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Post-sentence detention and supervision in New South Wales: Constructing the subject as a high risk offender

Josh Pallas

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Statement of Originality

This is to certify that to the best of my knowledge, the content of this Thesis is my own work. This Thesis has not been submitted for any degree or other purposes. I certify that the intellectual content of this Thesis is the product of my own work and that all the assistance received in preparing this Thesis and sources have been acknowledged.

Josh Pallas

AUTHORSHIP ATTRIBUTION STATEMENT AND ATTESTATION

This Thesis draws on analysis in the article published as Andrew Dyer and Josh Pallas, 'Why Div 105A of the Criminal Code 1995 (Cth) is Incompatible with Human Rights (and What to Do about It)' (2022) 33(1) *Public Law Review* 61, principally in Chapter 2. I co-designed the study with Andrew Dyer and contributed to drafting the article which began as a co-authored submission to a government inquiry. I conducted the initial legal analysis of Division 105A and contributed to the summary of preventive justice principles.

In addition to the statement above, permission to include the analysis has been granted by the corresponding author.

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Josh Pallas

As supervisor for the candidature upon which this Thesis is based, I can confirm that the authorship attribution statements above are correct.

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Arlie Loughnan

Abstract

This Thesis examines the *Terrorism (High Risk Offenders) Act 2017* (NSW) (THRO Act). The THRO Act constructs a post-sentence supervision and detention regime for people who are purported to pose an unacceptable risk of committing a serious terrorism offence. The THRO Act is engaged after expiry of a person's sentence under the criminal law. Its legislative intent is to protect the community from terrorism. Unlike other post-sentence supervision and detention regimes which link prospective risk to past offending, a person subjected to THRO orders may not have committed a terrorist offence.

The THRO Act is purported to prevent harm, but causes harm instead. While the numbers of people the THRO Act has been used against are small, its impact is profound. In this Thesis, I analyse how the THRO Act works in practice and excavate its political substrata to understand the ways in which it (re)shapes relationships between people and the State. To achieve these aims, I build on existing criminal law theory analyses with critical theory. By engaging with critical theory, I am able analyse the THRO Act on a deeper level, exposing the THRO Act's political dimensions.

I make three main arguments. First, the THRO Act allows violence: it causes pain and harms people. Second the THRO Act engages in Othering: the State uses it to construct people as not belonging. Othering legitimises the THRO Act's violence and is a form of violence itself. Third, the THRO Act creates a state of exception: it suspends an otherwise prevailing juridical order which allows violence to be clothed in legality.

ACKNOWLEDGMENTS

I recognise and pay respect to the Gadigal Elders, traditional custodians of the lands on which I live and work. For thousands of years, they have shared and exchanged knowledges across innumerable generations for the benefit of all.

In October 2018, my world collided with the *Terrorism (High Risk Offenders) Act 2017* (NSW) (THRO Act). I started working at the NSW Crown Solicitor's Office in the criminal law team. The first case that I recall working on concerned a person I can only refer to as Mr Dunn who appears throughout my Thesis. I was involved in preparing for the final hearing, and with others, instructed counsel at that hearing. Mr Dunn's case remains the only case in which a continuing detention order has been made.

The case was my primary focus for months, a phenomenon familiar to all who have worked on large litigation. But this experience was different. In seeking to manage a purported risk of future crime – and not just any crime but politically motivated crime – I received regular updates about Mr Dunn and his life while incarcerated. The litigation team reviewed reams of documents which included his reflections on the ongoing THRO proceedings (which you will read about shortly). These were extraordinary proceedings where my colleagues and I sought to incarcerate Mr Dunn beyond the expiry of his sentence under the criminal law. In the moment, I recall feeling flits of unease as I voyeuristically became inextricably linked to Mr Dunn. But I was mostly detached from the work and, like many lawyers, consumed by the grinding minutiae of litigation.

In time I moved away from high risk offender work generally. But I remained unsettled by it. I learned during my undergraduate studies that the best research topics are the ones that evoke feelings, or confusions that need to be worked through (credit to Professor Swati Parashar and Dr Marcelo Svirsky for this!), so the unsettled feeling led me to develop an academic interest in the THRO Act and this Thesis was born.

They say it takes a village to raise a child and that is most certainly the case with a Thesis! I thought that commencing a PhD during COVID-19 would be good, because what else would I be doing with my life which was disturbed by the uncertainty of a pandemic. But the challenge and isolation proved harder than expected which made the support from everyone around me all the more important.

My deepest thanks and gratitude go to Professor Arlie Loughnan and Associate Professor Kevin Walton, my supervisors, first readers, cheerleaders, life coaches and long-suffering companions throughout this journey. Big thanks to Dr Louise Boon-Kuo for the many chats about all things, especially politics and theory and Emeritus Professor Terry Carney for his endless capacity for incisive yet calming advice.

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Final thanks are reserved for my partner, Jay, one of the smartest, most caring people that I have the great privilege of knowing and sharing my life with. He unflappably said “yes”, the minute I said “I want to quit my job to do a PhD” and has provided so much love, care and support along the way.

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LIST OF ACRONYMS

CDO – a Continuing Detention Order

CHRO Act – *Crimes (High Risk Offenders) Act 2006* (NSW)

CSNSW – Corrective Services NSW

Cth – Commonwealth

CTO – Community Treatment Order

EDO – Emergency Detention Order

EO – Enforcement Officer

ESO – Extended Supervision Order

FCTO – Forensic Community Treatment Order

IDO – Interim Detention Order

ISO – Interim Supervision Order

MHRT – Mental Health Review Tribunal

MLC – Member of the Legislative Council

MP – Member of Parliament

NSW – New South Wales

RAR – Risk Assessment Report

RMR – Risk Management Report

THRO Act – *Terrorism (High Risk Offenders) Act 2017* (NSW)

TRAP-18 – Terrorist Radicalisation Assessment Protocol

UK – United Kingdom

USA – United States of America

VERA-2R – Violent Extremist Risk Assessment – version 2 Revised

POST-SENTENCE DETENTION AND SUPERVISION IN NEW SOUTH WALES: CONSTRUCTING THE SUBJECT AS A TERRORIST HIGH RISK OFFENDER

1. INTRODUCTION

In recent decades, in Australia and around the world, governments have sought to neutralise a threat of political violence with the spectre of "terrorism" looming large as a threat to the safety of states, people and Western civilisation.[1] The state has sought to eradicate the risk and uncertainty which had manifested as a result of highly visible political violence in the form of "terrorism", with too little consideration of the trade off or costs to the state, people and Western values.[2]

Australia, geographically removed from the main loci of world power, and seldom subjected to political violence of the kind witnessed elsewhere,[3] has not been spared from its uncertainty and risk. Like other states, Australia has legislated frenetically in response.[4] But the urge to control did not end at the Commonwealth level, it extended to the states, at the Commonwealth's urging and because the states bear the primary legislative responsibility for criminal law.[5] In 2017, the New South Wales Parliament acted, passing the *Terrorism (High Risk Offenders) Act 2017* (NSW) (THRO Act), creating a post-sentence supervision and detention regime for people who are purported by the

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[1] Jean Baudrillard, *The Spirit of Terrorism and Other Essays*, tr Chris Turner (Verso, 2012) 24–25; Keiran Hardy and George Williams, 'Two Decades of Australian Counterterrorism Laws' (2022) 46(1) *Melbourne University Law Review* 34, 38.

[2] Baudrillard (n 1) 25.

[3] Amber Hart, 'Risks, Radicalisation and Rehabilitation: Imprisonment of Incarcerated Terrorists' (2020) 15(3) *Journal of Policing, Intelligence and Counter Terrorism* 189, 192.

[4] Hardy and Williams (n 1) 38; George Williams, 'A Decade of Australian Anti-Terror Laws' (2011) 35(3) *Melbourne University Law Review* 1136, 1136–1137.

[5] For more on how NSW responded to the Commonwealth's call to action, see Bernhard Ripperger, 'The Use of Terrorism Risk Assessment Tools in Australia to Manage Residual Risk' in Raymond Corrado, Gunda Wössner and Ariel Merari (eds), *NATO Science for Peace and Security Series – E: Human and Societal Dynamics* (IOS Press, 2021) 165, 169–171.

state[6] to pose an ongoing unacceptable risk of committing a serious terrorism offence. The THRO Act operates after a person's sentence for a crime has expired, and its primary legislative intention is to protect the community from serious terrorist offending,[7] as understood in the *Criminal Code 1995* (Cth) (Criminal Code).[8] Since the THRO Act came into force, it has been used to detain or supervise thirty-three people, sometimes repeatedly.[9] While these are small numbers, for the people constructed as and indelibly marked as high risk terrorism related offenders the consequences of being subjected to THRO orders are severe and reshape their relationship with the state.

I seek to do two things in this Thesis. I analyse how the THRO Act operates in practice. I also excavate the political substrata to understand how the THRO Act (re)shapes relationships between people and the state. I build from criminal law theory using critical theory to deepen analysis of the THRO Act and expose its political dimensions. By foregrounding the political – omnipresent in any legal scholarship but often obscured – the story that I tell is one of violence, exception, and Othering. It is a story which unsettles the category of the terrorist high risk offender constructed by the state. Ultimately, I will show that the THRO Act is another tool of state repression[10] which, while formally legally valid, remains normatively questionable as it harms people and the social fabric of the state.

When moving beyond analysis of the THRO Act as a matter of doctrinal law alone and beyond using the tools available to criminal law theorists in excavating the politics of how the THRO Act operates in practice, many generative conclusions can be reached. Using

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[6] The 'State of New South Wales' is the named plaintiff in proceedings, *Terrorism (High Risk Offenders) Act 2017* s 22 The Attorney General, as the Minister responsible, provides the instructions to commence proceedings on behalf of the State of New South Wales, see s 66. To avoid confusion, when I am referring to the State of New South Wales as a plaintiff in legal proceedings, I refer to it the plaintiff. Otherwise, references to 'the state' should be taken to refer to the political entity that evinces control over people.

[7] Ibid s 3(1).

[8] Ibid s 4 (serious terrorism offence).

[9] As at December 2024, based on the publicly available decisions of the Supreme Court of New South Wales, accessible on its website.

[10] On the state's repressive apparatus see Louis Althusser, 'Ideology and Ideological State Apparatuses (Notes towards an Investigation)' in Ben Brewster (tran), *Lenin and Philosophy and Other Essays* (Monthly Review Press, 1971) https://www.marxists.org/reference/archive/althusser/1970/ideology.htm; see also, Agon Hamza, *Althusser and Pasolini* (Palgrave Macmillan New York, 2016) ch 14.

critical theory, I focus on three in this Thesis. The first is that the THRO Act enables violence. Its operation causes pain and harm to people. The second is that the THRO Act engages in Othering. The state uses the THRO Act to construct people as Others who do not belonging within the state. Othering is both a form of violence in itself and legitimises other aspects of the THRO Act's violence. The third is that the THRO Act creates a state of exception by suspending the otherwise prevailing juridical order which allows violence to be clothed in legality. Ultimately, the THRO Act, intended to prevent harm and protect society, causes harm instead.

Criminal law theorists rightly attack post-sentence regimes like the THRO Act on the basis that they do not meet appropriate justifications and safeguards required for the state to use force to detain and supervise people outside of the criminal law, as I will explore in Chapter 2. But by adopting a critical theoretical approach, I centre the effect of the law rather than its normative basis. So, my thesis is a story about state violence and the construction of identity rather than formal law on the books. My approach runs parallel to and in the same direction as, approaches of criminal law theorists who critique post-sentence and other preventive regimes. It goes further, however, in drawing on critical theory and focusing deeply on one regime.

In the remainder of the Introduction, I first discuss preventive justice, before sketching out the theoretical substrata and method of this Thesis. I then explain my exclusive focus on the THRO Act, before outlining how the remainder of the Thesis unfolds.

1.1. Scholarly context: Preventive justice

The concept of preventive justice has become a widely used theoretical tool for analysing and critiquing preventive legal measures like the THRO Act. Preventive justice is the hallmark of the preventive state's relationship to the criminal law as it foregrounds prevention over punishment often within criminal law but sometimes outside it. Preventive justice scholars are anxious to ensure that preventive legal measures retain a sense of equality before the law and procedural fairness, despite altering orthodox approaches to criminal law making. As I adopt a critical theoretical approach, my Thesis does not fit neatly within preventive justice scholarship, but rather it draws on and extends that literature while running alongside it in the same direction.

I explore the contours of preventive justice scholarship to orient my Thesis within the scholarly field that dominates the study of preventive legal measures like the THRO Act. Much of my analysis centres on the work of Andrew Ashworth and Lucia Zedner, as their landmark study, *Preventive Justice*,[11] remains a leading critique of preventive legal measures. Subsequent scholarship extrapolates from and responds to their work which they have continued to develop. Before exploring preventive justice in more detail, I will introduce the conditions which allowed an increase in prominence for prevention as a means of crime control.

Prevention's rise to prominence as a means of crime control emerged from the state's frenzied preoccupation with mitigating risk and eradicating uncertainty. David Garland explained how a 'culture of control' developed in tandem with the rise of neo-liberalism and neo-conservatism in the late 20th century.[12] As advanced industrial societies developed, it became apparent that 'the old fashioned sovereign state can deliver punishment but not security', and so a culture of control arose which continues to expand.[13] Under the conditions of the culture of control '[c]ommunity-safety becomes the chief consideration and law enforcement becomes merely a means to this end, rather than an end in itself. Fear-reduction, harm and loss-reduction […] becomes foreground considerations.'[14] Richard Ericson also noted that the focus on prevention embodied a 'perpetual tension between the modernist desire for greater certainty through scientific knowledge of risk, and the entrepreneurial desire for uncertainty as an engine of

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[11] And their associated works, for example, Lucia Zedner, 'Taking the Preventive Justice Project Forward' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) xiii; Lucia Zedner and Andrew Ashworth, 'The Rise and Restraint of the Preventive State' (2019) 2(1) *Annual Review of Criminology* 429; Andrew Ashworth, Lucia Zedner and Patrick Tomlin, 'Introduction' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 1; Andrew Ashworth, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of the Criminal Law* (Bloomsbury Publishing Plc, 2008) 87.

[12] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (University Press, 2001) 182–186; see also, ; Richard V Ericson, *Crime in an Insecure World* (Polity, 2007) 1; 119. Similar phenomena were observed and analysed using different terminology like the 'risk society'; see Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage Publications, 1992); and 'new penology' Malcolm M Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30(4) *Criminology (Beverly Hills)* 449.

[13] Garland (n 12) 200.

[14] Ibid 171.

enterprise'.[15] Ericson, like scholars of preventive legal measures,[16] expanded on Garland's analysis of risk, arguing that '[i]n the new world of catastrophic imagination and uncertainty, there is a shift from the "culture of control" to a culture of suspicion.'[17]

Ericson developed this argument by, rightly, stating that the culture of control laid foundations for 'Western societies [which] are now governed through the problem of uncertainty.'[18] The risk assessments and management techniques developed under a culture of control have magnified the epistemic gap between the results of such techniques and their inability to predict and manage risk with certainty.[19] Thus the inherent uncertainty of risk is exacerbated, not allayed, which, in turn, amplifies the urge to control. It is against this social background that "preventive justice" of the kind that gave rise to preventive regimes like the THRO Act arose. Zedner cautioned against understanding the rise of risk and uncertainty as 'sequential changing fashions'.[20] She argued that 'in practice they accumulate, layering upon one another to become even more burdensome'.[21]

But the preoccupation with risk and uncertainty must also be considered in the context of the securitisation of politics, which, in part, responded to the phenomena identified by scholars of risk like Garland and Ericson but also responded to the physical and symbolic threat of global terrorism.[22] Lucia Zedner, foreshadowing her later work, argued that securitisation of politics was '[t]o invoke security [a]s a move to foreclose debate as to

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[15] Ericson (n 12) 5.

[16] See, for example, Lucia Zedner, *Security* (Routledge, 2009); Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014); Henrique Carvalho, *The Preventive Turn in Criminal Law* (University Press, 2017).

[17] Ericson (n 12) 214.

[18] Ibid 204.

[19] Ibid.

[20] Lucia Zedner, 'Fixing the Future? The Pre-Emptive Turn in Criminal Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Bloomsbury Publishing Plc, 2008) 35, 56.

[21] Ibid.

[22] Baudrillard (n 1) 22–25.

the wisdom of a policy or the necessity of a measure.'[23] Security, for Zedner, was riddled with paradoxical thought, like the urge to securitise presuming an ongoing threat[24] and causing an extension of the penal carceral state.[25] Importantly, she argued that 'although security promises freedom and the liberty of citizens to pursue their individual and collective goals free from injury, harm, or loss, paradoxically it has the strong tendency also to infringe individual liberties'.[26]

Zedner argued for restraints to guide law-making aimed at creating a 'just security' within liberal democratic states[27] and called for its development to be 'justified by reference to clearly enunciated principles'.[28] Zedner's call for restraint in response to security and development of justificatory principles pre-figured her later calls for the same from preventive justice measures. That being said, the call for development of justificatory principles assumes qualified support for securitisation in response to risk and uncertainty.

The slow, but changing, accretion of risk, uncertainty and security over time has been borne out through new methods of law-making which foreground prevention over the historical primary touchstone of punishment. New legal measures require courts to make assessments of risk during preventive legal proceedings.[29] But such urges towards mitigating risk and uncertainty through security have reinforced the precarity of personal security for people in late modernity as all become attentive to the unknown, immeasurable and uncontrollable.

The prominence of prevention as a means for cultivating security in times of risk and uncertainty has given rise to theorising about the "preventive state". The concept is

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[23] Zedner, *Security* (n 16) 12.

[24] Ibid 144.

[25] Ibid 145.

[26] Ibid 149.

[27] Ibid 174.

[28] Ibid 150, albeit with an acknowledgment of her cynicism that this call will be heeded based on recent history of law making.

[29] For example, under the THRO Act.

closely linked to Carol Steiker's work,[30] and considers how the state has mobilised prevention – a longstanding feature of crime control – anew to expand preventive legal measures which can purportedly be contrasted with punitive measures.[31] Zedner and Ashworth – strongly influenced by Steiker's work like many others – explained that 'the Preventive State denotes the preventive function that lies at the heart of the state's fundamental *raison d'etre* to provide security for its citizens'.[32] They further explained that the preventive state:

> connotes a more recent tendency for states to pass preventive laws and measures designed to enhance their capacity to forestall risk and reduce or pre-empt harm. The graver the risk and the more serious the prospective harms, the greater the powers the state accords itself to combat them.[33]

The preventive state was used as the concept to describe preventive legal measures being used increasingly in the USA 'to prevent crime by incapacity or treating those deemed dangerous'.[34] Thus even in early scholarship of prevention and law, the connection between prevention and the way that the state constructs subjects loomed large. Steiker argued for more theorising about the preventive approach to crime control as its prominence increased.[35] The crime control dialectic of prevention/punishment as being mutually exclusive is a key feature of preventive justice scholarship[36] but has been problematised.[37] Others, like Henrique Carvalho, have observed that the increasing

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[30] Carol Steiker, 'The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771; Tamara Tulich, 'Critical Reflections on Preventive Justice' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 3, 5; Zedner and Ashworth (n 11) 430.

[31] Carol Steiker, 'The Limits of the Preventive State' (1998) 88(3) *Journal of Criminal Law and Criminology* 771, 773–774.

[32] Zedner and Ashworth (n 11) 431.

[33] Ibid.

[34] Tulich, 'Critical Reflections on Preventive Justice' (n 30) 5–6. See also, Zedner and Ashworth (n 11) 431.

[35] Steiker (n 31) 779.

[36] It has also been a key feature of Australian legal disputes around post-sentence regimes; see, Tamara Tulich, Sarah Murray and Natalie Skead, 'Antipodean Perspectives on Preventive Justice: The High Court and Serious Crime Prevention Orders' (2021) 30(2) *Griffith Law Review* 211, 226–228.

[37] Tulich, 'Critical Reflections on Preventive Justice' (n 30) 17–18. This dialectic is now even being problematised before the court, see, for example, the judgments of Edelman J in *Minister for Home Affairs v Benbrika* (4) (2021) 272 CLR 68 [196]-[204] ('*Minister for Home Affairs v Benbrika*') and *Garlett v Western Australia* (2022) 277 CLR 1 [247]-[255] ('*Garlett v Western Australia*').

prominence of preventive legal measures used by the preventive state have coincided also with a 'rise in punitiveness'.[38] Scholarship on the preventive state was crucial in instigating scrutiny of preventive justice in criminal law theory.

Extending from preventive state scholarship, Ashworth, Zedner and Tomlin used the phrase 'preventive justice' to describe 'the use of the criminal law and related coercive measures in a directly preventive way.'[39] Thus in criminal legal theory, the preventive state has come to be used as a meta-concept which explains how the state engages in risk prevention and management across *all* of its functions. Preventive justice, by contrast, has developed as a concept which focuses discretely on prevention and criminal laws. Ashworth and Zedner, in their wide-ranging book, *Preventive Justice*, paved the way for sustained engagement with the development and use of preventive legal measures for crime control. Their central focus was on coercive preventive measures which deprived people of liberty. These included measures that they call 'civil preventive orders', which resemble Australian post-sentence regimes most closely.[40] The purpose of *Preventive Justice* was twofold. First to 'investigate and catalogue the extent and nature of preventive endeavour within the criminal law and beyond the criminal justice system'.[41] Second to 'critically evaluate the preventive endeavour and to propose limits on it'.[42] The second purpose closely accords with their observations elsewhere, about not 'overlook[ing] the risk [that the preventive state] entails and the need for delimiting principles to contain those risks'.[43] The search for principles of limitation or restraints, while not necessarily questioning structural foundations or practical implications is a core characteristics of preventive justice critiques, which I explore in Chapter 2.

Preventive justice critiques tend to focus on high level normative concerns, legalistic principles and human rights critiques to strive to ensure that preventive legal measures minimally infringe on liberty. At the level of criminal law principles, Ashworth and Zedner

[38] Carvalho (n 16) 9.

[39] Ashworth, Zedner and Tomlin (n 11) 1.

[40] Ashworth and Zedner (n 16) 74.

[41] Ibid 250.

[42] Ibid.

[43] Zedner and Ashworth (n 11) 431.

accept the state's obligation to protect their citizens from harm.[44] But they dispute that such an obligation displaces all others, including the protection of liberty, autonomy and fair trial rights, which must become subservient for the preventive state to address the imperative to prevent harm.[45] Preventive justice critiques, while strong, can be blind to the political drivers and implications that flow from their use which may be better exposed using other theoretical approaches.

Preventive justice scholarship has expanded over time. But recently scholars have been circumspect in recognising its failures to restrain the expansion of preventive legal measures used for crime control. Writing in 2017, Zedner stated 'earlier scholars looked upon preventive justice as a source and means of regulation, the powerfully argued contributions to this volume provide forceful reasons to consider whether we would do better to talk about regulating preventive justice.'[46] Zedner also importantly recognised that early preventive justice scholarship 'generates a new hazard' as by establishing principles through which preventive justice may be used, it legitimised such measures instead of critiquing them.[47] Tamara Tulich argued that preventive justice scholarship 'can make an important contribution to identifying and abating the costs of prevention in terms of burdens on state budgets and civil liberties.'[48] She, however, acknowledged that such a project aimed at advocating for a restrained approach to the use of preventive measures is 'not an easy task – nor…a certain one'.[49] Tulich rightly recognised that the field's preoccupation with questions about whether certain measures are preventive or punitive and about the ambit of preventive justice (i.e. what is, and is not) are examples of limitations on its usefulness.[50] Nonetheless, Tulich construed such limitations as growing pains of an important emerging scholarly field.[51] As I explore further in the next

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[44] Ashworth and Zedner (n 16) 266; ch 1.

