Australia inspired by the Islamic State, the increased political interest in the use of control orders, and the apparent bipartisan support for their expanded

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62 *Thomas v Mowbray* (2007) 233 CLR 307, 335 [30]–[32] (Gleeson CJ), 358 [126] (Gummow and Crennan JJ), 509 [600] (Callinan J), 526 [651] (Heydon J).

application, the issues of proportionality in sentencing considered in this paper are likely to be of increasing relevance in the years to come. Though at the time of writing only two instances of control order violations have come before the courts, it requires limited imagination to conceive of their increasing prevalence in the immediate future. It is hoped, in that context, that this article contributes more broadly to a debate about the appropriate response of the institutions of the criminal justice system to these unique threats.