[45] Ibid 266.

[46] Zedner, 'Taking the Preventive Justice Project Forward' (n 11) xxii.

[47] Ibid.

[48] Tulich, 'Critical Reflections on Preventive Justice' (n 30) 5.

[49] Ibid 15.

[50] Ibid 15–18.

[51] Ibid 22.

section of the Introduction, preventive justice scholars have increasingly called for a deepening of the literature, including in how sites of inquiry are selected, which measures and jurisdictions are studied, and which theoretical approaches adopted.[52]

Preventive justice scholarship emerged within a fast-changing legal landscape. It emerged from a need for more thought about preventive legal measures that developed through a rapid securitised response to risk and uncertainty. Preventive justice first began as a project of cataloguing and making sense of legal developments. It then considered what justifications and restraints could be placed on preventive legal measures. In Chapter 2, I explore preventive justice critiques of post-sentence supervision and detention regimes, like the THRO Act. My Thesis shares similar roots to preventive justice scholarship and is motivated by a drive to understand and restrain post-sentence supervision and detention regimes like the THRO Act. But it adopts a critical theoretical posture shifting the lens away from normative judgments about liberty, autonomy and fairness. In seeking to deepen analysis of one type of preventive regime, the THRO Act, I centre on its political dimensions of how "high risk offenders" are constructed. In this way, I extend from and run alongside the powerful critiques offered by preventive justice scholars.

1.2. WHY STUDY THE THRO ACT?

There are three main reasons why I closely study the THRO Act. Firstly, as a preventive legal measure, and more specifically a post-sentence supervision and detention regime, the THRO Act extends beyond other similar regimes. The THRO Act is *sui generis* within a category of regimes which already extend beyond criminal law traditionally understood. Secondly, while preventive legal measures and counter-terrorism laws in Australia have been the subject of extensive scholarship, the THRO Act has received limited attention and been largely overlooked in preventive justice literature. Thirdly, preventive justice scholars have called for a deepening of scholarship which recognises the differences in types of preventive legal measures and the jurisdictions that enact them. Taking these three points together and recalling my desire to excavate the political dimension of the THRO Act to tell a story about the state, power and violence in

[52] See, for example, Zedner and Ashworth (n 11); Tulich, Murray and Skead (n 36).

constructing subjects as high risk offenders, the THRO Act warrants greater scholarly attention.

1.2.1. *The THRO Act is sui generis*

The first reason for why the THRO Act warrants additional scholarly attention is that the THRO Act is *sui generis* and extends beyond the approach of other post-sentence supervision and detention regimes. In so doing, I draw from the examples of Division 105A of the *Criminal Code* as an example of post-sentence supervision and detention targeting a future risk of terrorism[53] and the *Crimes (High Risk Offenders) Act 2006* (NSW) (CHRO Act) as an example of post-sentence supervision and detention targeting a future risk of sexual and violence offending. Whilst there are many differences between post-sentence supervision and detention regimes, the two unique aspects that I focus on are that: first the THRO Act separates a risk of future offending from a history of similar offending, and second, the THRO Act suspends the law of evidence which changes the nature of adversarial proceedings.

The THRO Act was introduced to parliament on 15 November 2017 and was passed by both houses without amendment, on 22 November 2017.[54] The THRO Act's creation was ostensibly instigated by a Council of Australian Governments Communiqué which resolved to implement consistent post-sentence regimes for terrorist offenders across Australian jurisdictions.[55] The THRO Act 'complements' the Commonwealth Division

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[53] The only other regime with specific provisions targeting terrorist offenders is the *Criminal Law (High Risk Offenders) Act 2015* (SA) ss 19; 5(ca).

[54] The THRO Act has been amended by each of the *Justice Legislation Amendment Act (No 2) 2018* (NSW) (assented to 21 June 2018) (addressing inter alia the terrorist intelligence provisions, passed with support from the Opposition); *Community Protection Legislation Amendment Act 2018* (NSW) (assented to 28 November 2018) (addressing inter alia mandatory ESO conditions and offender eligibility criteria, passed with support from the Opposition); *Crimes Legislation Amendment Act 2021* (NSW) (assented to 9 December 2021) (addressing the operation of the HRO Assessment Committee, passed with support from the Opposition); *Crimes (Administration of Sentences) Amendment Act 2022* (NSW) (assented to 4 March 2022) (making consequential amendments arising from changes to law around Victims Services, passed with support from the Opposition); *Justice Legislation Amendment (Miscellaneous) Act 2023* (NSW) (assented to 30 October 2023) (addressing, *inter alia,* the definition of offender information, passed with support from the Opposition); and, the *High Risk Offenders Legislation Amendment Act 2024*. (NSW) (assented to 19 February 2024) (addressing, inter alia, how aggregate and cumulative sentences are dealt with in the eligibility criteria under the THRO Act.

[55] Council of Australian Governments, 'Council of Australia Governments Communiqué: Countering Violent Extremism'; as cited in, Charisse Smith and Mark Nolan, 'Post-Sentence Continued Detention of High-Risk Terrorist Offenders in Australia' (2016) 40(3) *Criminal Law Journal* 163, 164; For more on how NSW responded to the Communiqué, see Ripperger (n 5) 169-170.

105A of the *Criminal Code* regime,[56] while bearing clear differences.[57] Despite the different risk that it seeks to address, the THRO Act is modelled from the CHRO Act[58] which allows continuing detention orders (CDOs) and extended supervision orders (ESOs) to be made against high risk sex and violence offenders.[59] While I argue that even amongst post-sentence supervision and detention regimes the THRO Act is unique, it is important to remember that such regimes themselves remain relatively new and unusual when considering the preventive measures used globally.[60]

The first difference between the THRO Act and other like regimes is that it separates a risk of future harm from a history of similar offending. Division 105A orders can only be sought against someone who has been convicted of offences which fall into three broad categories:[61] international terrorist activities;[62] domestic terrorist activities;[63] or foreign incursion offences.[64] In relation to domestic terrorist activities the offence committed must be a 'serious Part 5.3 offence', that is one which is contained in Part 5.3 of the

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[56] Natalie Marsic, 'Criminal Law: An "Unacceptable Risk" - Post Sentence Detention under the New Terrorism ('High Risk Offenders') Act' [2018] (44) *Law Society Journal* 86, 86; Andrew Dyer and Josh Pallas, 'Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights (and What to Do about It)' (2022) 33(1) *Public Law Review* 61, 61; For more on the Commonwealth regime see Dyer and Pallas generally and Grant Donaldson, *Review into Division 105A (and Related Provisions of the Criminal Code Act 1995 (Cth)* (Independent National Security Legislation Monitor, Commonwealth of Australia, March 2022) https://www.inslm.gov.au/system/files/2024-02/inslm-report-division-105a-3-march-2023.pdf.

[57] Donaldson (n 56) 24–25; Andrew Dyer and Josh Pallas, *NSWCCL and SIC Submission to the Independent National Security Legislation Monitor Review into Division 105A of the Criminal Code (Cth)* (New South Wales Council for Civil Liberties and Sydney Institute of Criminology, 1 September 2021) 28–29 https://www.inslm.gov.au/sites/default/files/2022-10/1-NSW-Council-for-Civil-Liberties-and-Sydney-Institute-of-Criminology.pdf.

[58] This is explicitly acknowledged in *Explanatory Note, Terrorism (High Risk Offenders) Bill 2017 (NSW)* (2017). See also, Marsic (n 56) 86; Ripperger (n 5) 170–171.

[59] Queensland was the first jurisdiction to introduce a generally applicable post-sentence regime in Australia. For a precis of each of the regulatory regimes, see Donaldson (n 56) 23. In that report, Grant Donaldson SC stated 'Australia leads the world in making laws of a kind discussed in this report' (7). For a detailed account of how the CHRO Act operates and its historical development, see Tamara Tulich, 'Post-Sentence Preventative Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38(2) *University of New South Wales Law Journal* 823.

[60] Tulich, 'Post-Sentence Preventative Detention and Extended Supervision of High Risk Offenders in New South Wales' (n 59) 823; 828; 852.

[61] *Criminal Code 1995* (Cth) s 105A.3(1)(a).

[62] Ibid div 72 sub-div A.

[63] Ibid pt 5.3.

[64] Ibid pt 5.5.

Criminal Code and attracts a maximum penalty of at least seven years' imprisonment.[65] An unacceptable risk of committing a 'serious Part 5.3 offence' is also what must be proven by the Commonwealth to obtain a CDO[66] or ESO against a person.[67] But even the other categories of offences that give rise to eligibility are offences that bear a relationship to a risk of committing a serious Part 5.3 offence as they are likely to be borne out of animosity to the Australian state or the West.

Similarly, under the CHRO Act, the plaintiff must prove that a person poses an unacceptable risk of committing a 'serious offence'.[68] A serious offence could take the form of a 'serious sex offence'[69] or 'serious violence offence'.[70] For a person to be eligible for the State to seek orders against under the CHRO Act, they must have been imprisoned following conviction for a serious offence.[71] In addition the person must be either detained (in the case of a CDO application)[72] or supervised (in the case of an ESO application)[73] for, *inter alia,* a serious offence; offence of a sexual nature;[74] or breach of an ESO condition for the State to be able to apply for CHRO orders. While it is possible for the serious offence for the purposes of eligibility and the serious offence for the purposes of the unacceptable risk test to be drastically different in character, this issue is not evident in the case law where the serious offences are generally congruent and often the pattern of serious offending can be very specifically identified.[75]

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[65] Ibid s 105A.2.

[66] Ibid s 105A.7(1)(b).

[67] Ibid s 105A.7A(1)(b).

[68] *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B(d); 5C(d).

[69] Ibid ss 4 (serious offence); 5(1).

[70] Ibid ss 4 (serious offence) 5A(1).

[71] Ibid s 4(b).

[72] Ibid s 13A(2).

[73] Ibid s 5H(2).

[74] Ibid s 5(2).

[75] See, for example, *Jones v State of New South Wales* [2020] NSWCA 202 where the unacceptable risk of committing a serious offence was specifically phrased as Mr Jones 'engag[ing] in physical contact with boys' ([7] Basten JA). See also [3]-[6] for discussions of the different definitions. For another example, see *State*

The approaches under Division 105A and the CHRO Act, where past offending and prospective risk are linked, stands in stark contrast to the THRO Act where a person need not have committed any terrorist offence to be subjected to a THRO order. For a person to be subjected to a THRO order the determination is made on the basis of a purely prospective risk of committing a serious terrorism offence (defined identically in Division 105A) with no basis in past terrorist offending. In fact, the regime has never been used against someone who has been convicted of a terrorist offence prior to THRO orders being sought.

Bernhard Ripperger has rightly observed that the THRO Act 'currently stands as the broadest response to the issue of residual risk of terrorism posed by offenders'.[76] He uses "residual risk" to refer to 'a threat of violent extremism [that] had been identified and mitigated (either via investigation, disruption, or incarceration) but there is an enduring level of risk that has not been eliminated and requires ongoing management'.[77] Amber Hart has characterised the THRO Act as 'innovative' in decoupling past offending from prospective risk of terrorist offending or violent extremism and sees it bearing promise for thwarting future terrorist attacks.[78] The THRO Act does not rely on past terrorist offending to ground a determination of whether a person poses a prospective risk of terrorist offending. This demonstrates how the THRO Act extends beyond how other similar regimes operate.

The second difference between the Division 105A regime and the THRO Act is in the extent to which evidence law is abrogated by the THRO Act. Division 105A specifically states that for a court to make a CDO or ESO, it can only do so 'on the basis of admissible evidence'.[79] Section 105A.13 clarifies that the jurisdictionally relevant rules of evidence apply to any Div 105A proceedings. There are limited provisions for the Commonwealth

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of New South Wales v Wynne (Preliminary) [2020] NSWSC 1650 from [129] (Davies J). Bernhard Ripperger, 'Preventive Justice, Autonomy and Rehabilitation: A Contribution Toward a Critical Theory of Law' (thesis, Macquarie University, 2023) 163–164 https://figshare.mq.edu.au/articles/thesis/Preventive_Justice_Autonomy_and_Rehabilitation_A_Contribution_Toward_a_Critical_Theory_of_Law/22280974/1.

[76] Ripperger (n 5) 171.

[77] Ibid 168.

[78] Hart (n 3) 190; 203.

[79] *Criminal Code 1995* (Cth) (n 61) ss 105A.7(1)(b); 105A.7A(1)(b).

to refrain from providing terrorism material to a person defending proceedings,[80] but such information remains available to a person's legal representatives.[81]

This stands in contrast to the THRO Act which abrogates the law of evidence by allowing the compulsory acquisition of evidence[82] which becomes automatically admissible during proceedings.[83] The evidence that can be obtained compulsorily and become automatically admissible contains the same information that the THRO Act requires the Court to consider when exercising the discretion to make THRO orders.[84] The THRO Act also allows for certain types of information to remain secret from a person defending proceedings and their legal representatives.[85] A significant part of my analysis about the THRO Act's violence enabled by a state of exception is based on the way that the THRO Act suspends the law of evidence, considered in Chapter 5.

The CHRO Act does not provide for the protection of terrorism intelligence in either the minimalist approach of Division 105A or the maximalist approach of the THRO Act. But it does have a process which allows the plaintiff to compulsorily obtain evidence which becomes admissible in the proceedings by force of law.[86] However, the CHRO Act does not specify matters that the court must consider when determining to make an ESO or CDO in the same way as the THRO Act, so the court is free to consider the evidence made admissible by force of law in whatever way it considers appropriate. So, in this way too, the THRO Act extends beyond the approaches of both the CHRO Act and Div 105A in abrogating the law of evidence, demonstrating the uniqueness of the regime.

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[80] Ibid s 105A.14C.

[81] Ibid s 105A.14C(3).

[82] *Terrorism (High Risk Offenders) Act 2017* (NSW) ss 58; 59.

[83] Ibid s 61.

[84] Ibid ss 25(3); 39(3).

[85] Ibid div 5.3.

[86] *Crimes (High Risk Offenders) Act 2006* (NSW) ss 25(1)-(2B); 25(3); See also *State of New South Wales v Burchell (No 2)* [2017] NSWSC 1191 [15] (Adamson J).

1.2.2. THE THRO ACT REQUIRES MORE SCHOLARLY ATTENTION

My second reason for closely analysing the THRO Act is that while preventive legal measures and counter-terrorism laws in Australia have been the subject of extensive scholarship, as introduced in the previous section of the Introduction, the THRO Act has received limited attention or been overlooked. Given the THRO Act's uniqueness, it warrants additional specific attention to contribute to a developing body of distinctly Australian literature on preventive legal measures.[87]

The Independent National Security Legislation Monitor has said 'Australia leads the world' in making post-sentence supervision and detention regimes.[88] Amber Hart agreed in her focused examination of the THRO Act's ESO regime,[89] and stated 'Australia could be considered pioneers in terms of monitoring radicalised prisoners post-release with the [THRO Act]'.[90] Hart's study focussed on how to deal with the risk of radicalisation in prison and canvassed a range of custodial practices and non-custodial options for mitigating such risk.[91] So whilst Hart considered the THRO ESO regime as an alternative to extended detention, her analysis is limited by the scope of her inquiry and disciplinary focus on policing and carceral practice. Hart's treatment of the THRO Act is representative of how other scholars treat it as part of their scholarship: peripheral or partial. This research is important, but it leaves the field impoverished as there has not been significant legal analysis of the THRO Act and how it works, as there has been with other preventive legal measures. Given the uniqueness of the THRO Act, it is particularly worthy of close and targeted study.

Like Hart, Ripperger and Wong also consider the THRO Act. Ripperger considers the THRO Act in his analysis of how 'terrorism risk assessment tools' are used.[92] He explains

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[87] On the importance of developing an Australian approach to studying the criminal law, see Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press, 2019) 1.

[88] Donaldson (n 56) 7.

[89] Hart (n 3) 190.

[90] Ibid 203.

[91] Ibid 189–190.

[92] Ripperger (n 5).

how the risk assessment tools are used with case studies. While exploring a focussed and important part of the THRO Act's operation, Ripperger's analysis contributes to the vast literature on actuarial risk assessment, and leaves gaps in analysis of the THRO Act from a legal and theoretical perspective. Similarly, Wong analyses parts of the THRO Act which allow for information transfer between policing and intelligence agencies and contributes to policing literatures.[93] As my focus is on the law and how it constructs relationships between people and the state, I do not consider the parts of the THRO Act which relate to policing practice; however, Hart and Wong demonstrate the importance of this scholarship which is outside the scope of my Thesis.

In 2024, two articles specifically about the THRO Act were published. Claire Stimpson conducted content analysis of all THRO judgments between 2017 and June 2023 to build a statistical profile of people subjected to THRO proceedings.[94] She found that most people subjected to THRO proceedings had histories of mental ill health and substance abuse.[95] She also found that most were from 'lower socio-economic backgrounds'.[96] Teresa Singh's analysis draws an interesting comparison between the Sovereign Citizen movement and First Nations sovereignty in exploring how the THRO Act has and may continue to be used to target these different, but easily mistaken as similar, political views.[97] Singh cautions that 'the wide net cast by the eligibility provisions' in the THRO Act could capture First Nations people.[98]

[93] Joanna Wong, 'Sharing Terrorism Intelligence: Insights from UK Law Enforcement Agencies' (2022) 17(2) *Journal of Policing, Intelligence and Counter Terrorism* 218.

[94] Claire Stimpson, 'Unfortunate, Unforgivable and Unacceptable? A Comprehensive Review of Applications under *Terrorism (High Risk Offenders) Act 2017 NSW*' (2020) (forthcoming) *Current Issues in Criminal Justice* 1.

[95] Ibid 13.

[96] Ibid.

[97] Teresa Singh, 'A Sovereign Citizen by Any Other Name? Risks in the Terrorism High-Risk Offender Context' (2024) 49(3) *Alternative Law Journal* 212.

[98] Ibid 215; I have explored the *Dickson* case concerning a First Nations man who expressed views against the Australian state in 'Heed the Call: The Implied Freedom of Political Communication and the Terrorism High-Risk Offenders Regime' (2021) 34(1) *Current Issues in Criminal Justice* 1.

Others gesture towards the THRO Act's importance in passing. McSherry identified it as one of many Australian laws which labels people 'high risk',[99] Blackbourn referred to the first THRO proceedings to consider far right ideology, in a study about far right extremism,[100] and Auld and Quilter identified the THRO Act as a factor which contributed to regressive bail law reform.[101] Dyer and I suggest that the THRO Act is similar to Division 105A of the Criminal Code in our study calling for the repeal of the latter,[102] and Hardy and Williams in their study of the second decade of Commonwealth counter-terrorist law making in Australia after 9/11 referred to the THRO Act as an example of a measure taken by a State government.[103] While the THRO Act is adverted to as important, it remains obscured in otherwise important literatures on preventive legal measures and the Australian counter-terrorism response. The time is ripe for more sustained analysis.

1.2.3. RESPONDING TO A SCHOLARLY CALL TO DEEPEN THE LITERATURE

Turning to the third reason why the THRO Act warrants increased scholarship, preventive justice scholars have called for a deepening of scholarship on preventive legal measures. My Thesis, as a focussed study of the THRO Act attempts to meet these calls, not just in terms of the subject being one particular type of preventive regime, but also in my theoretical approach, outlined later in this Introduction.

Zedner and Ashworth, in a 2019 survey of preventive justice literature, acknowledged that any preventive legal measure could be studied individually, and warned that due to the quick development of preventive legal measures, scholars too hastily saw 'sufficient commonality' and studied them together.[104] Going further, Tulich, Murray and Skead identified that this can be problematic, as '[t]here is no settled basis on which to identify

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[99] Bernadette McSherry, 'Risk Assessment, Predictive Algorithms and Preventive Justice' in John Pratt and Jordan Anderson (eds), *Criminal Justice, Risk and the Revolt against Uncertainty* (Springer International Publishing, 2020) 17 ('Risk Assessment, Predictive Algorithms and Preventive Justice').

[100] Jessie Blackbourn, 'Counterterrorism Legislation and Far-Right Terrorism in Australia and the United Kingdom' (2021) 50(1) *Common Law World Review* 76.

[101] Lachlan Auld and Julia Quilter, 'Changing the Rules on Bail: An Analysis of Recent Legislative Reforms in Three Australian Jurisdictions' (2020) 43(2) *University of New South Wales Law Journal* 642.

[102] Dyer and Pallas (n 56).

[103] Hardy and Williams (n 1).

[104] Zedner and Ashworth (n 11) 440.

and test similarities and distinctions between preventive measures'.[105] Zedner and Ashworth considered that for too long preventive justice scholarship has been fixed exclusively on the criminal law to the exclusion of considering how preventive justice was 'side-stepping the criminal process […and] blur[ring] the lines between crime control, security, counter-terrorism and immigration law'.[106] Thus preventive justice scholars, in identifying room for change in the scholarship, have made calls to broaden, deepen and diversify. In particular by not driving to find commonality where commonality may not lie, and being attentive to how preventive regimes may relate to the criminal law but formally sit outside of it as a body of doctrine.

Displays of weariness among critics of preventive legal measures about the lack of effectiveness of their critiques opens space for more diverse approaches to critiquing preventive legal measures. Tyulkina and Williams' work – on pre-crime preventive detention of people suspected of engaging in terrorist acts – provides an example. Their work laments that the relevant legislative regime has endured despite recommendations from both the Council of Australian Governments and Independent National Security Legislation Monitor for abolition.[107] They write '[t]he lack of justification for Australia's [preventive detention order] regime means that it should be abolished […] Rather than responding to independent reports recommending this course of action, Parliament instead extended the[ir] operation.'[108] Ananian-Welsh makes similar observations about pre-crime control order regimes. Control order regimes have not only expanded in scope, but across jurisdictions despite no demonstrated effectiveness and increasing recognition of their curtailment of civil liberties.[109] Ananian-Welsh observed 'far from

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[105] Tulich, Murray and Skead (n 36) 222.

[106] Zedner and Ashworth (n 11) 443.

[107] Svetlana Tyulkina and George Williams, 'Combating Terrorism in Australia through Preventative Detention Orders' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2019) 136, 141.

[108] Ibid 151.

[109] Rebecca Ananian-Welsh, 'If at First You Don't Succeed...: Effectiveness and the Evolution of Preventive Organised Crime Measures' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 177, 187; see also, Gabrielle Appleby and John Williams, 'The Anti-Terror Creep: Law and Order, the States and the High Court of Australia' in Gabrielle Appleby et al (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 162, for more on the creep of laws concerning motorcycle gangs.

prompting the winding back of these preventive measures, proven ineffectiveness was largely irrelevant to the initial introduction, migration and normalisation of bikie control orders, and assisted in the escalation of the control order paradigm to a new level of severity.'[110] The weariness of Australia scholars is echoed in Peter Ramsay's United Kingdom (UK) based work. He has expressed frustration that continuing to make normative liberal critiques of preventive measures, albeit valid, 'will at best miss its target and lack practical consequences',[111] which drove his motivation to look beyond liberal legal theory to explain the endurance of preventive legal measures.[112]

Tulich, Murray and Skead have also rightly identified that most preventive justice literature derives from the legal systems of the UK and United States of America (USA).[113] They urged 'caution' in applying such scholarship in the Australian context and further urged 'the development of an Australian account of preventive justice.'[114] In part, because of Australia's 'distinct history of settler colonialism and its effects' which are ongoing.[115] In addition, Australia's criminal law and use of preventive legal measures is fragmented as a feature of our federal system of government where power is shared between the Commonwealth, States and Territories. Moreover, Australia falls well short of the level of human rights protections of both the UK and USA, with neither the Commonwealth nor State of New South Wales having any formal human rights protections, meaning that critiques on the basis of breaches of human rights, common to some preventive justice literatures, have limited relevance. A distinctly Australian literature on preventive legal measures may generate new insights because of the federal structure of government, settler colonial context and absence of formal human rights protections.

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[110] Ananian-Welsh (n 109) 193.

[111] Peter Ramsay, 'The Theory of Vulnerable Autonomy and the Legitimacy of Civil Preventative Orders' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Bloomsbury Publishing Plc, 2008) 109, 112.

[112] Ibid 111.

[113] Tulich, Murray and Skead (n 36) 212.

[114] Ibid 212; 221.

[115] Ibid 221.

1.3. On theoretical substrata

What do I mean when I refer to "critical theory" as the theoretical approach that I take in this Thesis? In this part of the Introduction, I expand on the theoretical commitments that inform my research design and analysis. All research is situated, so it is important that I expose my theoretical approach to asking questions and thinking about the world.

In thinking about law, my orientation is neither as "insider" nor "outsider".[116] Firstly because the contours of law itself are uncertain, and secondly because my orientation to law is layered. I practise law, and in particular have practised the law that is the sole subject of this Thesis. I also study, write and think about law using concepts from outside of the academic discipline of law which, for some, is discrete from other social sciences and humanities. I advocate for policy change about law, including laws similar to the THRO Act. This advocacy is political as my audience is parliament and the executive. My orientation to the law, and my orientation to the THRO Act, is neither external nor internal but infused with insights from both.

I am also uninterested in thinking about law in binary terms, whether it is law and politics; inside and outside of "The Law"; legal theory and legal practice; criminal law and civil law. Boundaries can discipline thought and often impoverish scholarship. That being said, I am interested in thinking about the law as a boundary, threshold, or marker itself.[117] I am interested in thinking about what lies on each side of the boundary set by law and how and why the boundary is set. These are hallmarks of critical legal scholarship which stands opposed to 'traditional' approaches.[118]

But more specifically, what do I mean by "critical theory" as the approach that I use to understand the THRO Act? In *A Dictionary of Critical Theory*, the concept is explained as understanding that 'theory is historical, subjective and part of society'.[119] Critical theory

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[116] Margaret Jane Davies, *Asking the Law Question* (Law Book Company, 2008) 12–14.

[117] Ibid 14.

[118] Ibid 183–184. To be clear, I do not mean the Critical Legal Studies Movement in the USA. While it also bears the hallmarks of critical theoretical approaches, I do not draw inspiration from it in this Thesis. Roberto Mangabeira Unger, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso, 2015).

[119] Ian Buchanan, *A Dictionary of Critical Theory* (1st ed, 2010) 'Critical theory' 100, 100; See also, Ripperger (n 75) 17.

accepts that 'neither the subject nor the object of theory can be taken for granted' and is sceptical of tradition and monolithic analyses.[120] The Penguin Dictionary of Philosophy bears a strikingly similar definition, but adds 'critical theory is determined by an interest in human emancipation and so committed to seeking radical social change.'[121]

Critical theory as a school of thought is seen to have commenced with the Frankfurt School and carries on the tradition through various diverse forms.[122] All contemporary manifestations of critical theory, for me, are characterised by the embeddedness of theory in politics, scepticism about claims to innate truthfulness or naturalness, and an urge for justice.[123] I draw my influences from feminist,[124] queer,[125] post-colonial[126] and post-structural[127] thought which offer 'alternative narratives and critical approaches' which are underexplored in preventive justice scholarship.[128]

But of particular relevance to the formation of this project, is the queer sensibility of scepticism directed at state efforts to label subjects and fill the labels with value laden content. Excavating the humanity of subjects marked as abject and reclaiming abject subjects as human is central to queer politics and theory.[129] Exposing the story of how

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[120] Buchanan (n 119) 101; see also, David Held, *Introduction to Critical Theory: Horkheimer to Habermas* (University of California Press, 1980) 24.

[121] Thomas Mautner, *The Penguin Dictionary of Philosophy* (2nd ed, 2005) 'Critical theory' 130; See, also, Held (n 120) 15–16; Axel Honneth, 'Three. Reconstructive Social Criticism with a Genealogical Proviso: On the Idea of "Critique" in the Frankfurt School' in *Three. Reconstructive Social Criticism with a Genealogical Proviso: On the Idea of "Critique" in the Frankfurt School* (Columbia University Press, 2009) 43, 29–30.

[122] Held (n 120).

[123] The contours of critical theory itself, remain contested including with disputes about how faithful theoretical work is to the precepts of the Frankfurt School. See, Ibid 14.

[124] Sara Ahmed, *The Cultural Politics of Emotions* (Routledge, 2nd ed, 2015); Chandra Talpade Mohanty, *Feminism Without Borders: Decolonizing Theory, Practising Solidarity* (Duke University Press, 2003).

[125] Annamarie Jagose, *Queer Theory* (Melbourne University Press, 1996); Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990).

[126] Mohanty (n 124); Achille Mbembe, 'Necropolitics' (2003) 15(1) *Public Culture* 11.

[127] Jacques Derrida, *Of Grammatology*, tr Gayatri Chakravorty Spivak (John Hopkins University Press, 1998); Baudrillard (n 1).

[128] Tamara Tulich, '"Perverts", "Terrorists", and Business as Usual: Pether and Preventive Justice Scholarship' (2021) 30(1) *Social & Legal Studies* 123, 128 ('"Perverts", "Terrorists", and Business as Usual: Pether and Preventive Justice Scholarship').

[129] Gary W Dowsett, 'Abjection. Objection. Subjection: Rethinking the History of AIDS in Australian Gay Men's Futures' (2017) 19(9) *Culture, Health & Sexuality* 935.

the state uses power to construct subjects as Others and deploy violence against them using the THRO Act is central to this project.

Matthew Ball has stated that queer '[c]ritique, then, is a way of challenging the foreclosure of "reality" as produced through various forms of power. It identifies these foreclosures as illegitimate and utili[s]es them as opportunities to open up […] that which cannot be thought.'[130] Teasing this out further, Ball, referring particularly to criminology stated that queer theory 'opens up fissures in these forms of ordering and creates new spaces for pushing what it is possible to think, and how it is possible to be.'[131] In unsettling and questioning the decisions of courts, my Thesis contributes to the queer scholarly project which has now moved beyond the study of sexual orientation, gender identity and expression alone. Jasbir Puar's queer and post-colonial analysis of America's counter-terrorism response to the destruction of the Twin Towers offers a powerful example.[132]

My theoretical approach also accords with calls from within preventive justice scholarship to 'examine the subject' of preventive legal measures[133] and whether the 'consequential costs and burdens fall disproportionally on already marginali[s]ed groups'.[134] Loughnan and Selchow have urged scholars 'to go beyond the bounds of legal and effectiveness concerns.'[135] Tulich, Murray and Skead consider that Australian literature ought to pay closer attention to '[t]he question of race' particularly given

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130 Matthew Ball, 'Queer Criminology, Critique, and the "Art of Not Being Governed"' (2014) 22(1) *Critical Criminology* 21, 28.

131 Ibid 32.

132 Jasbir K Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, Tenth anniversary expanded edition., 2017). The examples are endless. But another more remote to the subject of this thesis would be Seuffert's work on queering financial systems after the post Global Financial Crisis, Nan Seuffert, 'Occupy, Financial Fraternity and Gender Ventriloquism' (2014) 10(3) Law, Culture and the Humanities 380.

133 Tulich, Murray and Skead (n 36) 229; This accords with Naffine's view that 'criminal law theory must engage with actual positive criminal laws and their actional operations if they are to serve a useful purpose' Ngaire Naffine, 'Moral Uncertainties of Rape and Murder: Problems at the Core of Criminal Law Theory' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Bloomsbury Publishing Plc, 2008) 213, 230.

134 Zedner, 'Taking the Preventive Justice Project Forward' (n 11) xxii.

135 Arlie Loughnan and Sabine Selchow, 'Preventive Detention Beyond the Law: The Need to Ask Socio-Political Questions' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013) 261, 264.

Australia's settler-colonial history.[136] Elsewhere, Tulich drawing from an incomplete book proposal by the late Penelope Pether called for scholars to 'think differently' by 'questioning [preventive justice's] normative project and legal standpoint'.[137] Whilst the theoretical substrata that have led me to my research design are personal theoretical commitments, they also address a theoretical gap in preventive justice literature.

1.4. ON METHOD

Studying terrorism in the modern world is complex. As my Thesis explores, the "terrorist" has been designated the ultimate *persona non grata,* the quintessential enemy of liberal democracy.[138] Attempts to problematise or interrogate counter-terrorism laws can lead to public condemnation and – theoretically at least – criminalisation,[139] as there is political consensus about the evil of "terrorism". While seeking to tell an alternative story about people who the state has sought to label as high risk offenders, I do not seek to glorify any harm caused or political violence. I rather seek to add context and nuance to the way that "terrorism" is invoked under the THRO Act, and the stories that the state tells about people.

One may think that an obvious way to tell this story would be through an empirical study which, at the very least, sought access to the evidence adduced in THRO proceedings and at most would involve interviews with people involved in THRO proceedings, including defence lawyers. But my Thesis is not just about people. It is also about state power. So, in order to tell a story about people, power and the State, my Thesis needs to analyse law and how it organises and shapes lives. To tease out the relationship between people and the state, close analysis of case law is apt. In that regard, my Thesis method, unlike my

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136 Tulich, Murray and Skead (n 36) 229.

137 Tulich, '"Perverts", "Terrorists", and Business as Usual: Pether and Preventive Justice Scholarship' (n 128) 125.

138 See, generally, Joseph Pugliese, *State Violence and the Execution of Law* (Routledge, 2013); Puar (n 132) 37–39.

139 See, for example, *Criminal Code 1995* (Cth) s 80.2C, which criminalises advocating terrorism. Advocates is, in part, defined as 'the person praises the doing of a terrorist act or the commission of a terrorism offence in circumstances where there is a substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or to commit a terrorism offence' (s 80.2C[3][c]). A terrorist act need not ever occur (s 80.2C[4][a]). While I do not suggest that counter-terror law scholars do this, the definition has sufficient latitude to at least conceivably capture some of scholarship.

theoretical approach, resembles a traditional doctrinal approach. Theunis Roux describes doctrinal research as:

> aimed at the systematisation and critique of a defined body of positive law…[t]he general aim is to persuade other legal professionals…of the researcher's understanding of the state of the law and the seriousness of any deficiencies identified.[140]

My Thesis closely analyses one statute and how it has been interpreted by the court.[141] It identifies inconsistencies within doctrine and as between other bodies of law, especially law of evidence and procedure. The methodological choice to analyse both statute and case law enables analysis of law in practice. Consideration of statute alone denudes the analysis of case law's richness in demonstrating the executive's approach to litigation and framing of the purported high risk offender as the plaintiff in THRO proceedings. The state constructs people as high risk offenders through litigation under the THRO Act. That process of construction commences when the Act is first engaged by the Attorney General to gather evidence against a person. It culminates in a court rendering a judgment determining the executive's application. The process of constructing people as high risk offenders takes place through litigation. Case law, insofar as it is a record of litigation, is the most appropriate material from which to theorise. Case law also provides insights into how people defend THRO proceedings. That said, a limitation of this method is that those insights are only present in some cases and are inextricably linked to court proceedings and representations made by lawyers and judges.

Notwithstanding the suitability of statute and case law analysis for an applied theoretical Thesis, there remains another significant limitation insofar as it is able to represent the effects of violence against people. My method of analysing statute and case law readily allows for analysis of power and violence at the political level. It can assist in exposing the violence of structures and administrative regimes. But in so doing also leaves a representational gap as to how that violence manifests and is experienced by the people who are purported to be high risk offenders.[142] But, if the focus was on the embodied

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[140] Theunis Roux, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24(2014) *Legal Education Review* 177, 178.

[141] My analysis should be taken as current as at December 2024.

[142] On the difficulty with representing violence, see generally, Elaine Scarry, *The Body in Pain: The Making and Unmaking of the World* (Oxford University Press, 1985).

experience of state violence, the multi-layered analysis of power which causes violence may similarly be obscured as felt experiences and personal accounts are foregrounded. While my method allows for stories to be told about violence from people who defend THRO proceedings, such a picture is not complete, but ought to be acknowledged.

My method, like any, is inextricably linked with my theoretical orientation. Matthew Ball distinguishes between criticism from critique in the queer theoretical tradition as a method. 'Criticism', is 'premised on judgement, and positions the critic as legislator identifying problems, gaps, or oversights in a body of knowledge or a set of relations, and prescribing solutions – that it *should* say this, or it *ought* to do that.'[143] Criticism, as articulated by Ball, is compatible with doctrinal scholarship which adopts an internal gaze and orientation to law. Instead, my critique observes law from an outside perspective (despite me also being an insider) and using theoretical tools from outside law as a means of analysis. Further, and importantly, I do not call for reform in my Thesis in the vein of doctrinal criticism.[144] My Thesis, as applied critical theory, is about excavating the political and analysing relations of power between the subject and the state when deployed through the THRO Act which cannot be done within a doctrinal framework. I will leave it for others, or perhaps for myself at another time, to suggest strategies for reform.

1.5. THESIS OUTLINE

The Thesis unfolds in the following way. Chapter 2 provides an overview of how the THRO Act operates. It commences with an analysis of parliamentary history and analyses the THRO Act's key features and the case law. As the THRO Act is *sui generis* it is important to explain how it works to ground the rest of the analysis. While I have already made an argument about the THRO Act being *sui generis* in the Introduction, I develop this further in Chapter 2. Chapter 2 also expands on preventive justice critiques and applies them to the THRO Act. Chapter 2 provides a descriptive baseline for the remainder of the Thesis, permitting me to proceed on the basis of a working knowledge of the legislation.

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[143] Ball (n 130).

[144] See also, Roux (n 140) 178.

Chapters 3 and 4 each examine the effects of the State constructing people as high risk offenders using critical theory. Chapter 3 argues that the THRO Act allows for violence to be used against people. The THRO Act enables violence in two principal ways: firstly, it enables violence and control through incarceration. Secondly, it enables control when people are subjected to supervision in the community.

Chapter 4 expands on a particular form of violence, Othering, which assists in legitimising the violence explored in Chapter 3. In Othering people subjected to the THRO Act, the state labels people as those who do not, and should not, belong. The clearest categories of Other used are the terrorist and criminal. But the State also invokes the racialised and disabled Other as markers of people who do not belong.

Chapter 5 examines how the State is able to create violent effects through the THRO Act. Using the concept of the state of exception, Section 5.2 argues that the process for gathering information under the THRO Act cultivates favourable outcomes for the state. It does so in three ways. Firstly, it allows the plaintiff to access information more permissively. Secondly, it removes barriers to the admissibility of such information. Thirdly, it requires the court to consider certain types of information acquired by the plaintiff in proceedings. I also consider the provisions that sometimes allow for evidence to be kept secret. Section 5.3, again using the state of exception, analyses how procedure has been altered by the state through the THRO Act to generate more favourable outcomes. Section 5.3 offers a careful examination of the altered burden of proof at the preliminary hearing.

I conclude by summing up my arguments and presenting avenues for further research. By moving beyond the powerful preventive justice critiques and engaging with critical theory, my Thesis analyses the relations of power that underpin the THRO Act. My analysis foregrounds how the state constructs individuals as high risk offenders. In so doing, I tell a story about violence, Othering and exception as a regime which was ostensibly created to protect causes harm instead.

2. THE TERRORISM (HIGH RISK OFFENDERS) ACT 2017 (NSW)

As briefly described in the Introduction, the THRO Act established a post-sentence supervision and detention regime for people who are found by the court to pose an ongoing unacceptable risk of committing a serious terrorism offence. This Chapter lays the doctrinal foundations for my critique of the *Terrorism (High Risk Offenders) Act 2017* (NSW) (THRO Act). As previously introduced, the THRO Act is *sui generis* and, as such, deserves greater scholarly consideration both within the framework of preventive justice and outside of it. By exploring how the THRO Act operates in this Chapter, I further demonstrate the THRO Act's uniqueness and contribute to the development of a knowledge base which consolidates how it is understood through case law. Exploring the THRO Act doctrinally will assist others interested in comparative work within and across jurisdictions in making comparisons. In providing an account of how the THRO Act works at the outset, the balance of my Thesis unfolds thematically without needing to continue to orient the reader around how any part of the analysis fits into the broader regime.

I also examine how a preventive justice analysis may be applied to the THRO Act. I introduce some justifications that ought to be present for a preventive justice measure to be normatively justifiable. I also introduce some limitations that scholars suggest ought to be placed on preventive legal measures which are normatively justifiable. Andrew Dyer and I have synthesised these preventive justice limitations to be that a regime must:

> (1) apply to persons who have been convicted in the past of an offence involving serious violence; (2) permit post-sentence preventive detention only if no less restrictive alternative would deal adequately with the relevant threat; and (3) provide that detainees serve such detention in non-punitive conditions, and not within the prison system.[145]

We further observe, that compliance with these three principles is also required to ensure that preventive justice measures comply with international human rights law.[146] I do not apply these principles in great detail, but introduce their application to the THRO Act to

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[145] Dyer and Pallas (n 56) 70.

[146] Ibid 70–72.

show the power of preventive justice critiques and to orient the parallel course that I chart in this Thesis. From a preventive justice perspective, the THRO Act appears to be appropriately legally justified, but falls well short of adopting the necessary limitations and restraints required for a normatively justifiable regime.

I start with the THRO Act's legislative history before engaging with key concepts like the 'eligible offender' and 'unacceptable risk'. I then consider the types of orders that can be made by a court before turning to evidence and procedure. I close by analysing the legal challenges that have been brought against the THRO Act, which have mostly failed.

2.1. INTRODUCTION OF THE LEGISLATION IN PARLIAMENT

When introducing the Bill in 2017 the then Attorney General, Mark Speakman SC MP, in his second reading speech stated '[t]here is no doubt that laws to keep offenders behind bars or under supervision after they have completed their sentences are tough laws. The New South Wales Government makes no apologies for this'.[147] He later continued, '[i]t is unfortunate that we have to introduce these laws. But what would be more unfortunate – what would be unforgiveable for a government – is if someone who we knew posed an unacceptable risk of committing a serious terrorism offence in custody was then released […] and committed an atrocity'.[148] To this end, the THRO Act's objects which guide all exercises of power and the court when interpreting the THRO Act, are to maintain the 'safety and protection of the community' by preventing an 'unacceptable risk of [a person] committing serious terrorism offences',[149] and, secondly to encourage rehabilitation.[150] In relation to the objects, which are often invoked in litigation, they are only directed only to protecting the public from serious terrorism offences not all criminal offending.[151]

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[147] New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 November 2017, 16:29 (Mark Speakman, Attorney General).

[148] Ibid.

[149] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 3(1).

[150] Ibid s 3(2).

[151] *State of New South Wales v BP (Preliminary)* [2019] NSWSC 699, [24] (Wright J).

The Attorney General justified the bill on the basis of a ‘probable’ terrorism threat level indicator and invoked the 2014 Lindt Café siege[152] in arguing that the bill ‘ensur[ed] that the authorities have effective powers and legal frameworks aimed at combating terrorism and protecting the public’.[153] The Attorney General was supported by Government colleagues, including the then Minister for Counter Terrorism, David Elliott MP, who stated ‘[t]his bill will ensure that New South Wales has the strongest counterterrorism laws in Australia – for which I do not apologise – and the world.’[154] Trevor Khan MLC – now a Magistrate – stated ‘[w]e must ensure that radicalised individuals who are in our prison system understand that […] there are consequences [...] They will not be allowed to reach the end of their sentence and simply wander out onto the streets.’[155]

The Opposition ‘did not oppose’ the bill but, counterintuitively, also argued that the gaps that the Attorney General said were remedied by this Bill were ‘not as gaping’ as suggested.[156] Ron Hoenig MP, from the Opposition, however, was strident in his criticisms, he stated ‘they are certainly tough laws, and those of us with views on post-sentence detention have clearly lost that debate.’[157] He continued, ‘no-one in a liberal democracy, if given a choice, supports post-sentence detention because it offends every conceivable principle of the doctrine of separation of powers and infringes against the

[152] The Lindt Café Siege of 15 to 16 December 2014, saw Man Haron Monis orchestrate a sixteen hour siege of a Sydney CBD Café with ten people held hostage. Two hostages and Monis were killed. Monis raised the Shahada flag during the siege. For more see, Russ Scott and Rodger Shanahan, ‘Man Haron Monis and the Sydney Lindt Café Siege - Not a Terrorist Attack’ (2018) 25(6) *Psychiatry, Psychology, and Law* 839; Deborah Snow, *Inside the Lindt Café Siege: The Powerful and Uncompromising Story of What Happened and Why the Police Response Went so Tragically Wrong* (Allen & Unwin, 2018). Monis was known to law enforcement agencies, one of his prosecutions was for sending offensive messages to family members of Australian soldiers who were fighting and had fought in Afghanistan was ultimately determined by the High Court: *Monis v The Queen; Droudis v the Queen* ((2013) 249 CLR 92). See also Auld and Quilter (n 101) for more on the relationship between the Lindt Café Siege and bail law reform in particular.

[153] New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 November 2017, 16:29 (Mark Speakman, Attorney General).

[154] New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 November 2017, 17:41 (David Elliott, Minister for Counter Terrorism).

[155] New South Wales, *Parliamentary Debates*, Legislative Council, 22 November 2017, 17:07 (Trevor Khan).

[156] New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 November 2017, 16:25 (Paul Lynch, Shadow Attorney General).

[157] New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 November 2017, 17:12 (Ron Hoenig).

principles contained within the International Covenant on Civil and Political Rights.'[158] Mr Hoenig's remarks found no support from other Opposition parliamentarians.

Crossbench parliamentarians, however, shared Mr Hoenig's well-founded concerns and most did not support the Bill.[159] Alex Greenwich MP, Independent, stated 'Governments and parliaments should be cautious in the measures they use to deal with terrorism and not resort to popular measures just to appear to be tough on terror. Unfortunately the bill's approach relies on the premise that eroding people's civil liberties and rights to freedom from arbitrary detention will make people safe.'[160] Jenny Leong MP said that the law was 'creating a parallel criminal justice system based on rumour, innuendo, suspicion and prejudice,' and denounced the laws as 'keeping people in jail for a crime they have not committed.'[161]

Beyond the parliamentary debate, the Legislation Review Committee – comprised of parliamentarians across the political spectrum – tasked with assessing bills against the criteria contained in s 8A(1)(b) of the *Legislation Review Act 1987* (NSW) expressed strong concerns.[162] They considered it 'trespasses on personal rights and liberties' including through retrospective operation and a deficiency in procedural fairness.[163] The Committee also seems to have misapprehended how the THRO Act operated, stating 'while the offences are of a serious criminal nature, the prosecution is only required to meet the lower standard of proof'.[164] This comment ostensibly refers to the requirement on the plaintiff to prove to a high degree of probability an unacceptable risk of committing a serious terrorism offence. The messy way in which the THRO Act operates outside but

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158 Ibid.

159 Christian Democrat, the Reverend Dr Fred Nile MLC, was the only crossbench parliamentarian to speak for the bill: New South Wales, *Parliamentary Debates*, Legislative Council, 22 November 2017, 17:14 (Fred Nile).

160 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 November 2017, 17:28 (Alex Greenwich).

161 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 November 2017, 17:30 (Jenny Leong).

162 Legislation Review Committee, *Legislation Review Digest* (No No. 65/56, New South Wales Parliament, 21 November 2017).

163 Ibid v.

164 Ibid vi.

inextricably linked to criminal law adjudication of guilt and criminal punishment is evident through this comment from the Committee. The Committee further found that the Bill makes rights 'unduly dependent upon insufficiently defined administrative powers' and raised concerns about how the Bill would relate to protest and political communication directed to government.[165] Despite these strong concerns raised by the Committee, the Bill was not scrutinised by a specialist parliamentary inquiry as is often the case when matters of civil liberty are before parliament.

Failure to refer the Bill to a full parliamentary inquiry is more surprising given that civil society actors made representations to parliamentarians about the bill's harmfulness. Various members mentioned that the NSW Council for Civil Liberties and NSW Bar Association opposed the Bill.[166] In an unusual note from the Editor appended to Natalie Marsic's article in the Law Society Journal about how the THRO Act will operate for practitioners, it was observed that the NSW Law Society had written to the Attorney General upon introduction of the Bill to express concern and indicated 'the Society's fundamental opposition to the concept of post-sentence preventative detention'.[167] However, as the Bill passed parliament within seven days without amendment, the warnings given by the Committee and civil society actors were not heeded.

How does the parliamentary intention behind the Bill compare with the normative justifications derived from preventive justice scholarship for preventive measures? Slobogin considers the most persuasive justification for preventive detention to be when laws are used to incapacitate 'undeterrable' subjects.[168] For Slobogin 'the criminal justice system must be the response to antisocial behaviour *unless it cannot work as a preventive mechanism*' which necessitates preventive justice measures.[169] The state's focus, therefore, is on a person who 'is either unable or unwilling to exercise autonomy in the

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[165] Ibid vii.

[166] New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 November 2017, 17:30 (Jenny Leong); New South Wales, *Parliamentary Debates*, Legislative Council, 22 November 2017, 16:48 (David Shoebridge).

[167] Marsic (n 56) 87.

[168] Christopher Slobogin, 'Preventive Detention in Europe, the United States and Australia' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013) 31, 51.

[169] Ibid.

right direction even if the consequences are grave and immediate'.[170] Slobogin argues that the degree of undeterrability must be 'significant' to justify preventive detention.[171] Similarly, Ashworth and Zedner state that:

> The state's duty to protect people from serious harm may justify depriving a person of liberty if that person has lost the presumption of harmlessness by virtue of committing a serious violent offence and is classified as dangerous.[172]

They rightly caution, however, that determining whether someone is dangerous 'must be approached with caution' and is inherently risky.[173]

The stated objectives of the THRO Act, without consideration of its operation in practice, accord with preventive justice justifications for preventive legal measures. The punitive and retributivist comments from some of the then Government members however, tend against the logic of prevention. But the fundamental premise of the THRO Act that there are people who have some connection with terrorism and there is a high degree of probability that they pose an unacceptable risk of committing a serious terrorism offence in the future, so need to be detained or supervised. This appears to be a sound normative justification for creating the regime. It was also intended that the regime assists with rehabilitation of people subjected to it, another important feature of just preventive measures.[174] However when a critical theoretical approach is taken to analyse the THRO Act's operation in practice, some of these intentions can be unsettled, as will be seen in the balance of my Thesis.

I now turn to the THRO Act's operative elements as in force at December 2024.

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[170] Ibid.

[171] Ibid 52.

[172] Andrew Ashworth and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014) 168.

[173] Ibid.

[174] Ashworth and Zedner (n 172).

2.2. THE 'ELIGIBLE OFFENDER'

For proceedings to be commenced against a person,[175] they must be eighteen years or older, and serving a custodial sentence for an indictable offence.[176] The person must be detained or supervised as part of a sentence for a NSW indictable offence or other THRO order when proceedings are commenced.[177] The person must be, a 'convicted NSW terrorist offender'; a 'convicted NSW underlying terrorism offender'; or a 'convicted NSW terrorism activity offender'.[178] I will consider each category in turn. As mentioned in the introduction, unlike Division 105A of the *Criminal Code* where a person has to have been convicted of a terrorism or foreign incursion offence[179] a person can be subjected to THRO proceedings without having been previously convicted of an offence of the kind that the THRO Act seeks to prevent.

A 'convicted NSW terrorist offender' is someone who has been sentenced to incarceration for an offence contrary to s. 310J of the *Crimes Act 1900* (NSW), or has previously been incarcerated for such an offence and is incarcerated for another NSW indictable offence.[180] There have been no orders made with respect to a 'convicted NSW terrorist offender'.[181]

A 'convicted NSW underlying terrorism offender' is someone who is incarcerated for an indictable offence that is also considered a serious offence under s. 9(2) of the THRO Act.

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[175] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 22.

[176] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 7; see also, s 6.

[177] Ibid s 20(a); see also, ss 5 and 6.

[178] Ibid s 20.

[179] *Criminal Code 1995* (Cth) s 105A.3(1)(a).

[180] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 8. Section 310J of the *Crimes Act 1900* (NSW) makes it an offence when a 'person intentionally is a member of a terrorist organisation, and the organisation is a terrorist organisation, and person knows the organisation is a terrorist organisation'.

[181] As at December 2024. Justice N Adams J considered whether Mr White was a 'convicted NSW terrorist offender' but the plaintiff did not press an application on that basis: *State of New South Wales v White (Final)* (1943) [2018] NSWSC 1943 [33] ('*State of New South Wales v White (Final)*').

That serious offence must also have occurred in a 'terrorism context'.[182] The list of factors that render an offence serious is extensive, and includes:[183]

> (a) the offender committed the offender's offence with:
>
> > (i) the intention of advancing a political, religious or ideological cause, and
> >
> > (ii) the intention of coercing, or influencing by intimidation, the government of an Australian jurisdiction or foreign country (or of part of an Australian jurisdiction or foreign country) or of intimidating the public or a section of the public, or
>
> (b) the offender knew, or was reckless as to whether, the offender's offence would materially assist any other person to commit:
>
> > (i) an offence against section 310J of the Crimes Act 1900, or
> >
> > (ii) a NSW indictable offence that is a serious offence committed by the other person with the intentions referred to in paragraph (a), or
> >
> > (iii) a terrorism offence within the meaning of the Crimes Act 1914 of the Commonwealth.[184]

This eligibility category is used infrequently. In Mr White's case N Adams J was satisfied that Mr White met this definition because he 'burnt down the church in Taree with the intention of advancing a political, religious or ideological cause and intending the intimidation of the public or a section of it'.[185] In addition to the *White* proceedings, I have only found one other concerning a 'convicted NSW underlying terrorism offender'.[186]

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182 *Terrorism (High Risk Offenders) Act 2017* (NSW) s 9(1)(c).

183 Ibid s 9(3)(ii).

184 Ibid s 9(3)(ii).

185 *State of New South Wales v White (Final)* (n 181) [47] (N Adams J).

186 See, for example, *State of New South Wales v Dickson (Preliminary)* [2019] NSWSC 1534 [64] (Ierace J) ('*State of New South Wales v Dickson (Preliminary)*'); confirmed in *State of New South Wales v Dickson (Final)* [2020] NSWSC 100 [25] (Ierace J) ('*State of New South Wales v Dickson (Final)*') As at December 2024.

For someone to be considered a 'convicted NSW terrorism activity offender' they must be incarcerated for a serious offence and have either been subject to a Commonwealth control order,[187] a member of a terrorist organisation[188] or someone who:

> (i) is making or has previously made any statement (or is carrying out or has previously carried out any activity) advocating support for any terrorist act or violent extremism, or
>
> (ii) has or previously had any personal or business association or other affiliation with any person, group of persons or organisation that is or was advocating support for any terrorist act or violent extremism.[189]

The phrase "advocating support" has not been defined.[190] But courts have construed there to be no time limitation on when the advocacy occurs.[191]

Section 4(1) of the THRO Act imports the definition of "terrorist act" from the *Criminal Code*.[192] The definition has many elements. The first requires an 'action' which, *inter alia*, causes death, serious physical harm or serious damage to property.[193] The second is that that the action must occur with the 'intention of advancing a political, religious or ideological cause'.[194] The third is that the action must be intended to coerce or intimidate a government or whole or part of the public.[195]

"Violent extremism" is undefined. Justice White has observed that it 'connote[s] an element of ideology and is not to be equated with extreme violence', rather, 'it refers to

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[187] Section 4 of the THRO Act defines a "control order" for the purposes of the THRO Act to mean an order under pt 5.3 of the *Criminal Code 1995* (Cth).

[188] Section 10(3) confirms that the definition of "terrorist organisation" is congruent with that in pt 5.3, div 10 of the *Criminal Code 1995* (Cth).

[189] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 10(1)(c).

[190] *State of New South Wales v Dunn (a pseudonym)* (2018) 273 A Crim R 238 [29] (N Adams J) ('*State of New South Wales v Dunn (a pseudonym)*'); cited with approval in *State of New South Wales v Ibrahim (Final)* [2021] NSWSC 793 [70] (Walton J) ('*State of New South Wales v Ibrahim (Final)*').

[191] *State of New South Wales v Ibrahim (Final)* (n 190) [73] (Walton J).

[192] *Criminal Code 1995* (Cth) (n 61) s 100.1; See *State of New South Wales v Mustapha (Final)* [2022] NSWSC 116 [19] (N Adams J) ('*State of New South Wales v Mustapha (Final)*').

[193] *Criminal Code 1995* (Cth) (n 61) s 100.1.

[194] Ibid.

[195] Ibid.

violence associated with, or in furtherance of, or motivated by extremist views'.[196] Put another way, Basten JA suggested that "violent extremism" 'does not refer to any form of violent behaviour, but rather a violent form of ideology'.[197] Some judges consider that "violent extremism" extends beyond conduct captured by the definition of "terrorist act"[198] but others have declined to decide that point.[199] Whether a person's thought is disordered at the time they advocate support for "violent extremism" is irrelevant.[200]

The THRO Act, by operation of an amendment, identifies examples of conduct which advocates support for a terrorist act or violent extremism in a deeming provision which includes making a pledge of loyalty, displaying symbols and making threats of violence.[201] Importantly, this categorisation can apply irrespective of whether a person has been convicted of an offence arising from the conduct relied on to prove that they are a 'convicted NSW terrorism activity offender'.[202] The amendment came into force on 28 November 2018, just over one year after the THRO Act passed parliament. In the Second Reading Speech for the amendment, the Attorney General did not explain why the amendment was required, but stated '[t]hese amendments will clarify that advocating support for terrorism activity or violent extremism is distinct from the actual commission

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[196] *Hardy v State of New South Wales* (2021) 294 A Crim R 424 [82] (White JA), [91] (McCallum JA agreeing) ('*Hardy v State of New South Wales*'); cited with approval in *State of NSW v XX (Final)* [2023] NSWSC 59 [10] (Fagan J) ('*State of NSW v XX (Final)*').

[197] *Hardy v State of New South Wales* (n 196) [30] (Basten JA); [74] (White JA agreeing); [91] (McCallum JA agreeing); cited with approval in *State of NSW v XX (Final)* (n 196) [10] (Fagan J); and *State of New South Wales v Gavin* [2022] NSWSC 84 [25] (Harrison J) ('*State of New South Wales v Gavin*').

[198] *State of New South Wales v Ibrahim (Final)* (n 190) [81] (Walton J); cited with approval in *State of New South Wales v Mustapha (Final)* (n 192) [103] (N Adams J); *State of New South Wales v Richardson (Preliminary) (No 2)* [2023] NSWSC 794 [45] (Davies J) ('*State of New South Wales v Richardson (Preliminary) (No 2)*'); *State of New South Wales v Hickey (Preliminary)* [2022] NSWSC 1498 [38] (N Adams J) ('*State of New South Wales v Hickey (Preliminary)*').

[199] *Hardy v State of New South Wales* (n 196) [30] (Basten JA).

[200] Ibid [23]-[24] (Basten JA); cited with approval in *State of New South Wales v Richardson (Final)* [2023] NSWSC 1048 [50]; [53] (Rothman J); and *State of New South Wales v Taleb (Final)* [2022] NSWSC 1748 [51] (Yehia J).

[201] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 10(1A); For more on the operation of the deeming provision see, *Cheema v State of New South Wales* (190) ((2020) 102 NSWLR 714) [17]; [63]-[65] (Bathurst CJ, Leeming and White JJA) ('*Cheema v State of New South Wales*').

[202] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 10(2).

of a terrorism offence'.[203] The corollary is that there is absolute clarity that the conduct relied upon to ground a person's eligibility need not have resulted in a terrorism conviction.[204]

Most cases concern 'convicted NSW terrorism activity offender[s]'.[205] For example, the court considered a case under s. 10(1)(c)(i) by operation of the deeming provision because a person displayed images and symbols associated with the Islamic State by sharing a Facebook post from an Islamic State affiliated media outlet with religious text which could be construed as advocating violence.[206] Mr Cheema argued that the provision infringed his implied freedom of political communication, because of its purported limitation on his speech.[207] Justice Johnson rejected the application and found that the proper construction of the statute meant the THRO Act only sought to restrain speech which could cause harm, so did not infringe the implied freedom.[208] This decision was upheld on appeal.[209] Another significant site of contestation has been regarding the proximity with which an offender must be associated with other people who advocate support for a terrorist act or violent extremism.[210]

Thus, the criteria that apply to determine whether a person is an 'eligible offender' are broad and can even be invoked if there is the presence of conduct deemed to be connected

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[203] New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 November 2018, 16:27, (Mark Speakman, Attorney General).

[204] *State of New South Wales v Naaman (No 2)* (2018) 276 A Crim R 30 [22] (Basten, Macfarlan, Leeming JJA) ('*State of New South Wales v Naaman (No 2)*'); *Lawrence v State of New South Wales* (148) (2020) 103 NSWLR 401 [58] (Bathurst CJ) ('*Lawrence v State of New South Wales*'); *State of New South Wales v Hickey (Preliminary)* (n 198) [39] (N Adams J).

[205] See, for example, *State of New South Wales v GB by his Tutor* [2020] NSWSC 913; *State of New South Wales v Dickson (Final)* [2020] NSWSC 100; *State of New South Wales v Dunn* [2019] NSWSC 426; *Hardy v State of New South Wales* (n 196).

[206] *State of New South Wales v Cheema (Preliminary)* [2020] NSWSC 876 [110] (Johnson J) ('*State of New South Wales v Cheema (Preliminary)*').

[207] Ibid, [132]-[158] (Johnson J).

[208] Ibid [150]-[153] (Johnson J).

[209] *Cheema v State of New South Wales* (n 201); For more analysis about the THRO Act and the case law concerning the implied freedom of political communication, see Pallas (n 98).

[210] See, for example, *State of New South Wales v Barez (Final)* [2020] NSWSC 555, [51] (Walton J); *State of New South Wales v Elmir (Final)* [2019] NSWSC 1867, [51]-[58] (Walton J); *State of New South Wales v Fayad (Preliminary)* [2020] NSWSC 1681 [189] (Johnson J) ('*State of New South Wales v Fayad (Preliminary)*').

with terrorist acts or violent extremism. But most importantly, as has been outlined in the Introduction, the THRO Act decouples past offending and future risk, which makes it unique.

2.3. 'UNACCEPTABLE RISK' AND DISCRETION

The THRO Act allows the Supreme Court to exercise the discretion to make ESOs[211] or CDOs for up to three years once satisfied of certain criteria.[212] In this section, I explain what satisfaction 'to a high degree of probability that the [eligible] offender poses an unacceptable risk of committing a serious terrorism offence' if not supervised[213] or incarcerated means.[214] To do so, I will break down the components of the test.

Justice Hoeben, explained '[t]he expression "high degree of probability" indicates something beyond "more probably than not". The existence of the risk needs to be proved to a higher degree than the normal civil standard of proof, though not to the criminal standard'.[215] The word "unacceptable" has been construed as meaning 'so far from a required standard, norm, expectation etc as not to be allowed'.[216] Taken together, the courts have construed that "unacceptable risk" 'should be given its everyday meaning' consistent with the THRO Act's objects.[217] The burden of proof attaches to the question

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[211] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 20.

[212] Ibid s 34.

[213] Ibid s 20(d).

[214] Ibid s 34(d).

[215] *State of NSW v Holschier (No 2)* [2018] NSWSC 1921, [21] (Hoeben CJ at CL); citing from *Cornwall v Attorney General for New South Wales* [2007] NSWCA 374, [21] (Mason P, Giles and Hodgson JJA). On not having to prove that the risk is more likely than not, see also, *Terrorism (High Risk Offenders) Act 2017* (NSW) ss 21; 31; *State of New South Wales v Mustapha (Final)* (n 192) [25] (N Adams J).

[216] *Lynn v State of New South Wales* (2016) 91 NSWLR 636, [51] (Beazley P) has been widely adopted in THRO jurisprudence; see for example, *State of New South Wales v Naaman (Final)* [2018] NSWSC 1635 [18]-[22] (Fagan J) ('*State of New South Wales v Naaman (Final)*'); *State of NSW v XX (Final)* (n 196) [14] Fagan J); *State of New South Wales v Hickey (Preliminary)* (n 198) [46] (N Adams J).

[217] *State of New South Wales v Hickey (Preliminary)* (n 198) [46] (N Adams J).

of whether a person poses an unacceptable risk of committing a serious terrorism offence and not 'the existence of the risk or the likelihood of its manifestation'.[218]

The unacceptable risk test requires an assessment of both gravity and likelihood of risk.[219] Considering similar provisions in the *Criminal Code*, Edelman J described the test:

> Whether the risk of commission of a Pt 5.3 offence is "unacceptable" is not limited to the likelihood of the commission of the offence. It extends also to the magnitude of harm to the community in light of the interest that the terrorist offender has in their liberty.[220]

Justice Edelman's approach is mirrored in THRO decisions. For example, Rothman J provided examples of how this calculus could be determined:

> To utilise two deliberately extreme examples: if the risk were the detonation of a nuclear missile involving the death of many, only a very slight probability may be required to render the risk unacceptable. On the other hand, if the manifestation of the risk was a minor contusion, even a high probability of its manifestation may not render the risk unacceptable.[221]

This assessment must be 'undertaken to ensure, but not necessarily guarantee, the safety and protection of the community.'[222] But ultimately, what has to be proven to a high degree of probability, a risk, which is a probabilistic assessment itself and inherently imprecise.[223]

A serious terrorism offence is an offence contrary to Part 5.3 of the *Criminal Code* with a penalty of at least seven years' imprisonment.[224] This includes offences such as engaging

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[218] *State of New South Wales v Ceissman* [2018] NSWSC 508 [32] (Rothman J) ('*State of New South Wales v Ceissman*'); cited with approval in *Cornwall v Attorney General for New South Wales* [2007] NSWCA 374 [21] (Mason P, Giles and Hodgson JJA).

[219] *State of New South Wales v Simcock (Final)* [2016] NSWSC 1805, [71] (Wilson J); cited with approval in, *State of New South Wales v Hickey (Preliminary)* (n 198) [46] (N Adams J); *State of New South Wales v Azar (Preliminary)* [2020] NSWSC 1807 [79] (Hoeben CJ at CL); Along similar lines, see, *State of New South Wales v Pacey (Final)* [2015] NSWSC 1983 [43] (Harrison J) (as his Honour then was).

[220] *Minister for Home Affairs v Benbrika* (n 37) [193] (Edelman J); see also *State of New South Wales v Simcock (Final)* [2016] NSWSC 1805 [71] (Wilson J).

[221] *State of New South Wales v Ceissman* (n 218) [31] (Rothman J); cited with approval in *State of New South Wales v Elomar (Final)* [2021] NSWSC 411 [12] (Hamill J) ('*State of New South Wales v Elomar (Final)*').

[222] *State of New South Wales v Reginald Collingwood (a pseudonym)* [2021] NSWSC 1365 [44] (Hamill J).

[223] See Dyer and Pallas (n 56) 80–81.

[224] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 4(1).

in a terrorist act;[225] possessing things connected to a terrorist attack;[226] acting in preparation for, or planning a terrorist attack;[227] and membership of a terrorist organization (*inter alia*).[228] It is unnecessary for the plaintiff to identify which serious terrorism offence is contemplated in its application.[229]

The court has repeatedly identified that Part 5.3 offences extend liability for conduct beyond that which would ordinarily attract criminal liability.[230] Part 5.3 offences have been described by Gageler J (as his Honour then was), adopting language from Simester and von Hirsch, as:

> "[P]rophylactic offences" in the sense that the "risk of harm" relevantly from the commission of a terrorist act, "does not arise straightforwardly from the prohibited act" but "only after, or in conjunction with, further human intervention – either by the original actor or by others".[231]

The breadth of offences that are considered 'serious' under the THRO Act call into question the basis on which the THRO Act can be normatively justified when many of the offences do no concern a person causing harm in themselves.[232] For preventive justice

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[225] *Criminal Code 1995* (Cth) s 101.1.

[226] Ibid s 101.4.

[227] Ibid s 101.6.

[228] Ibid s 102.3; On the risk extending beyond commission of the commit a terrorist act offence, see also *State of NSW v XX (Final)* (n 196) [13] (Fagan J).

[229] *State of New South Wales v Alam* [2020] NSWSC 295 [129] (Wilson J) ('*State of New South Wales v Alam*'); cited with approval in *State of New South Wales v Richardson (Preliminary) (No 2)* (n 198) [52] (Davies J).

[230] *State of New South Wales v Cheema (Preliminary)* (n 206) [84]-[85] (Johnson J); citing *Lodhi v R* (2006) 199 FLR 303 [66] (Spigelman CJ, Sully J agreeing at [111]; and *Lodhi v R* (2007) 179 A Crim R 470 [79] Spigelman CJ); [211] (Barr J); [299] (Price J) with approval. See also *Minister for Home Affairs v Benbrika* (n 37) [46] (Kiefel CJ, Bell, Keane and Steward JJ); Much could be said about the way in which Part 5.3 of the *Criminal Code 1995* (Cth) contributes to the broader state of exception that exists in the Australian legal landscape with respect to the regulation of "terrorism" generally, but that would require another Thesis. I elaborate more on this with Andrew Dyer in (n 56) 78–80; See also Sarah Sorial, 'Guilt by Association: The "anti-Terrorism" Case of Regina v Lodhi' (2007) 32(3) *Alternative Law Journal* 160.

[231] *Minister for Home Affairs v Benbrika* (n 37) [56] (Kiefel CJ, Bell, Keane and Steward JJ); citing AP Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs* (Hart Publishing, 1st ed, 2011) 79.

[232] Ashworth and Zedner (n 172) 168; See also, for similar analysis re Div 105A of the *Criminal Code 1995* (Cth) Dyer and Pallas (n 56) 78–80.

scholars, the touchstone of legitimacy derives from preventive justice measures only being used if there is a 'very serious danger to others'.[233]

Once a court is satisfied of a person's eligibility and that there is a high probability that the person poses an unacceptable risk if they remain undetained or unsupervised, the court retains a discretion as to whether an ESO or CDO should be made.[234] The court is mindful that '[t]he paramount consideration…is the safety and protection of the community…[and] [t]he impact of an [ESO] on an offender's liberty may be relevant to the Court's exercise of its discretion to make the relevant orders but is not to be considered' when determining if jurisdictional requirements are satisfied.[235]

Practically, however, if the court is satisfied about the presence of an unacceptable risk, the main question is whether an ESO will be sufficient to mitigate the risk or whether detention is warranted because if the risk has already found to be "unacceptable" it seems to oblige a response. In some proceedings a question is raised about whether other types of intersecting regimes which are contemplated or already in effect could also serve to sufficiently mitigate the risk.[236] However, there is no requirement in the THRO Act that THRO orders impose 'restraints no greater than those required by the imperatives of security', as Ashworth and Zedner would require of preventive justice measures.[237]

The judicial risk assessment under the THRO Act has become dominated by recommendations made through structural professional judgment tools used by clinicians. Such tools have a controversial history, particularly in relation to forecasting a terrorism related risk.[238] Carolyn McKay summarised the crux of the issue being the

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[233] Ashworth and Zedner (n 172).

[234] *Terrorism (High Risk Offenders) Act 2017* (NSW) ss 25(1); 34(1).

[235] *State of New South Wales v Gavin* (n 197) [34] (Harrison J).

[236] For discussion about the intersections between the THRO Act and the forensic community treatment order and community treatment order regimes, see: *State of New South Wales v Dunn* [2019] NSWSC 426 ('*State of New South Wales v Dunn*'); *State of New South Wales v Ibrahim (Final)* (n 190).

[237] Ashworth and Zedner (n 172).

[238] For a detailed recent criticism of the tools in respect of Div 105A of the Criminal Code, see Donaldson (n 56) The risk assessment tools are also the subject of an ongoing inquiry before the Commonwealth' Parliamentary Joint Committee on Intelligence and Security: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Division105A.

opaqueness of how a risk value is appointed, which makes it difficult to challenge the risk assessment.[239]

Risk assessment tools are developed based on data models, and usually involve a trained clinician cataloguing judgments about a person against a set of risk indicators determined by the data model to generate an overall risk assessment.[240] Factors are split between the static (usually fixed in nature and not prone to change, for example, age, prior offending) and dynamic (the myriad variable factors) to appoint a risk profile.[241] The most commonly used tools in Australia are the "Violent Extremist Risk Assessment – version 2 Revised" (often referred to as VERA-2R) and the "Terrorist Radicalization Assessment Protocol" (TRAP-18).[242]

VERA-2R has become the site of particular contention because of a failure by the Commonwealth Department of Home Affairs in the *Benbrika* Division 105A proceedings to disclose a report[243] which cast doubt on VERA-2R's validity.[244] The contentiousness of

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239 Carolyn McKay, 'Predicting Risk in Criminal Procedure: Actuarial Tools, Algorithms, AI and Judicial Decision-Making' (2020) 32(1) *Current Issues in Criminal Justice* 22, 23.

240 See, N Pyszora et al, 'Violent Extremism Risk Assessment in the Australian Courts; Professional and Ethical Challenges for the Expert Witness in Post Sentence Preventative Detention Cases' (2022) 17(3) *Journal of Policing, Intelligence and Counter Terrorism* 314, 321–323 for more on how these tools operate. Naomi Prince, one of the authors, prepared the risk assessments in many of the cases that will be referred to throughout this Thesis.

241 McKay (n 239) 28; McSherry, 'Risk Assessment, Predictive Algorithms and Preventive Justice' (n 99) 22–23.

242 Hart (n 3) 198; Pyszora et al (n 240) 321. VERA-2R's role in THRO proceedings is even recognised explicity within the THRO Regulations. One of the limbs of the definition of 'relevant expert' is that a person has 'knowledge obtained as a result of being trained in the use of' VERA-2R, *Terrorism (High Risk Offenders) Regulations 2024* (NSW) cl 7(1)(c)(i).

243 Emily Corner and Helen Taylor, *Testing the Reliability, Validity, and Equity of Terrorism Risk Assessment Instruments* (Centre for Social Research and Methods, 2023) https://www.homeaffairs.gov.au/foi/files/2023/fa-230400097-document-released-part-1.PDF.

244 Nino Bucci and Christopher Knaus, 'Coalition Warned of Problems with Tool to Predict Future Terrorist Crime but Continued to Use It on Offenders', *The Guardian* (online, 7 April 2023) https://www.theguardian.com/australia-news/2023/apr/08/coalition-warned-of-problems-with-tool-to-predict-future-terrorist-but-continued-to-use-it-on-offenders; Nino Bucci and Christopher Knaus, 'Lawyers Outraged by Government Failure to Disclose Terrorism-Prediction Tool's Serious Problems', *The Guardian* (online, 27 April 2023) https://www.theguardian.com/australia-news/2023/apr/28/lawyers-outraged-by-government-failure-to-disclose-terrorism-prediction-tools-serious-problems; Donaldson (n 56) 7 argues that there is 'increasing confidence' in risk assessment tools, despite their weaknesses. But compare Ripperger (n 5) 180 who argues that there is 'increasing confidence' in risk assessment tools, despite their weaknesses.

VERA-2R has since extended into THRO proceedings.[245] Clinicians have identified the weaknesses in these tools and recommended that they be used with 'other psychometric tools' to deliver a more valid assessments.[246] A significant issue being that the sample size of people used to create the data set which underlies the risk assessment is not large enough, and may never be large enough, to deliver a reliable outcome.[247]

These vulnerabilities in risk assessment tools have led Cherney, Grossman and Khalil to rightly identify that '[c]ourts have to act in an environment of uncertainty' which includes the inherent uncertainty about the reliability of structured professional judgment assessments.[248] Further Pressman and Davis have identified that risk assessment tools are 'less a prediction of future behaviour than a plan to address the nature of level of risk' used by clinicians in a therapeutic process.[249] This gestures towards an interesting line of inquiry as to whether these assessments will ever be appropriate for informing judicial risk assessments. Certainly, Ashworth and Zedner warned against judgements of dangerousness being made based on a person being 'a member of a group with certain characteristics and with an overall probability rating,' their recommendation was clear that for preventive justice measures to be normatively justifiable the judgement of dangerousness ought to be made of a person on an individual basis only.[250]

Justice Campbell's approach summarised how the court is treating clinical risk assessments in THRO proceedings. He stated:

> Neither expert regarded VERA-2R as predictive of outcomes…Both adhered to their view of VERA-2R's utility if one kept its limitations or shortcomings in mind…Valid as [VERA-

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[245] *State of New South Wales v Richardson (Preliminary) (No 2)* (n 198) [38]-[40] (Davies J); *State of New South Wales v Holt (No 8)* [2023] NSWSC 1363 [56]-[73] (Campbell J) ('*State of New South Wales v Holt (No 8)*'); *State of NSW v XX (Final)* (n 196) [91]-]92] (Fagan J); For precis of how the court considered risk assessments in proceedings up to 2020, see Ripperger (n 5) from 182.

[246] Pyszora et al (n 240) 322.

[247] Ibid 323; Corner and Taylor (n 243) 16.

[248] Adrian Cherney, Michele Grossman and Lydia Khalil, 'Guest Editorial: Special Issue on Violent Extremist Risk Assessment' (2022) 17(3) *Journal of Policing, Intelligence and Counter Terrorism* 235, 239.

[249] D Elaine Pressman and Natalie Davis, 'Violent Extremism Risk Assessment and Screening Analysis: Applicability, Challenges, and New Developments' (2022) 17(3) *Journal of Policing, Intelligence and Counter Terrorism* 301, 303; See also Hart (n 3) 198.

[250] Ashworth and Zedner (n 172) 169.

> 2Rs] criticisms may be, I am not of the view that opinions informed by the application of VERA-2R are rendered so unreliable as to be rejected or entitled to no or little weight.[251]

My Thesis does not further consider risk assessment tools in detail, as there is a developed and fast-moving clinical literature about prospective risk assessment for criminal offending and the use of structured professional judgment tools.[252] The focus of my Thesis is rather on the way in which the THRO Act allows for risk to be adjudged by the court and the political dimensions of such determinations.

2.4. CDOs AND ESOs

As mentioned previously, the outcome of THRO proceedings, if the court decides to exercise its discretion, is an ESO or CDO for up to three years' duration. A CDO orders the continuing detention of a person for the purportedly preventive purposes of the THRO Act.[253] In effect, this means that a person remains in substantially the same situation that they were in while serving their sentence under the criminal law in a prison. Unlike the Commonwealth Div 105A regime, the THRO Act does not stipulate that a person subjected to a continuing detention 'must be treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment'.[254] This offends one of the requirements for restraint of preventive justice measures, that detention ought to

[251] *State of New South Wales v Holt (No 8)* (n 245) [71]-[72] (Campbell J); See also Ripperger (n 5) 189–190.

[252] For a legal consideration of the development and use of risk assessment in terrorism related post-sentence regimes, see Donaldson (n 56) 7; and Ripperger (n 5); For clinical literatures, see Corner and Taylor (n 243); Pyszora et al (n 240); Cherney, Grossman and Khalil (n 248); Pressman and Davis (n 249). For more general analysis of how these tools are used within and outside of terrorism contexts, see, McSherry, 'Risk Assessment, Predictive Algorithms and Preventive Justice' (n 99); Dominic J Doyle, James RP Ogloff and Stuart DM Thomas, 'An Analysis of Dangerous Sexual Offender Assessment Reports: Recommendations for Best Practice' (2011) 18(4) *Psychiatry, Psychology and Law* 537; Dominic J Doyle and James RP Ogloff, 'Calling the Tune Without the Music: A Psycho-Legal Analysis of Australia's Post-Sentence Legislation' (2009) 42(2) *Australian & New Zealand Journal of Criminology* 179; B McSherry, 'Throwing Away the Key: The Ethics of Risk Assessment for Preventive Detention Schemes' (2014) 21(5) *Psychiatry, Psychology and Law* 779.

[253] *Terrorism (High Risk Offenders) Act 2017* (NSW) div 3.6. An *ex parte* application can be made for an emergency detention order if a person subjected to an ESO 'poses an unacceptable and imminent risk of communitting a serious terrorism offence if the emergency detention order is not made' (s 43[1]). As at December 2024, no such orders have been sought.

[254] *Criminal Code 1995* (Cth) s 105A.4(1); Regulation 33 requires that 'as far as practicable' classes of people in prison are to be kept in their separate classes; *Crimes (Administration of Sentences) Regulation 2014 (NSW).* One class is "NSW post sentence inmate".

take place outside of the prison system.[255] Only one person has been subjected to a CDO since the THRO Act came into force.[256]

The court can also impose an ESO, which requires a set of conditions with which a person is ordered to comply. The THRO Act, unlike the CHRO Act, sets out conditions which a court 'must' make when imposing an ESO 'unless the Supreme Court orders differently',[257] and also provides the court with discretion to make other conditions as 'appropriate'.[258] In determining appropriateness, the court must consider 'that it is appropriate to impose a particular condition so as to address the risk of future offending of the type which was the basis of the order'.[259] The plaintiff does not need not specify a particular offence that a person is at risk of committing in its Summons, so determining the appropriateness of any conditions to mitigate an unidentified offence is not straightforward.

The court has established principles to guide the making of conditions. One judge identified that the conditions 'cannot be unjustifiably onerous or simply punitive' and ought not be imposed merely for convenience to the plaintiff and executive agencies that administer an ESO.[260] Increasingly, the court is attentive to the need for plain English conditions to enhance precision and clarity.[261] Some judges explicitly remark on the need

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[255] Ashworth and Zedner (n 172) 169; Dyer and Pallas (n 56) 70.

[256] *State of New South Wales v Dunn* (n 236).

[257] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 29(1A).

[258] Ibid s 29(1).

[259] *State of New South Wales v Fayad (Variation of Conditions)* [2021] NSWSC 600 [17] (Wright J) ('*State of New South Wales v Fayad (Variation of Conditions)*'); citing *Wilde v State of New South Wales* (2015) 249 A Crim R 65 [53] (Beazley P, McColl and Ward JJA) with approval. *Wilde* was also cited with approval in other cases, see for example, *State of New South Wales v BP (No 2)* [2019] NSWSC 806 [11] (Wright J); and *State of New South Wales v Ibrahim (Final)* (n 190) [358] (Walton J); *State of New South Wales v XX* [2022] NSWSC 1583 [67] (Beech-Jones CJ at CL) (as his Honour then was).

[260] *State of New South Wales v White* [2020] NSWSC 1568 [39] (Schmidt AJ) ('*State of New South Wales v White*'); Elsewhere a similar sentiment has been expressed stating that the court ought to impose 'the least intrusive conditions' to effectively mitigate the risk *State of New South Wales v Fayad (Variation of Conditions)* (n 259) [17] (Wright J).

[261] *State of New South Wales v Azar (Final)* (216) [2021] NSWSC 216 [108]-[110] (Davies J); *State of New South Wales v White (Final)* (n 181) [166] (N Adams J).

to consider a person's right to liberty.[262] Another has been attentive to restrictive ESO conditions being 'counterproductive' to rehabilitation.[263]

The prescribed conditions were inserted into the THRO Act by the *Community Protection Legislation Amendment Act 2018* (NSW). The Attorney General identified that the amendment was required to 'avoid protracted disputes' about monitoring conditions which were considered essential.[264] The prescribed conditions include wearing electronic monitoring, submitting a schedule of movements, submission to search of property and person, seizure of any property, which all comprise what could be categorised as monitoring conditions.[265] But some extend beyond what can be construed as monitoring conditions, for example, a prohibition on illicit drug use or prohibition on the possession of a firearm, prohibited weapon or munitions or a requirement to undertake psychiatric or psychological 'assessment or counselling' or a requirement to 'obey all reasonable directions of an enforcement officer'.[266] In construing s. 29(1A) Wright J stated that '"must", is subject to the court's power not to impose one or more of those conditions if it forms the view that such conditions are not appropriate in the circumstances.'[267] Elsewhere, Justice Wright explained that s. 29(1A) does not create an onus of proof for a defendant to negative a prescribed condition.[268] His Honour further identified that one way that the court may decline to impose a prescribed condition would be to 'order differently' to mitigate the risk in a way different to that contemplated by the

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[262] *State of New South Wales v Cheema (Final)* [2022] NSWSC 463 [169] (Campbell J) ('*State of New South Wales v Cheema (Final)*'); *State of New South Wales v Holt (No 8)* (n 245) [108] (Campbell J); *State of New South Wales v Cheema (Preliminary)* (n 206) [199] (Johnson J).

[263] *State of New South Wales v Osman* [2021] NSWSC 124 [43] (Harrison J) ('*State of New South Wales v Osman*').

[264] New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 November 2018, 16:27, (Mark Speakman, Attorney General).

[265] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 21(1A).

[266] Ibid.

[267] *State of New South Wales v BP (No. 2)* (n 259) [13] (Wright J).

[268] *State of New South Wales v Fayad (Variation of Conditions)* (n 259) [12] (Wright J).

prescribed conditions.[269] The appropriateness of conditions is a significant site of dispute in THRO proceedings.[270]

While the court has gone some way to moderate the statutory power to make conditions, from a preventive justice perspective, it is concerning that the THRO Act does not explicitly require consideration of whether they are the 'least restrictive appropriate alternative'.[271] This is especially so, because failure to comply with any supervision condition constitutes an offence, punishable by a fine of 500 penalty units and/or 5 years' imprisonment.[272] As an offence contrary to s 30 of the THRO Act is listed in Table 2 of Schedule 1 of the *Criminal Procedure Act 1986* (NSW), prosecutions for this offence occur in the Local Court unless the Director of Public Prosecutions elects to take the charge on indictment.[273] It has been observed that a unique feature of the THRO Act is the ambit of conduct that can be criminalised through making an ESO condition.[274]

2.5. INFORMATION GATHERING POWERS

Part 5 contains provisions which afford the Attorney General a broad range of information gathering powers. I consider these provisions in more detail in Chapter 5 where I explore how they create a state of exception by suspending the otherwise prevailing legal order. Sections 58 and 59 govern the information gathering powers which can be used to prepare for, and bring THRO proceedings. Both provisions were enacted upon initial introduction of the THRO Act, and remain unamended. They broadly replicate similar powers in the CHRO Act.[275]

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[269] Ibid [13] (Wright J).

[270] See, for example, *State of New South Wales v BP (No 2)* [2019] NSWSC 806; *State of New South Wales v Azar (Final)* [2021] NSWSC 216.

[271] Ashworth and Zedner (n 172) 168.

[272] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 30.

[273] There is only one reported decision which concerns proceedings under s 30 of the THRO Act. It is an appeal under Part 5 of the *Crimes (Appeal and Review) Act 2001* (NSW) to a single judge of the Supreme Court: *White v Director of Public Prosecutions* [2021] NSWSC 1629. I infer that this means prosecutions to date have occurred in the Local Court, otherwise, there would be more reported judgments.

[274] *State of New South Wales v Ibrahim (Final)* (n 190) [299] (Walton J).

[275] *Crimes (High Risk Offenders) Act 2006* (NSW) ss 24; 25.

Section 58 empowers the Attorney General to require the production of 'offender information' from a person, if certain 'prescribed circumstances' are met. 'Offender information' is defined in s 57 as '(1) any document, report or other information from which the behaviour, beliefs, financial circumstances, or physical or mental condition of an eligible offender may be inferred, or (2) terrorism intelligence'. The relevant regulations also can prescribe the nature of offender information that can be sought,[276] and identify that the offender information must be in the 'person's possession or under the person's control'.[277] To lawfully obtain material under s 58, the Attorney General must issue a written order which must be served on the person.[278] If a person has been served with an order, they are compelled to comply.[279] Failure to comply with an order can result in a fine, and/or two years' imprisonment.[280]

The *Terrorism (High Risk Offenders) Regulations 2024* (NSW) (THRO Regulations or the Regulations) inform s 58's operation. Clause 4 specifies the 'prescribed circumstances in which a s 58 order can be issued. Firstly, it must be issued to a compellable person.[281] Secondly the information sought must be required for use in proceedings under the THRO Act or 'determining whether or not to make' any THRO application ought to be made.[282] Thirdly, if the compellable person is not a public authority or official,[283] then the Attorney General must be satisfied that the eligible offender 'could pose an unacceptable risk of committing a future serious terrorism offence'.[284]

Clause 4 is very powerful. It allows for an order to be issued in respect of offender information that will assist the Attorney General in merely 'determining' whether to

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[276] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 58(1).

[277] Ibid.

[278] Ibid.

[279] Ibid s 58(2).

[280] Ibid.

[281] *Terrorism (High Risk Offenders) Regulations 2024* (NSW) cl 4(1)(a) The list of compellable people appears at sch 2.

[282] Ibid cl 4(1)(b).

[283] Ibid sch 1 imports the definitions of public authority and public official from the *Independent Commission Against Corruption Act 1988* (NSW) s 3 (public official); (public authority).

[284] *Terrorism (High Risk Offenders) Regulations 2024* (NSW) cl 4(1)(c).

commence THRO proceedings. Apart from the requirements set out above, the only other condition that the Attorney General needs to satisfy is that the person whom the offender information is about is an 'eligible offender'. So, these invasive orders may be issued with respect to offender information about persons not ultimately subjected to THRO proceedings. There is also no obligation on the Attorney General to notify an eligible offender that orders have been issued prior to commencing proceedings.[285]

Schedule 3 of the THRO Regulations specifies the type of 'offender information' that can be sought by the Attorney General under s 58. There are 16 types of information enumerated, which span medical reports, custodial records, supervision and criminal history and documents that relate to a person's life, like telephone records, information about membership of organisations, or their associates' memberships of organisations, or correspondence with associates and family members.[286] Other categories of documents like 'books, magazines, pamphlets' and 'material posted on the internet' are qualified so that the Attorney General can only seek such information if it 'advocat[es] support for engaging in terrorist acts', but not all categories are similarly qualified.[287] Clause 7(2) clarifies that the Attorney General can only compel production of 'pre-existing documents'. So, s 58 cannot cause a person to draft a new document, for example by compelling a prison psychiatrist to draw a new assessment.[288] The scope of the documents that can be obtained by the Attorney General is broad and extends far beyond documents which relate to a person's criminal and custodial history and risk of committing a serious terrorism offence.

Section 59 is more circumscribed. Section 59 allows the Attorney General to 'request' that a court or person outside of New South Wales provide 'offender information' which is 'held by the court'.[289] It also allows the Attorney General to 'request' that a person 'in another Australian jurisdiction' provide 'offender information that is in the person's

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[285] *Terrorism (High Risk Offenders) Act 2017* (NSW) ss 24(1); 38(1). A Summons must be served within two business days of filing. The court may allow further time on application.

[286] *Terrorism (High Risk Offenders) Regulations 2024* (NSW) sch 3.

[287] Ibid sch 4, items 14 and 15.

[288] But other sections require new reports to be created, see, for example, *Terrorism (High Risk Offenders) Act 2017* (NSW) s 23(3)(b).

[289] Ibid s 59(1).

possession or under the person's control'.[290] Offender information is construed identically as for s 58. A request under s 59 is a request to provide information only and failure to comply does not attract criminal sanction.

Part 5 also contains the terrorism intelligence provisions, which are deceptively simple in how they operate. If the Attorney General or a prescribed terrorism intelligence authority or agency[291] proves to the civil standard[292] that material received using Part 5 powers meets the definition of 'terrorism intelligence', the court 'must' grant any application made in relation to the material under s 59A restricting access to that material.[293]

'Terrorism intelligence' is defined as:

> information relating to actual or suspected terrorism activity (whether in the State or elsewhere) the disclosure of which could reasonably be expected:
>
> (a) to adversely affect the capacity of persons or bodies involved in the prevention of terrorist acts from preventing such acts or the capacity of intelligence agencies (for example, the Australian Security Intelligence Organisation) to carry out their functions, or
>
> (b) to prejudice criminal investigations or investigations by intelligence agencies, or
>
> (c) to enable the discovery of the existence or identity of a confidential source of information relevant to law enforcement or the functions of intelligence agencies, or
>
> (d) to endanger a person's life or physical safety.[294]

So, in effect the terrorism intelligence provisions allow for information gathered and before the court to be withheld from a defendant.

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[290] Ibid s 59(2).

[291] A prescribed terrorism intelligence authority or agency could include, the NSW Independent Commission Against Corruption, the NSW Law Enforcement Conduct Commission, the NSW Crime Commission, the NSW Police Force or Corrective Services NSW: *Terrorism (High Risk Offenders) Regulations 2024* (NSW) cl 6.

[292] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 50(1).

[293] Ibid s 59A(2).

[294] Ibid s 4.

2.6. THE STRUCTURE OF THRO PROCEEDINGS

The THRO Act allows proceedings to unfold in a similar way to the CHRO Act. I will briefly consider the form that proceedings take in this section. Section 12 allows the State to seek a declaration from the court that a person is eligible to be subjected to an order under the THRO Act. If a declaration is made, it is valid for up to 15 months.[295] A declaration can be sought before proceedings seeking an ESO or CDO are commenced,[296] and the failure of any such application does not prevent the State from later seeking another declaration or commencing proceedings.[297] As at December 2024, this provision has not been used.

Twenty-eight days after THRO proceedings are filed, the court must, unless it orders otherwise, hold a preliminary hearing.[298] After satisfying the court that the necessary jurisdictional and eligibility thresholds are met, the preliminary hearing has two functions triggered by a finding that 'the matters alleged in the supporting documentation, would, if proved' justify making an ESO or CDO.[299] If the court is not satisfied, the proceedings must be dismissed.[300] If the statutory test is met, the first function is that the court must appoint psychiatric and/or psychological experts to conduct examinations of the person and report to the court.[301] The second function enlivens the court's discretion to make an interim supervision order (ISO)[302] or interim detention order (IDO)[303] of twenty-eight days' duration.[304] An IDO or ISO can only be made if the person's 'current custody or supervision' will expire before the determination of proceedings.[305] An interim order can be renewed, but consecutive interim orders

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295 Ibid s 12(5).

296 Ibid s 12(2).

297 Ibid s 12(9).

298 Ibid ss 24(4) (for an ESO); 38(4) (for a CDO).

299 Ibid s 38(7).

300 Ibid.

301 Ibid ss 24(5) (for an ESO); 38(5) (for a CDO).

302 Ibid s 27.

303 Ibid s 41.

304 Ibid ss 28(1)(a) (for an ESO); 41(1)(a) (for a CDO).

305 Ibid s 27(a); see also s 41(a).

cannot last for more than three months.[306] I consider the preliminary hearing as an example of how the THRO Act constructs a state of exception in Chapter 5.

At the final hearing, apprised of the expert reports ordered at the preliminary hearing, the court determines whether the person is an "eligible offender", whether the "unacceptable risk" test has been satisfied, whether to exercise the residual discretion to make an ESO or CDO, and the terms upon which that order ought to be made. All proceedings are civil in nature, and so the default position is that civil procedure and law of evidence applies.[307] But as I have mentioned in this Chapter the civil burden of proof is displaced on the question of the "unacceptable risk" which has to be proven to a high degree of probability.

Turning to evidence, s 61 states '[a]ny document or report (or a copy of a document or report) provided to the Attorney General under this Part is admissible in proceedings under this Act despite any Act or law to the contrary.' The express terms of s. 61 must necessarily exclude the *Evidence Act 1995* (NSW) (*Evidence Act*).

Section 61 must, however, be read with s 50(2),[308] which states:

> To avoid doubt, a provision of this Act that provides for a document, report or other information to be admissible in proceedings under this Act despite any Act or law to the contrary does not affect any rule of evidence with respect to the relevance or probative value of the document, report or other information once it is admitted into evidence.

These provisions sit uncomfortably together, and position the THRO Act awkwardly against the law of evidence. I will analyse these provisions in more detail in Chapter 5.

Parties can appeal interlocutory or final decisions to the Court of Appeal by right, which operates by way of rehearing.[309] The term of any ESO or CDO may be varied or revoked

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306 Ibid ss 42(3); 28(3).

307 Ibid s 51(1).

308 *State of New South Wales v Lawrence* (946) [2019] NSWSC 946 [28] (Johnson J) ('*State of New South Wales v Lawrence*').

309 *Terrorism (High Risk Offenders) Act 2017* (NSW) s 53(1)-(2); *State of New South Wales v Naaman (No 2)* (n 204) [7] (Basten, Macfarlan and Leeming JJA) For consideration of the rules concerning an appeal by way of rehearing (not to be confused with a de novo hearing) see [8]-[14].

‘if circumstances have changed sufficiently to render the order unnecessary,’[310] and the Commissioners of Corrective Services and Police Force must report annually on the status of all orders regarding whether they continue to be ‘necessary and appropriate’.[311] The discretion to vary or revoke an order has been construed as ‘very broad’.[312] As at December 2024, four variation and revocation applications have been made. In one case an IDO was revoked and an ISO imposed.[313] In three cases ESO conditions were varied.[314]

2.7. Legal challenges to the THRO Act

Over the short period within which the THRO Act has operated, proceedings have been fiercely contested. This is despite the difficulties for people defending THRO proceedings given that the THRO Act has been constructed to provide advantage to the plaintiff. As at December 2024, there were eighty-five published judgments in THRO proceedings[315] concerning thirty-three people. Thirty-seven preliminary judgments[316] were published, and twenty-two final hearing judgments. Sixteen proceedings resulted in the Summons’ being dismissed, with costs awarded against the plaintiff in twelve.[317] Seven Summons’ were dismissed at the final hearing. Most of the proceedings defended successfully were because either the plaintiff could not meet the requisite standard of proof in relation to eligibility or unacceptable risk; or because the court declined to exercise its discretion to make final orders. That is, most proceedings where the Summons was dismissed were

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[310] *Terrorism (High Risk Offenders) Act 2017* (NSW) ss 31(3); 48(3).

[311] Ibid ss 31(4)-(5); 48(4)-(5).

[312] *State of New South Wales v Elmir (Final)* [2019] NSWSC 1867 [189(4)] (Walton J) (‘*State of New South Wales v Elmir (Final)*’); see also, *State of NSW v TL (Preliminary)* [2022] NSWSC 946 [44] (Bellew J) (‘*State of NSW v TL (Preliminary)*’) where the discretion was described as ‘unfettered’.

[313] *State of NSW v TL (Preliminary)* (n 312).

[314] *State of New South Wales v Ceissman* [2021] NSWSC 390 (‘*State of New South Wales v Ceissman*’); *State of New South Wales v Fayad (Variation of Conditions)* (n 259); *State of New South Wales v White* (n 260).

[315] Given the availability of non-publication, suppression and terrorism intelligence orders, there is the chance that there may have been more judgments that are not yet published. See Stimpson (n 94) for detailed statistical analysis of applications between commencement of the THRO Act and June 2023.

[316] Four people have been subjected to more than one application.

[317] Ripperger (n 5) 181 identified that the plaintiff had a ‘significantly lower’ success rate in obtaining orders under the THRO Act than it did under the CHRO Act.

dismissed for reasons specific to the particular proceedings and not because of some broader legal challenge to the THRO Act's validity.

That being said, some people have mounted challenges to the legal validity of the THRO Act following in a long tradition of rights-based litigation and preventive legal regimes in NSW and Australia.[318] The high watermark being the first High Court proceedings concerning a general purpose post-sentence detention and supervision regime which was subsequently taken to the United Nations Human Rights Committee (UNHRC).[319] The High Court decisively upheld the validity of Queensland's post-sentence detention and supervision regime. Mr Fardon brought a complaint[320] against Australia to the UNHRC alleging breach of the *International Covenant on Civil and Political Rights*. In 2010, the Human Rights Committee, by majority of eleven to one,[321] found that the regime allowed arbitrary detention contrary to Article 9 and did not afford required due process under Article 14.[322] The UNHRC found, contrary to the High Court and legislatures, that post-sentence detention under the regimes constituted punishment which can only lawfully be ordered following a criminal trial.[323] Patrick Keyzer, who was counsel for Fardon, has since explained that the Australian government did not accept the findings of the UNHRC and did not implement its findings.[324]

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[318] Tamara Tulich, 'Post-Sentence Preventative Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38(2) *University of New South Wales Law Journal* 823, 829–830 ('Post-Sentence Preventative Detention and Extended Supervision of High Risk Offenders in New South Wales').

[319] *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

[320] Human Rights Committee, *Views: Communication No 1629/2007,* 98th sess, UN Doc CCPR/C/98/D/1629/2007, (10 May 2010) ('*Fardon v Australia*'). In a joint complaint with Mr Tillman who was subject to orders under a former version of the CHRO Act in NSW: Human Rights Committee, *Views: Communication* No 1935/2007, 98th sess, UN Doc CCPR/C/98/D/1635/2007, (10 May 2010).

[321] *Fardon v Australia* (n 320); Brendan Gogarty, Benedict Bartl and Patrick Keyzer, 'The Rehabilitation of Preventive Detention' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013) 1, 130.

[322] *Fardon v Australia* (n 320) [7.4]; Patrick Keyzer, 'Preventive Detention: Asking the Fundamental Questions' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013) 1, 5.

[323] *Fardon v Australia* (n 320) [7.4(2)]; Keyzer (n 322) 5.

[324] Keyzer (n 322) 5; fn 26.

Without directly enforceable human rights protections in New South Wales and Australia,[325] there is little use that can be made of the UNHRC's decision in legal proceedings, so it is unsurprising that legal challenges to the validity of the regime have mostly concerned principles of constitutional and administrative law. That said, none of the legal challenges to the THRO Act have succeeded,[326] nor have any reached the High Court. However, challenges to other like regimes have, with the most recent being the *Benbrika* challenge to Div 105A of the *Criminal Code*[327] and *Garlett* to the Western Australian sex and violence high risk offender regime.[328] Both failed, however, the dissenting judgments have increased in number since *Fardon* was determined.[329]

The most significant legal challenge to the THRO Act was mounted in the *Lawrence* proceedings.[330] The plaintiff made a terrorism intelligence application which was granted, meaning that Mr Lawrence was unable to access the terrorism intelligence material, but his legal representatives could.[331] In response to the application being

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[325] see generally, Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (Comonwealth of Australia, May 2024) especially ch 5 https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000210/toc_pdf/InquiryintoAustralia'sHumanRightsFramework.pdf. See also, Julie Debeljak, 'The Fragile Foundations of Human Rights Protections: Why Australia Needs a Human Rights Instrument' in Melissa Castan and Paula Gelber (eds), *Critical Perspectives on Human Rights Law in Australia Vol 1* (Thomson Reuters (Professional) Australia Pty Limited, 2021) 39, 61; Matthew Groves, Janina Boughey and Dan Meagher, 'Rights, Rhetoric and Reality: An Overview of Rights Protection in Austrlaia' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Bloomsbury Publishing Plc, 2019) 1, 1.

[326] This is consistent with the THRO Act adopting a similar structure to the CHRO Act, which has been found Constitutionally valid despite legal challenges.

[327] *Minister for Home Affairs v Benbrika* (n 37); See also Andrew Dyer, 'Minister for Home Affairs v Benbrika and the Capacity of Chapter III of the Commonwealth Constitution to Protect Prisoners' Rights' (2022) 45(1) *University of New South Wales Law Journal* 209.

[328] *Garlett v Western Australia* (n 37). See also Tamara Tulich and Sarah Murray, 'Confronting Race, Chapter III and Preventive (In)Justice: Garlett v Western Australia', *Australian Public Law* (4 November 2022) https://www.auspublaw.org/blog/2022/11/confronting-race-chapter-iii-and-preventive-injustice-garlett-v-western-australia.

[329] In *Minister for Home Affairs v Benbrika* (n 37). Gageler J (as his Honour then was) was in dissent (from [54]) with Gordon J (from [103]) In *Garlett v Western Australia* (n 37), Gageler J (as his Honour then was) was in dissent (from [110]) with Gordon J (from [161]). Justice Edelman joined the orders of the majority (at [285]), but dissented from their finding that the relevant act was not punitive (between [247]-[255]) a departure from his Honour's findings in *Benbrika* (cf [210]-[214]).

[330] See Chapter 5.

[331] *State of New South Wales v Lawrence* (n 308) [90]-[91] (Johnson J).

granted, Mr Lawrence challenged the validity of the THRO Act on the basis that it infringed on the *Kable* principle.[332] The Kable principle can be summarised as:

> [B]ecause the Constitution establishes an integrated court system, and contemplates the exercise of federal jurisdiction by State Supreme Courts, State legislation which purports to confer upon such a court a power or function which substantially impairs the court's institutional integrity, and which is therefore incompatible with that court's role as a repository of federal jurisdiction is constitutionally invalid.[333]

Mr Lawrence argued that the terrorism intelligence provisions, coupled with ss 50(1) and 61 which render evidence admissible in proceedings, made the THRO Act different in character to other like regimes which had been found to be valid.[334] Mr Lawrence also identified features which circumscribed the court's discretion when making an ESO or CDO, which was said to be core to maintaining the institutional integrity of the court.[335] Justice Fullerton dismissed the challenge and found support for so doing in the High Court's decision in *Fardon*. *Fardon* held the *Kable* principle had not been infringed upon because the court ultimately retained powers to make or refuse the orders sought.[336] On appeal, Justice Fullerton's decision upheld unanimously.[337] This has been the only broad-based challenge to the Constitutional validity of the THRO Act.

Ahsan Cheema mounted another Constitutional challenge to a decision that he was an "eligible offender" by operation of the deeming provision in s 10(1A). Mr Cheema argued that the State's application infringed his implied freedom of political communication. To substantiate the making of an ESO, the plaintiff relied on a single Facebook post by Mr Cheema which shared an article containing a *Nasheed*[338] posted by the Islamic State

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[332] *State of New South Wales v Lawrence* [2019] NSWSC 1441; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[333] *Attorney-General (NT) v Emmerson* (2014) 254 CLR 393, [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), cited in; *State of New South Wales v Lawrence* (n 332) [44] (Fullerton J).

[334] *State of New South Wales v Lawrence* (2019) 349 FLR 142 [61] (Fullerton J) ('*State of New South Wales v Lawrence*').

[335] Ibid [62] (Fullerton J).

[336] Ibid [115]-[116] (Fullerton J).

[337] *Lawrence v State of New South Wales* [2020] NSWCA 248.

[338] Citing evidence from a counter-terrorism expert, Johnson J explained that a *Nasheed* is an 'Arabic chant often with romantic martial themes about brothers-in-arms': *State of New South Wales v Cheema (Preliminary)* (n 206) [111].

backed Ajnad Media, to demonstrate his advocacy of support for a terrorist act or violent extremism by operation of s 10(1A)(a)(ii) of the THRO Act.[339]

The link, published on his public Facebook page, was to 'a martial Islamic Nasheed described as "Heed the call – new Nasheed from Islamic State's Ajnad Media'.[340] The second line of the post stated '"Heed the call" (Arabic: labbu al-nida') is the latest production from the Islami…[sic]'.[341] Accompanying the text was 'a picture of what appears to be a short Arabic word or words, to which is affixed a microphone.'[342] The link directed to a blog post by Aymenn Jawad Al-Tamini posted on 4 May 2017.[343] The opening line of the blog indicated that 'Heed the call' was a publication by Islamic State's Ajnad Media.[344]

Mr Cheema's primary submission was that he did not make any statement advocating support for a terrorist act or violent extremism.[345] In alternative submissions, he sought for s. 10(1A)(a)(ii) to be either read down or constitutionally invalidated to the extent that it infringed the implied freedom of political communication.[346] Justice Johnson rejected Mr Cheema's arguments,[347] and the decision was unanimously upheld.[348] Justice Johnson rejected the submission that the implied freedom was burdened at all,[349] and the Court of Appeal agreed, but acknowledged that if there were a burden, it would be 'slight'.[350] In any event, the Court of Appeal held that the provision was proportionate

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[339] Ibid [23] (Johnson J).

[340] Ibid [111] (Johnson J).

[341] *Cheema v State of New South Wales* (n 201) [19] (Bathurst CJ, Leeming and White JJA).

[342] Ibid.

[343] Ibid [20] (Bathurst CJ, Leeming and White JJA).

[344] Ibid.

[345] *State of New South Wales v Cheema (Preliminary)* (n 206) [115] (Johnson J).

[346] Ibid [124]; [133] (Johnson J).

[347] Ibid [156] (Johnson J).

[348] *Cheema v State of New South Wales* (n 201).

[349] *State of New South Wales v Cheema (Preliminary)* (n 206) [153] (Johnson J).

[350] *Cheema v State of New South Wales* (n 201) [79] (Bathurst CJ; Leeming and White JJA).

to the objects of the THRO Act and disincentivised people convicted of criminal offences from engaging in speech about terrorism.[351]

Another smaller site for challenges to the THRO Act based on legal principle has been in relation to ESO conditions. For example, certain conditions have unsuccessfully been challenged on the basis that they infringe the privilege against self-incrimination for requiring a person to answer questions about where they are going and what they are doing.[352] This challenge failed because the privilege is abrogated by the THRO Act.[353] In another case, the infringing condition was rewritten to be less offensive to the privilege, but nonetheless still infringing, had the privilege applied.[354] Conditions which compel medical treatment and/or allow for the transfer of healthcare information have been contested as being in breach of autonomy in healthcare.[355] In one case, a psychologist described such conditions as 'unpalatable at best, and possibly an infringement on his human rights'.[356] But the conditions were ultimately imposed.

Accordingly, in the face of non-traditional proceedings, people continue to defend and resist proceedings in whatever way available. Very few challenges to the legality of the THRO Act have been mounted, and none have yet succeeded. But some proceedings do ultimately fail, which is important in recognising the continued agency of people in defending their rights, and in the way that the court checks parliamentary and executive power.

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[351] Ibid [73] (Bathurst CJ; Leeming and White JJA).

[352] *State of New South Wales v Cheema (Preliminary)* (n 206) [212]-[213] (Johnson J).

[353] Ibid [212]-[213] (Johnson J).

[354] *State of New South Wales v Fayad (Variation of Conditions)* (n 259) [38]-[47] (Wright J).

[355] *State of New South Wales v White (Final)* (n 181) [92] (N Adams J).

[356] *State of New South Wales v Fayad (Variation of Conditions)* (n 259) [99] (Wright J).

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This Chapter explored how the THRO Act is constructed and operates in practice. A doctrinal understanding of the THRO Act lays the groundwork for the critique that follows. I developed my argument introduced in the Introduction that the THRO Act is unique. It also drew from the targeted scholarship on the THRO Act to show that there is ample room for further analysis.

This Chapter also examined how preventive justice scholarship could be applied to the THRO Act. On its face, the THRO Act appears to be appropriately justified insofar as it seeks to protect the community from serious terrorist offending. However, the THRO Act could be critiqued as not appropriately limited and constrained to protect liberty and freedom. Three examples include that the THRO Act not only focusses on a risk of serious violent offending, THRO orders can be made without considering whether the orders are the most appropriate measure available and risk assessments are made using tools that remove consideration of individual circumstances alone. From this doctrinal basis and gesturing towards what a preventive justice critique might say about the THRO Act, my Thesis continues by charting a parallel critical theoretical course.

3. THE THRO ACT'S VIOLENCE

Now having considered the *Terrorism (High Risk Offenders) Act 2017* (NSW), or THRO Act's, operation and how it can be critiqued through a preventive justice lens, this Chapter charts a parallel critical theoretical course which continues for the remainder of the Thesis. In this Chapter, I explain the THRO Act's violence. My central argument is that the THRO Act is violent and neither harm minimising nor a proportionate preventive response.

Violence is central to my observation of how the THRO Act contributes to implementing the state's preferred ordering of society. The THRO Act is purported to achieve community safety through incarceration and supervision of people who do not form part of the community proper. As with many laws, when viewed through the lens cultivated by the state, the THRO Act benefits many and causes justified detriments to few who deserve its consequences. But in turning to critical theory and excavating the politics underlying the law, a different story emerges which exposes the violence directed towards people enabled by the THRO Act.

This Chapter begins with an explanation of how I understand violence. The term violence is often used with little concern for what it means or its usefulness. In this Chapter I explore the THRO Act as a regime that is violent. I explore both direct and indirect forms of violence which occur because of the THRO Act. In this Chapter I focus on direct violence caused by the THRO Act. In Chapter 4, I focus on the indirect violence of Othering.

The THRO Act's enabling of violence is important, because it allows the state to construct people as *homines sacrii* or bare lives, people subjected to the state's violent control because of their constructed status as high risk offenders. Agamben states:

> In modern biopolitics, sovereign is he who decides on the value or the nonvalue of life as such. Life – which, with the declarations of rights, had as such been invested with the principle of sovereignty – now itself becomes the place of a sovereign decision.'[357]

[357] Giorgio Agamben, 'Homo Sacer: Sovereign Power and Bare Life' in Daniel Heller-Roazen (tran), *The Omnibus Homo Sacer* (Stanford University Press, 2017) 1, 119.

The decision around life entails who gets to live and how they get to live, when subject to state control. Through exercising power under the THRO Act the state bears powerful tools to violently control a person's life.

After expanding on how I understand violence at the start of this Chapter, I analyse examples of direct violence caused by the THRO Act. I analyse incarceration's violence which may seem obvious, but is obscured by the THRO Act's legalistic discourse of 'continuing detention'. I also analyse the extended supervision order (ESO), which establishes a harmful framework of surveillance and close control, grounded in a permanent threat of physical violence. This Chapter draws out the indeterminacy of these means of control which contributes to the pain that it causes to people.

In this Chapter and the next my analysis focusses on case law for three reasons. Firstly, in writing about the effects of the THRO Act, I want to capture the stories of the people subjected to violence. Case law provides material to tell these stories which cannot be captured through analysis of statute or statistics alone. Secondly, the executive, is a party to each THRO proceedings as the plaintiff. So, case law provides a unique glimpse into how the executive constructs people as high risk offenders. Thirdly, the court settles the narrative by delivering a judgment. The court is a part of the state that considers the law made by parliament and determines the applications brought by the executive. Case law exposes how different parts of the state can be in tension with each other. Case law also demonstrates how the court can sanitise and legitimise stories presented by the executive to make the THRO Act's violent work acceptable.

3.1. ON VIOLENCE

Violence, as a concept, is often used without much thought about how it relates to other concepts like politics or force. To anchor this Chapter, I sketch out how I conceptualise violence. Exposing the THRO Act's violence is important, because conduct connected with the THRO Act which ought to be properly considered as violence pervades the way that the state structures its relationship with so-called high risk offenders. Violence is caused through a panoply of the state's interlocking components, the executive, parliament, the court. Within the executive branch there are yet more components, including the NSW Police Force and Corrective Services NSW (CSNSW). The interactions between the executive, parliament and the court, as different but central entities to the state, will be returned to throughout this Thesis. For example, a person is not incarcerated under a CDO without parliament having made the THRO Act. The executive must have commenced proceedings against the person. The person must have interacted with police and CSNSW before the post-sentence regime is engaged. An ESO could not be made without an order of the court.

Since the 1990s, legal scholars have sought to excavate law's relationship with violence.[358] However, the relationship between law and violence, particularly within legal scholarship, remains obscured due to the iterative force of the language of law which reframes violence in sanitised, legitimate and acceptable forms, like punishment, force, supervision and control.[359] In demystifying the relationship between law and violence, Austin Sarat and Thomas R. Kearns stated 'law is a creature of both literal violence, and of imaginings and threats of force, disorder and pain'.[360] Jacques Derrida goes further in exposing the omnipresence of law's violence:

> The word "enforceability" reminds us that there is no such thing as law (*droit*) that doesn't imply *in itself, a priori, in the analytic structure of its concept*, the possibility of being "enforced", applied by force. There are, to be sure, laws that are not enforced, but there is no law without enforceability, and no applicability or enforceability of the law without force, whether this force be direct or indirect, physical or symbolic, exterior or interior, brutal or subtly discursive and hermeneutic, coercive or regulative, and so forth.[361]

Giorgio Agamben says that there is an 'irreducible link uniting violence and law'.[362] He finds separating the founding violence of law from the violence of enforcing law to be unhelpful, instead preferring to analyse the relationship between violence and law as an exercise of political power.[363]

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[358] See generally, Austin Sarat and Thomas R Kearns, 'Introduction' in Austin Sarat and Thomas R Kearns (eds), *Law's Violence* (The University of Michigan Press, 1992) 1 and other chapters in the edited collection.

[359] Patricia M Wald, 'Violence under the Law: A Judge's Perspective' in Austin Sarat and Thomas R Kearns (eds), *Law's Violence* (The University of Michigan Press, 1992) 77, 9; 1.

[360] Ibid 1.

[361] Jacques Derrida, 'Force de Loi: Le "Fondement Mystique de L'Autorite' (1990) 11(5–6) *Cardozo Law Review* 920, 925–927.

[362] Agamben (n 357) 54.

[363] Ibid 55.

Law's violence is predominantly constituted in how it 'deal[s] pain and death',[364] that is, taking pain and death together, how the law causes harm to people. This could easily lead one to believe that violence could only be constituted by physical acts. But violence comes in different forms. In thinking about forms of violence, I am influenced by Elizabeth Frazer and Kimberly Hutchings' taxonomy of violence which takes as a starting point that violence can be directly and indirectly perpetrated. Direct violence is where 'an agent inflicts physical harm'.[365] Indirect violence is when the 'agent of violence is not the one who delivers the blow, but the one who intentionally manipulated the attacker or created the conditions in which the attack took place.'[366]

Indirect violence could be perpetrated by an agent; but can also arise because of structural violence, where systems, institutions and structures, give rise to conditions of violence by aggregate.[367] An example of structural violence would be when a social security system leaves certain people hungry which causes them harm through physical pain. The harmful conditions cultivated by the social security system give rise to the physical pain, even though there are a series of indirect perpetrators who make decisions which directly cause the physical pain from hunger allowed by an unjust social security system. When considering politics at a structural level, a complete analysis of violence cannot always occur through observing the actions of a series of indirect perpetrators alone without considering how their conduct taken together creates a structure, system or process which is violent.[368]

Violence can also take non-physical forms or forms which amalgamate physical and non-physical elements, 'psychological terror and emotional domination' are two examples.[369] But there are also more indirect forms of non-physical violence, an example of which has been referred to as epistemic violence, where people are constructed as Other in

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[364] Robert M Cover, 'Violence and the Word' (1986) 95(8) *The Yale Law Journal* 1601, 1609.

[365] Elizabeth Frazer and Kimberly Hutchings, *Violence and Political Theory* (Polity, 2020) 2.

[366] Ibid.

[367] Ibid 3. See also, Cover (n 364) 1628.

[368] For another example, see, Cover (n 364) 1986–1987 The example is of a criminal sentence where the judge is likened to the 'transmission' of a car which keeps the rest of the wheels of the criminal justice system turning – the police, the prison, the gaolers – in aid of violent ends through incarceration.

[369] Frazer and Hutchings (n 365) 3.

opposition to the norm, which leads to other direct and indirect violence.[370] Examples are racism or misogyny. The structures themselves, insofar as they reject racialised and gendered Others as rights bearers, cause harm by constructing them as Others. But those structures may also instigate racialised or gendered physical violence directly perpetrated by people.

Turning from the nature of violence to violence's relationship with law, I follow Sarat and Kearns, in understanding that the relationship can be constructed in three ways. First, violence contributes to the founding of a legal order; second, law is constructed to regulate violence; and, third, law is enforced through violence.[371] I am principally interested in the relationship in the third sense. Law's violence perpetrated against people is often obscured or backgrounded in scholarship about law which typically focuses on how law is made, what principles it derives from or how it is considered in courts. In focussing on the violence of the THRO Act, I deepen scholarly accounts of the relationship between violence and law.

Chapter 2, in part, introduced how the THRO Act has been ostensibly constructed to respond to people who have caused harm and continue to pose an ongoing risk of harm to the community. That is, the relationship between violence and law in the second sense articulated by Sarat and Kearns. Chapter 2 also developed how the eligibility criteria for the THRO Act are broad and not necessarily tethered to the cause of terrorist violence as the conduct sought to be prevented does not necessarily cause harm.[372] The relationship between law and violence permeates this Thesis and the analysis demonstrates that while it is useful to categorise the relationship between law and violence in discrete ways to aid scholarly analysis, the categories are interconnected. So, throughout the Thesis – but particularly in this Chapter and the next – these questions appear: who is causing harm, and to whom is harm caused?

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[370] Ibid. See generally, Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Lawrence Grossberg and Cary Nelson (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press, 1988). Developed further in the next Chapter.

[371] Sarat and Kearns (n 358) 4.

[372] See definition of serious terrorism offences in *Criminal Code 1995* (Cth) pt 5.3.

The preceding discussion of violence provides a sufficient descriptive baseline of violence, so that I can explore the 'politics inherent in practices and conditions of violence'.[373] To do this, I identify violence in the enforcement of the THRO Act, sketch out its contours as harm causing, and consider the politics underpinning the THRO Act and its enforcement. The THRO Act's violence is often characterised by unstated threats and acquiescence to them. The THRO Act's violence is also often indirectly perpetrated by a structure with many actors who operate invisible to subjects and observers. In sketching out the THRO Act's violence, I unsettle the story presented by the state about the THRO Act as protecting the community and show that it enables violence. I now consider how the THRO Act allows direct violence.

3.2. CONTINUING DETENTION AS VIOLENCE

The THRO Act allows for incarceration and all of the violence that incarceration brings. The THRO Act allows interim detention orders (IDOs) and continuing detention orders (CDOs) which incarcerate people in prisons. As introduced in Chapter 2, the THRO Act is criminal law adjacent but does not mete out punishment and is not criminal law in an orthodox sense. But for the power conferred on the court under the THRO Act, people subjected to an IDO or CDO would have been released from prison after their sentence imposed under the criminal law expired. People would not otherwise be subjected to the state's physical control, unless they were charged with another criminal offence and remanded in custody or sentenced to incarceration.

Incarceration itself is violent as a person is forcibly detained as part of the pain of punishment with circumscribed freedom. If a person sought to refuse incarceration, they would be forcibly restrained and taken to a prison. When a person is held in a prison, there remains a constant threat of further violence, not just from prison staff in both lawful and unlawful forms, and/or other incarcerated people. Incarceration's violence is often obscured, not just by political and legal language, but also as people are resigned to the threat of physical violence and incapacitation if they fail to comply.[374]

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[373] Frazer and Hutchings (n 365) 2.

[374] Cover (n 364) 1618–1619; Bree Carlton and Emma K Russell, *Resisting Carceral Violence: Women's Imprisonment and the Politics of Abolition* (Springer International Publishing, 2018) 5.

I first examine incarceration's violence itself. I then illustrate incarceration's violence with two examples from case law, Mr Dunn who was subjected to a CDO and Mr Lawrence who was seriously assaulted while incarcerated under an IDO. I finally consider the indeterminacy of incarceration under the THRO Act.

3.2.1. *THE VIOLENCE OF INCARCERATION*

The violence of incarceration is well documented,[375] but remains obscured in criminal law scholarship. Incarceration has been the end point for five people under the THRO Act.[376] While it is known that incarceration under the THRO Act is not the consequence of a conviction under the criminal law, little is known about what periods of incarceration under the THRO Act look like. But people incarcerated under IDOs and CDOs are held in prisons and are subjected to the ordinary prisoner classification system. So, to make the obvious point, that incarceration is violence, I draw from literature about incarceration's violence generally.

Some scholars have attempted to sketch the violence of incarceration which evokes a sense of what it must be like for a prisoner. Patricia M. Wald stated 'a sentence for any extended length of time in a cramped, desolate prison cell away from family, friends, and all rudiments of ordinary social life also represents an invocation of the law's violence'.[377] Wald's explanation centres on incarceration's confinement and isolation. The confinement is as much psychologically violent as it is physical. Confinement in a small space with limited capacity to move, let alone exercise, and see sunlight has obvious physical health, not to speak of mental health, detriments. The straining of relationships

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[375] See, for example, JF Nagle, *Report of the Royal Commissioner into New South Wales Prisons* (No G46890D-1, Parliament of New South Wales, 31 March 1978); Carlton and Russell (n 374); George Zdenkowski and David Brown, *The Prison Struggle: Changing Australia's Penal System* (Penguin Books, 1982); John Basten et al (eds), *The Criminal Injustice System* (Australian Legal Workers Group, 1982); Chris Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Routledge, 2016); Angela Y Davis and Cassandra Shaylor, 'Race, Gender, and the Prison Industrial Complex' (2020) 19(S1) *Meridians* 87; In March 2024, the Peter McClellan, *Report - Special Commission of Inquiry into Offending by Former Corrections Officer Wayne Astill at Dillwynia Correctional Centre* (State of New South Wales, 2024) https://www.nsw.gov.au/sites/default/files/noindex/2024-03/Wayne%20Astill%20Special%20Commission%20of%20Inquiry%20-%20Final%20Report.pdf was delivered in relation to sexual assaults committed by a former Corrections Officer in a womens' prison. Chapter 7 of the Report explores the institutional culture of violence and control in the prison.

[376] 4 IDOs and 1 CDO.

[377] Wald (n 359) 81.

with families, friends and social networks causes social harm. Prison is intended to punish; punishment is intended to cause pain; causing pain is violence.

David Brown recently analysed the Prisoner Action Group Submission to the Nagle Royal Commission into NSW Prisons.[378] The Prisoner Action Group was a collective of formerly incarcerated people, lawyers and academics who advocated for prison reform.[379] The Prisoner Action Group Submission, filed in 1979, analysed prison's violent practices that were used as techniques of dehumanisation and control:

> [A] range of practices were outlined, including the reception process and mortification of the self, the loss of personal possessions, strip searches, the loss of name, the forced revelation of life history, obedience tests and will breaking, physical violence, changing classification and freezing…the generation of fear in a range of ways including through the use of armed guards, administrative segregation and the loss of remissions; the "heavy" system; psychological pressure; the constant transfer or "shanghaiing" of prisoners through a hierarchy of institutions; and outright violence.[380]

I draw from an old source because it draws from the views of formerly incarcerated people and makes for stark reading which displays continuity with contemporary accounts of prisons.[381] For example, Lucashenko and Kilroy write about '[p]rison culture [a]s one based on violence, fear, dominance and mistrust' in their work which looks at the experience of Murri First Nations women prisoners in Queensland.[382] In a section particularly on strip searches, they say '[m]ost Murri women prisoners experience systematic humiliation in prison. We cop racism and sexism from the prison system […] Other prisoners can also hold racist and sexist attitudes, and Murri prisoners can hurt us

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[378] The submission made by the Prisoner Action Group is available here: https://www5.austlii.edu.au/au/journals/AltCrimJl/1979/2.pdf. It is broad and extensive. I draw from Brown's analysis instead of the submission itself because it usefully aggregates the important points.

[379] David Brown, 'The NSW Prisoners Action Group Submission to the Nagle Royal Commission' in Michael J Coyle and David Scott (eds), *The Routledge International Handbook of Penal Abolition* (Routledge, 2021) 280, 280. The Prisoner Action Group morphed into Justice Action.

[380] Ibid 283.

[381] For further contemporary lived experience accounts of Australian incarceration see, Debbie Kilroy and Tabitha Lean, 'The Not So Easy, Simple Solution' (2022) 30(2) *Journal of Prisoners on Prisons* 91; Tabitha Lean, 'Why I Am an Abolitionist' (8 June 2021) *Overland Literary Journal* <https://overland.org.au/2021/06/why-i-am-an-abolitionist/>; Melissa Lucashenko and Debbie Kilroy, *A Black Woman and a Prison Cell: Working with Murri Women in Queensland Prisons* (Sisters Inside Inc, 2005) https://drive.google.com/file/d/16RYEPrT8gJopYiZekkaKEvbq0UF33gjI/view?usp=sharing&usp=embed_facebook.

[382] Lucashenko and Kilroy (n 381) 15.

[…] where they adopt racist attitudes in order to protect themselves.'[383] Thus when a long-term view is taken, there is a striking similarity between prison techniques of violent control and punishment on incarcerated people over time.[384]

The views expressed by the Prisoner Action Group and others like Lucashenko and Kilroy who provide contemporary lived experience accounts tell a clearly different story about incarceration from the view of prisons as corrective, rehabilitative and justified punishment. The analysis of prison violence demonstrates how it can be both directly and indirectly perpetrated and shows how it can be inextricably systemic and interpersonal in nature. Incarceration is both about causing direct physical harm while systematically dehumanising and degrading a person.

But people who are incarcerated under the THRO Act are incarcerated because they are purported to pose a terrorist risk. This often results in special arrangements for their incarceration if they are classified using one of the classifications available to manage prisoners purported to pose a national security risk, or risk to other prisoners or prison staff.[385] Hart explained how prison conditions are more onerous for such people:

> Prison conditions are inherently harsh in order to achieve the punishment goal of incarceration. Prisoner's liberties are taken away, their daily routine is highly regulated, their general ability to associate with others is diminished. In a Supermax setting (highest security prisons), these restrictions becoming more exaggerated in order to manage the risk that these prisoners pose, including one-out cell placement and decreased time out of the cell.[386]

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383 Ibid 16.

384 See, McClellan (n 375) Ch 7; The Nagle Royal Commission described a regime of 'sadistic violence', Brown (n 379) 287. It must be acknowledged that physical violence in prisons has changed markedly since that time. But prisons remain places of physical violence, albeit more sanitised.

385 See Hart (n 3) 193 for more on the classification system as it relates to national security. See also *State of New South Wales v Osman* [2020] NSWSC 1646 ('*State of New South Wales v Osman*') who was variously classified as a National Security Interest and Extreme High Risk Restricted prisoner ([67]; [81] [Wilson J]); *State of New South Wales v Mustapha* (2022) 295 A Crim R 296 ('*State of New South Wales v Mustapha*') who was identified as a National Security Interest prisoner (197]-[200] [Walton J]); *State of NSW v XX (Final)* (n 196) who was identified as a National Security Interest prisoner ([96]-[97] [Fagan J]).

386 Hart (n 3) 194.

Hart identified that conditions for people with national security classifications 'induce[s] or exacerbate[s]' grievances with the state.[387]

This brief analysis of incarceration's violence is presented without even turning to a detailed account of how incarceration is indirectly violent. This includes, how it is used selectively and disproportionately against people without fixed address, people from low socio-economic backgrounds, and people who are racialised Others, (amongst other marginalised groups).[388]

Incarceration is violent in numerous discrete and intersecting ways. This section demonstrates how rather than being 'exceptional or abnormal', incarceration's violence is 'routine' and pervasive.[389] The physical control and restraint of incarceration and ongoing threats of violence if the person does not comply, are acts of violence perpetrated against people subjected to IDOs and CDOs.

3.2.2. Mr Dunn and the violence of the CDO

The clearest example of incarceration's violence being inflicted on a person using the THRO Act is when they are placed on a continuing detention order (CDO). This is because a CDO brings THRO proceedings to a close by determining that a person poses an unacceptable risk to society which warrants incarceration in a prison. Moving away from the fact of incarceration itself, a CDO demonstrates that a person is in the worst category of people within the state because nothing short of incarceration can mitigation their risk to society even after they have completed a sentence under the criminal law. So, whilst the primary violence enacted by the THRO Act through a CDO is through incarceration, there is also the violence consequent on labelling a person as an Other deserving of a CDO which I will address in detail in Chapter 4.

Mr Dunn's case remains the only case that has concluded with the imposition of a CDO. Mr Dunn was a migrant and Muslim, he had experienced trauma and violence and lived with poor mental health. He was portrayed as a radical Islamist who posed an imminent

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[387] Ibid.

[388] Peter Duncan, 'Achieving Law Reform' in John Basten et al (eds), *The Criminal Injustice System* (Australian Legal Workers Group, 1982) 288, 289 and see generally, other contributions to the book. See also Brown (n 379) 287–288. I turn to Othering more in the next Chapter.

[389] Carlton and Russell (n 374) 5.

threat to Australian society and was subjected to further incarceration, first under an IDO, then a CDO. As I return to Mr Dunn's case throughout the Thesis, I introduce some facts of his case to orient future discussions and explore how the court justified his ongoing incarceration.

The final hearing judgment provided a succinct snapshot of how the plaintiff constructed Mr Dunn as a high risk offender, Justice Wilson said:

> Mr Dunn…has a long history of threatening acts of violence against police and others, generally in the context of his asserted loyalty to the terrorist group ISIS or the so-called "Caliphate", or otherwise "in the name of Allah". The State…contends that he poses a danger to the community.[390]

However, Mr Dunn was never convicted of terrorism offences.[391] Mr Dunn was twenty-eight years of age at the preliminary hearing,[392] and twenty-nine by the final hearing.[393] Mr Dunn migrated from Pakistan to Australia when he was eleven years of age.[394] He moved with his older brothers, who were described as 'not adequately supervis[ing] him and assault[ing] him'.[395] Mr Dunn was 'estranged from his family due to his violence'.[396] Mr Dunn practiced Islam and worshipped in Mosques around south-western Sydney.[397]

At the preliminary hearing, Mr Dunn opposed the plaintiff's application for an IDO and submitted that an interim supervision order (ISO) would be sufficient to mitigate any unacceptable risk.[398] Mr Dunn's counsel also submitted that the proposed conditions of any ISO were 'much more onerous than any conditions [Mr Dunn] has ever been under

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390 *State of New South Wales v Dunn* (n 236) [1] (Wilson J).

391 *State of New South Wales v Dunn (a Pseudonym)* (n 190) [2] (N Adams J).

392 Ibid [3] (N Adams J).

393 *State of New South Wales v Dunn* (n 236) [35] (Wilson J).

394 Ibid [70] (Wilson J); *State of New South Wales v Dunn (a Pseudonym)* (n 190) [47] (N Adams J).

395 *State of New South Wales v Dunn (a Pseudonym)* (n 190) [47] (N Adams J). In 2003, four of Mr Dunn's brothers were convicted of serious sex offences and in 2004, one of Mr Dunn's brothers died in his arms after being murdered [48].

396 Ibid [49] (N Adams J); *State of New South Wales v Dunn* (n 236) [71] (Wilson J).

397 *State of New South Wales v Dunn (a Pseudonym)* (n 190) [63] (N Adams J).

398 Ibid [6] (N Adams J).

on a parole order' which was important for N Adams J in considering whether to grant an ISO or IDO.[399]

Her Honour gave prominence to Mr Dunn's criminal history of violence and statements which 'endorse participation in terrorist acts'.[400] Her Honour further noted '[i]t is of significant concern that [Mr Dunn] has never taken part in any programs to address his violent offending' nor was there evidence demonstrating a future intention to participate in programs.[401] Another 'significant concern' was an emerging diagnosis of schizophrenia and unclear causes of psychosis.[402]

Justice N Adams appreciated 'observations […] that it is to some extent a complex exercise to disentangle the applicant's mental health issues with the threats'. However, 'specific threats' were made, and '[e]ven if the acts of violence are not realised the threats are made with a clear and specific intent to instil fear.'[403] Her Honour accepted that Mr Dunn had an ideological framework which could cause a terrorist act.[404] In turning to whether an ISO would be sufficient, her Honour placed emphasis on the limited evidence that Mr Dunn would comply with any ISO.[405]

At the final hearing, the plaintiff sought an eighteen-month CDO followed by an ESO for three years. Justice Wilson summarised Mr Dunn's position as 'he contends that he is in need of medical treatment for a mental illness, and not incarceration.'[406] The main dispute was whether the plaintiff could prove that Mr Dunn posed an ongoing unacceptable risk of committing a serious terrorism offence if he were not incarcerated or supervised.[407] Despite having much wider scope than the judge at the preliminary

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399 Ibid [131] (N Adams J).

400 Ibid [137] (N Adams J).

401 Ibid [138] (N Adams J).

402 Ibid.

403 Ibid.

404 Ibid [140] (N Adams J).

405 Ibid [154] (N Adams J).

406 *State of New South Wales v Dunn* (n 236) [2] (Wilson J).

407 Ibid [11] (Wilson J).

hearing to consider and weigh the evidence, there is little analysis of the evidence by Wilson J who mostly adopted with approval the evidentiary analysis from the preliminary hearing judgment.[408]

Justice Wilson identified Mr Dunn's extensive criminal history and utterances of threats of violence which, in her view, pre-dated his diagnosis with schizophrenia.[409] Her Honour further noted that '[t]he gravity of the threats, the breadth of the categories of persons and things that threats are directed to, and his claimed adherence to the tenets of extremist violent Islam, have all come later, but are also of long duration'.[410] Justice Wilson identified that Mr Dunn's 'expressed ideology cannot be entirely explained by mental illness', which made assessing risk difficult:[411]

> When [Mr Dunn's] mental health is juxtaposed with his criminal history for violence, history of non-compliance with supervisory regimes, his anti-social personality disorder, and the illegal drug use that has characterised his day to day life since childhood, and even noting that the defendant has never carried out a violent terrorist crime, the risk he poses is very clear.[412]

On the risk itself, Wilson J acknowledged that the likelihood of the risk materialising in a terrorist act was in the 'low' range, but its consequences would be 'catastrophic' for either the individual victims or the 'nation as a whole'.[413] Ultimately, her Honour made a CDO for nine months' duration, with an ESO to follow.[414] Justice Wilson made the orders despite acknowledging evidence from psychiatrists that incarceration is suboptimal for improving mental health.[415] But Her Honour firmly rebutted this evidence stating that

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[408] See Chapters 2 and 5 for the difference between the preliminary and final hearings.

[409] *State of New South Wales v Dunn* (n 236) [188] (Wilson J).

[410] Ibid.

[411] Ibid [189] (Wilson J).

[412] Ibid [190] (Wilson J).

[413] Ibid [193] (Wilson J).

[414] Ibid [208] (Wilson J).

[415] Ibid [200] (Wilson J). See Chapter 4.

Mr Dunn's '[h]ealth is not the priority when considering imposing orders under the Act; the safety of the community is'.[416]

In Mr Dunn's case, the court was made aware of the harmfulness of incarceration which often causes mental health concerns to be unaddressed by psychiatrists, and the risk of further radicalisation.[417] But the court still chose the most violent option available: incarceration.

3.2.3. Mr Lawrence and violence within prison

In addition to incarceration itself being violent in how it restrains and harms people, prisons are also places of physical violence. Violence can be instigated by staff or other incarcerated people. In this section, I focus on violence instigated by staff.[418] Most of this section focusses on Mr Lawrence's case, which displays the most serious type of physical violence that can occur within prisons. I will also briefly address enforced medication at the end drawing from Mr Dunn's case. I consider psychological and psychiatric restraint and control in more detail in Chapter 4.

Mr Lawrence was incarcerated by Fullerton J on 21 August 2019 through an IDO.[419] After the IDO was made, Mr Lawrence was charged with other offences and sentenced to further periods of incarceration which would have suspended his IDO.[420] So at the outset it is important to clarify that it is unclear whether Mr Lawrence was incarcerated under the IDO or the criminal law when he sustained catastrophic injuries in prison.

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416 Ibid [201] (Wilson J).

417 See Hart (n 3) 194 and discussion above.

418 That is not to diminish the violence perpetrated by prisoners, which, without them being incarcerated in the first place would not be allowed to happen. See Jennifer Galouzis, 'Research Bulletin: Profile of Violent Behaviour by Inmates in NSW Correctional Centres' (NSW Department of Corrective Services Corporate Research, Evaluation and Statistics, March 2008) <https://correctiveservices.dcj.nsw.gov.au/documents/research-and-statistics/rb25-profile-violent-behaviour-inmates-nsw-correctional-centres.pdf>; Giselle Wakatama, 'Jail Attack Data Lays Bare Violent Reality of Prison Life', *ABC News* (online, 7 November 2022) https://www.abc.net.au/news/2022-11-08/nsw-prisoner-assault-statistics-concern-advocates/101624424.

419 *State of New South Wales v Lawrence* (n 334).

420 *State of NSW v TL (Preliminary)* (n 312) [23] (Bellew J).

In 2022, Mr Lawrence successfully sought to have an IDO revoked, but the plaintiff was also successful in arguing that Mr Lawrence should remain subjected to an ESO.[421] A central contention was whether Mr Lawrence's physical ability had been altered due to a spinal cord injury inflicted in prison. On 27 November 2021, according to Bellew J, Mr Lawrence was 'involved in an incident in custody and was transferred to Prince of Wales Hospital.'[422] A doctor confirmed that Mr Lawrence was 'tetraplegic as a consequence of his spinal cord injury', so he no longer had control over his limbs, bowel or bladder function.[423] The doctor opined that Mr Lawrence was 'very likely to require a significant degree of assistance to perform all activities of daily living' with low prospects for improvement.[424] A physiotherapist gave evidence that Mr Lawrence could use a mobile telephone by '"knocking" the buttons with his knuckle, and that he was capable of using a keyboard in a "slow and effortful" way'.[425] The physiotherapist also gave evidence that whilst Mr Lawrence could breathe unaided, due to reduced lung capacity ventilator use was recommended at night.[426]

But the THRO judgment obscures how Mr Lawrence was injured. Another judgment about Mr Lawrence reveals that he, with seven other people, 'refused to be locked into their cells' at the Goulburn High Risk Management Correctional Centre.[427] CSNSW used 'force and chemical munitions' to 'ensure compliance', causing Mr Lawrence's spinal cord injury.[428] Media reports suggested that Mr Lawrence may have been 'hit in the neck' after a gas canister was fired at him.[429] The Daily Mail suggested that he was also struck with

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[421] *State of NSW v TL (Preliminary)* (n 312).

[422] Ibid [26] (Bellew J); In another judgment, Mr Lawrence's condition and its cause was described '[o]n 27 November 2021, the offender suffered a catastrophic spinal cord injury whilst in detention which rendered him a tetraplegic'. *R v Lawrence* [2023] NSWSC 1428 [5] (Ierace J) ('*R v Lawrence*').

[423] *State of NSW v TL (Preliminary)* (n 312) [27] (Bellew J).

[424] Ibid [28] (Bellew J).

[425] Ibid [31] (Bellew J).

[426] Ibid.

[427] *R v Lawrence* (n 422) [71] (Ierace J).

[428] Ibid.

[429] Lauren Ferri, 'Paralysed Alleged Terror Offender Tukiterangi Larwrence's Big for Freedom from Supermax', *News.com.au* (online, 7 April 2022) https://www.news.com.au/national/nsw-act/courts-

a door or shield and told CSNSW staff that he could not feel his legs.[430] Thus the violence was perpetrated by CSNSW officers in what is purported to be one of the most secure prisons in Australia. What risk Mr Lawrence and the other men posed is unclear. Also unclear is whether that risk justified the use of physical violence and use of chemical weapons. Regardless of whether the use of violence against Mr Lawrence was justified, its use by prison staff had devastating consequences for Mr Lawrence.

Despite recognising the serious injuries suffered by Mr Lawrence and perpetrated by CSNSW Officers, the plaintiff continued to present him as within the 'high range' for risk of ideologically driven violence.[431] The plaintiff emphasised that he retained 'organisational capacity' despite being physically unable to be directly violent.[432] Justice Bellew accepted the plaintiff's position that Mr Lawrence posed a risk, but questioned the appropriateness of his categorisation within the high risk range.[433] His Honour made an ISO in recognition that despite Mr Lawrence's physical incapacity, he continued to hold extremist ideology and could 'communicate with and encourage others in a way which was consistent with his beliefs' which could be an offence contrary to s 101.6(1) of the *Criminal Code*.[434] At the same time as the THRO proceedings about the revocation IDO, he was facing criminal proceedings after he entered a plea of guilty to one offence contrary to s 101.6(1), in part, for conduct directed at CSNSW officers while incarcerated.[435]

This short example demonstrates how prisons are places of physical violence. In this case, the violence had catastrophic consequences. But even though Mr Lawrence's life was irreparably altered by CSNSW staff actions, his thoughts and actions – despite his physical

law/paralysed-alleged-terror-offender-tukiterangi-lawrences-bid-for-freedom-from-supermax/news-story/c47eff3d8cfe084fc8a07a4594ed11e0.

430 Charlie Coë, 'Alleged Terrorist Could Be PARALYSED after a Violent Stand-off with Prison Officers "over Prayer Time" at Goulburn's Notorious Supermax Jail', *The Daily Mail* (online, 3 December 2021) https://www.dailymail.co.uk/news/article-10269965/Alleged-terrorist-PARALYSED-stand-prison-officers-Goulburn-supermax-prison.html. .

431 *State of NSW v TL (Preliminary)* (n 312) [35] (Bellew J).

432 Ibid [37] (Bellew J).

433 Ibid [35] (Bellew J).

434 Ibid [50] (Bellew J).

435 *R v Lawrence* (n 422).

incapacity – remain the conduct that the state is fixated on controlling as harm causing. The harm that most clearly appears to have been caused was to Mr Lawrence, who, but for the IDO, would not have been subjected to ongoing incarceration.

Turning to another example of violence within prison, this time from Mr Dunn's case, incarceration's violence is clear. As recounted earlier in this section, Mr Dunn lived with numerous complex mental health diagnoses. While incarcerated, CSNSW sought and was granted a Forensic Community Treatment Order (FCTO) from the Mental Health Review Tribunal for six months.[436] FCTOs can be sought against people living with mental illness who are detained in custody and authorise mental health treatments that can be involuntarily administered by the Justice Health and Forensic Mental Health Network (JHFMHN).[437] A person is formally free to refuse treatment, but failure to comply will lead to the person's removal from the general part of the prison to Long Bay Hospital (or a like facility) for forced treatment.[438] Mr Dunn's FCTO required regular contact with mental health professionals, monthly urinalysis and consent to injected antipsychotic medication.[439] Had Mr Dunn not been incarcerated under a CDO, an FCTO could not have been sought which would allow for him to be forcibly medicated, in particular by injection. An injection requires the piercing of skin, an action that causes pain, albeit fleeting, but a bodily invasion. Medication itself can cause physical and mental changes to people, sometimes intentionally, but sometimes unintentionally through side effects. When medication is forcibly administered it is not just the act of administration that cannot be consented to but the changes that the medication causes to the person as well.

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[436] *State of New South Wales v Dunn* (n 236) [156] (Wilson J).

[437] Mental Health Review Tribunal, 'Forensic Community Treatment Orders' (March 2021) https://www.mhrt.nsw.gov.au/files/mhrt/MHCIFP/FCTOInformationKit-March2021.pdf. See also, *Mental Health Act 2007* (NSW) ch 3 pt 3. See generally, *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW); See also Sarah-Jane Spencer, 'Forensic Community Treatment Orders: Waste of Time or Exciting New Provision?' (2015) 49(11) *Australian & New Zealand Journal of Psychiatry* 965; cf, Andrew Carroll et al, 'No Involuntary Treatment of Mental Illness in Australian and New Zealand Prisons' (2021) 32(1) *The Journal of Forensic Psychiatry & Psychology* 1.

[438] Mental Health Review Tribunal (n 437).

[439] *State of New South Wales v Dunn* (n 236) [156] (Wilson J).

According to Carroll et al, the FCTO regime is the only within Australia and 'one of very few in the world' which allows for involuntary mental health treatment in prison.[440] Carroll et al argue that:

> The Long Bay Hospital 'mental health facility' provides little more than biological treatment. No formal psychotherapy, group programs or any allied health services are offered and prisoners in the 'mental health facility' are locked in their cells most of the day and do not have access to exercise yards and other recreation activities available to mainstream unit prisoners.[441]

The authors further document how 'seclusion and restraint'[442] is often used against people subjected to an FCTO as well as 'restrictive practices' which include the use of physical restraints and violence to ensure compliance with medical regimes.[443] Thus conditions on a FCTO – an order meant to improve a person's mental health – are more punitive and violent than general prison conditions. It is unsurprising that Carroll et al consider that involuntary treatment under an FCTO 'compromised clinical care, encouraged inappropriate management of prisoners and breached human rights'.[444]

That consent can actually be given in the ordinary sense when a person is in prison and subjected to an FCTO is fanciful. Prisons are inherently coercive and violent. Consent under the threat of violence under the ordinary criminal law is considered to have been induced by duress and vitiated. Nonetheless, the law has constructed a perverse fiction that consent can be rendered in such circumstances as those of Mr Dunn. This is without any consideration of his capacity in the first place.

Accordingly, THRO orders are not only violent in themselves by placing individuals within carceral settings. They also enable the violence that occurs within prisons. I have provided two examples. Mr Lawrence has sustained catastrophic life altering injuries at the hands of CSNSW officers. While Mr Dunn was subjected to further coercive orders which compelled invasive involuntary medication. The violence within prison cannot be

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[440] Carroll et al (n 437) 10.

[441] Ibid.

[442] Ibid 14.

[443] Carroll et al (n 437).

[444] Ibid 15.

understated, and the THRO Act, by allowing for incarceration enables the violence that occurs within prisons.

3.2.4. *Indeterminacy and incarceration's violence*

My final point on incarceration's violence is that the THRO Act places people within an endless loop of waiting and indeterminacy while in prison. Prisons are places of punishment, incapacitation and symbolic denunciation. Prisons are places of violent control. But practically, they are also places where people wait. Incarcerated people are always waiting for what comes next: another hearing, another decision, another appeal, another search, another assault, another lockdown and always, ultimately, release.

But the THRO Act, like other post-sentence regimes, changes the parameters around the finality of waiting in prison. By creating post-sentence regimes, the state has altered the settings for people while incarcerated and rendered uncertain the endpoint of their incarceration. This indeterminacy is indirectly violent as it solidifies uncertainty around a person's liberty and status within the community. A sentence delivered or finally appealed no longer becomes a signifier of the end point of incarceration for an incarcerated person. An incarcerated person could now be subjected to further incarceration under a post-sentence regime, a process which does not commence until their sentence nears its end. Whilst regimes like the CHRO Act afford a greater degree of certainty that only related historical offending and prospective risk are targeted, the THRO Act severs the relationship between historical offending and prospective risk leaving uncertainty about a person's eligibility to be subjected to further ongoing orders.[445] Moreover, the evidence used in the prospective risk assessment does not even necessarily relate to conduct which has previously been the subject of criminal charge or conviction.

Even for a person incarcerated under the THRO Act, their position also remains uncertain. Whilst each order must be made for a specified term, there is no limit to the number of THRO orders that can be made so it is possible for people to be placed on multiple sequential orders after their sentence has expired. Given the way that risk is assessed under the THRO Act – which requires a weighing of likelihood and gravity of a serious

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[445] See Introduction and Chapter 2, especially 2.2.

terrorism offence being committed – it is obvious how multiple orders could be made with little to nil adverse change to a person's circumstances, and even sometimes improvements.[446]

This is exacerbated by the use of structured professional judgment tools like VERA-2R[447] which are grounded in consideration of static and dynamic risk factors. Static risk factors, which contribute to the calculation of risk using these tools, will never change. So even the gravest threats, despite their remoteness, could lead to incarceration based on this measure of risk. Linking a decision about further incarceration to prospective risk assessment under the THRO Act, renders incarceration as a period of waiting indeterminate and contributes to the harm caused by incarceration under the THRO Act.

The effect is that people subjected to the THRO Act could be indelibly marked as a terrorist Other and never return to enjoying full rights and freedoms outside of prison with any confidence. Further, regardless of whether additional orders are made, the mere existence of the THRO Act has rendered periods of incarceration – periods of waiting – uncertain and indeterminate. The THRO Act's mere existence in allowing further incarceration, including all its direct violence, beyond the expiry of a sentence under the criminal law renders the finality of a criminal sentence or appeal unclear. As the mere fact of the sentence can then be used ground further periods of incarceration or supervision, this is particularly so with the THRO Act where past criminal history and prospective risk need not be the same. Rendering periods of incarceration indeterminate is indirectly violent as it contributes to the mental harm caused by prison for people who are incarcerated and cultivates a sense of hopelessness, lack of belonging and lack of agency for people subjected to the THRO Act which will be explored further in the next Chapter concerning Othering.

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[446] See for example, *State of New South Wales v Williamson (No 1)* [2019] NSWSC 812. The CHRO jurisprudence has had to grapple with this issue more given its longer timeframe of operation. But repeat applications are beginning to be made under the THRO Act. See for example, *State of New South Wales v Fayad (Preliminary)* [2023] NSWSC 115 ('*State of New South Wales v Fayad (Preliminary)*'); and *State of New South Wales v Hardy* [2022] NSWSC 1724.

[447] See Chapter 2, especially 2.3.

3.3. EXTENDED SUPERVISION AS VIOLENCE

In this section I consider the violence of ESOs. An ESO creates a framework for surveillance and close control of people which is directly violent itself because it causes harm. The ESO is also grounded in the threat of physical violence by incarceration if a person does not comply. The control that a person is subjected to under an ESO is indeterminate and can be susceptible to rapid discretionary changes by the CSNSW Enforcement Officers (EOs). The close control of people under an ESO severely curtails agency and freedom. There can be little difference between the control that a person is subjected to in prison when incarcerated and the control of a person under an ESO. The person remains under the close control of the executive and even minor and trivial breaches can lead to reincarceration. So, when subjected to an ESO the spectre of incarceration is ever present.

When an ESO is observed in totality, it cultivates a structure allowing surveillance and control over a person which causes harm. Despite the person residing outside of a prison, they have little to no control over almost any aspect of their life when subjected to an ESO. The ESO made by the court bears a complex relationship to violence. It is a signifier that the person has been constructed as an Other by the executive which has been accepted by the court.[448]

Apart from sometimes forcing consent to medication and forcing consent to search and seizure of items from a person's body and property, the ESO does not facilitate direct physical violence but rather harm through control and constraint. In stitching together a framework for surveillance and control it is not physically violent as it causes pain and mental harm by stripping away a person's agency and dignity. The ESO's framework for surveillance and control, however, always carries the threat of physical violence which ultimately could lead to further incarceration and violence perpetrated by executive, especially through the Police Force and CSNSW. While the court is meant to act as a check and balance on the power of other arms of the state, this section will show how the court can enable expansive and unreviewable exercises of power by the executive to the detriment of people subjected to ESOs.

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[448] See Chapter 4.

3.3.1. THE ESO CONDITIONS

To show the breadth of conditions attached to an ESO which allow for the close control that causes harm to people, I draw from Mr White's case which I return to later when analysing how ESO conditions are enforced.[449] During the final hearing, the only matter in dispute was which conditions should apply to Mr White's ESO.[450] But I explore some of the facts of the case, because the THRO Act requires that conditions only be made if they address the person's identified risk factors.

In total 54 conditions were made which spanned over nine pages, in an ESO which is typical of others. In the final hearing judgment, N Adams J described Mr White as:

> [S]erving a sentence…imposed for a church arson committed in Taree in 2016. In 2014, [Mr White] had made threats to the Jewish Museum in Sydney and was also convicted in relation to that. He is a 28-year-old man with a historic association with and membership of right-wing white supremacist groups with neo-Nazi tendencies.[451]

Mr White was reportedly part of white supremacist groups including the Right Wing Resistance (RWR) which he was understood to lead in Australia.[452] As a member of these groups, he was involved in combat training, perpetrating violence, attending demonstrations, promotion and recruitment work.[453] Some groups were associated with neo-Nazism,[454] but none were prescribed terrorist organisations.[455]

The psychiatric and psychological evidence about Mr White was unsettled in determining a clear diagnosis.[456] But regardless, there was consensus that supervision would mitigate

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[449] In some cases, the terms of an ESO are made public, but in other cases they are not. There is no apparent reason beyond judicial preference.

[450] *State of New South Wales v White (Final)* (n 181) [7] (N Adams J).

[451] Ibid [1] (N Adams J). As the focus of this section is on how the THRO Act enables a higher degree of physical control over bodies, I will only provide background about Mr White to the extent necessary to orient the discussion about his ESO conditions, and breaches.

[452] Ibid [9]-[10] (N Adams J).

[453] Ibid [9]-[10] (N Adams J).

[454] Ibid [43] (N Adams J).

[455] Ibid [53] (N Adams J).

[456] Psychiatrist, Dr Adam Martin, found that Mr White 'does not have any major mental illness nor does he present with current major mood disturbance or depression' yet also found that he had a chronic

Mr White's purported terrorism risk.[457] Ms Dewson, a psychologist, and the CSNSW prepared Risk Assessment Report (RAR) emphasised the importance of controlling Mr White's alcohol consumption to mitigate risk.[458] There was also conflicting evidence about whether Mr White continued to hold white supremacist views. For example, in a recorded interview in 2016, he disavowed former white supremacist beliefs.[459] The RAR appointed his risk level as 'low-medium' and was predicated on a belief that Mr White had deradicalised.[460]

Justice N Adams characterised the case as:

> Somewhat unusual…to the extent that, although [Mr White] has clearly expressed views that are consistent with him committing a terrorist act, none of the offences which make him eligible…involve the actual infliction of any violence. Nor does [Mr White] have any convictions for violence against any particular person…Nor was there any material put before the Court to suggest that RWR had ever committed a terrorism act in Australia.[461]

Before being subjected to an ESO for two years, Mr White was also subjected to an ISO.[462]

When identifying conditions below from the 54 made in Mr White's ESO, I identify those which demonstrate the breadth of surveillance and control enabled by an ESO. On review of the conditions, it will become clear that everything that a person does is subject to the control and approval of their Enforcement Officer (EO). Any failure to comply can be punished if not approved by an EO. I extract the conditions at length in the body of the Thesis to show their extent and complexity which may not be as clear if I were to summarise them. Selected conditions from Mr White's ESO include:

1) Condition 2: 'The defendant must report to his EO as reasonably directed'.
2) Condition 3: 'The defendant must follow all reasonable directions by his EO.'

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personality disorder (at [61]). Chelsea Dewson, psychologist, diagnosed him with 'post-traumatic stress disorder and major depressive disorder' with anti-social personality disorder (at [69]): *State of New South Wales v White (Final)* (n 181).

[457] Ibid at [64] re Dr Martin; at [72] re Ms Dewson.

[458] Ibid [71]; [77]; [162] (N Adams J).

[459] Ibid [141] (N Adams J).

[460] Ibid [152] (N Adams J).

[461] Ibid [160] (N Adams J).

[462] *State of New South Wales v White (No 1)* [2018] NSWSC 1064 ('*State of New South Wales v White (No 1)*').

3) Conditions 5 and 6: 'The defendant must provide a weekly plan […] to be approved by his EO and this is to be provided three days before it is due to start' and changes to the plan must be approved at least 24 hours before the change takes effect.
4) Condition 8: 'The defendant must truthfully answer questions from his EO about where he is, where he is going and what he is doing.'
5) Conditions 10 and 11: 'The defendant must allow his EO to visit him at his approved address at any time and for the purposes of monitoring compliance with this Order, to enter the premises at that address' and he must be at the address between 9pm and 6am unless an alternate arrangement has been approved.
6) Condition 14: 'The defendant must not go to a place if his EO tells him that he cannot go there'.
7) Condition 16: The defendant must not work or study without EO approval.
8) Conditions 17-19: Prohibitions on the possession or use of 'illegal drugs', 'prescription medication other than as prescribed' and alcohol, with mandatory testing at his EO's direction.
9) Conditions 20 and 22: 'The defendant must not associate, contact or communicate with any persons specified by the EO' and must 'inform his EO of the identity of any person with whom he does, or is likely to regularly associate.'
10) Condition 31: 'The defendant must provide his EO with all passwords, pin codes and pass codes used to access all electronic devices, electronic applications and communication platforms of any kind.'
11) Conditions 32 and 33: 'The defendant must not use any coded or encrypted messaging application or service' and 'must not access, join and/or connect to any social networking service or application without the prior approval of his EO'.
12) Condition 34: 'The defendant must provide consent for his EO […] to remotely inspect any internet account used by the defendant, including any internet service provider account, email accounts and social media accounts'.
13) Conditions 38 and 40: In certain circumstances Mr White must 'submit to' searches of his property and person, and 'allow' seizure of items.
14) Condition 46: 'The defendant must not significantly change his appearance without the approval of his EO.'
15) Conditions 50 and 51: If directed by his EO, the defendant must attend healthcare appointments, assessments or programmes and take all prescribed medications.

16) Conditions 53 and 54: The defendant must agree to treatment and service providers sharing information with his EO. This information may then be shared with agencies responsible for his supervision.

An electronic monitoring condition was also imposed, but only for six months from the date of the ESO.[463] As a consequence of ESO breaches and incarceration which suspended the ESO's operation, the plaintiff sought for the electronic monitoring condition to be reintroduced.[464] Acting Justice Schmidt reimposed electronic monitoring at the discretion of Mr White's EO but only on the proviso that it be reviewed at least every 3 months, and, when reimposed, that the EO provide written reasons to Mr White.[465]

The conditions attached to an ESO are expansive in their urge to control and prohibit. They are also extensive in forcing consent to surveillance, and broad in requiring a person to endlessly seek approval from the EO when changes are needed. Instead of a person being able to control their own life, they are subjected to almost total control by the EO, as an agent of the state, supported by constant surveillance and a threat of direct violence through incarceration to ensure compliance. Ripperger, writing about the CHRO Act, aptly said 'in addition to a large part of an offender's everyday life – indeed significant parts of their broader lifeworld – now being legally regulated and monitored, non-compliance with this external structuring of their everyday life is actually criminalised.'[466] Criminalisation is code for an ESO effectively rendering a person's life, and control over it, impermissible by the state. The state, through the executive, is then able to take control of the person's life and shape it according to their aims and objectives.

People subjected to ESOs are rendered as Others as their agency is diminished as the state's ability to control their life is subject to little constraint. The THRO Act's violence extends beyond the carceral into how it enables supervision which causes harm to people within the community. Supervision, in ordinary parlance, may evoke something more pastoral than the high degree of control that the executive obtains from the court under

[463] *State of New South Wales v White (Final)* (n 181) Condition 4.

[464] *State of New South Wales v White* (n 260) [4] (Schmidt AJ).

[465] Ibid [88] (Schmidt AJ).

[466] Ripperger (n 75) 173.

the THRO Act. Whether direct physical violence actually materialises because of an ESO, the threat of physical violence is ever present through the breadth of conduct which is prohibited and the constant need to consider whether permission is required from an EO for a person to perform even the most mundane things in life.

A return to Mr Dunn's case assists in demonstrating the effect of such a high degree of control over a person. Recall that Mr Dunn was subjected to an ESO when his CDO expired. CSNSW's Risk Management Report (RMR) described how a supervision plan for Mr Dunn would restrict movement and associations, require electronic monitoring, scheduling of all movements with exclusion areas and curfews, compelled psychiatric treatments and regular drug and alcohol testing.[467] Despite the expansiveness and stringency of the proposed supervision plan, the RMR identified that Mr Dunn 'has consistently demonstrated his unwillingness or inability to comply with community supervision orders. When challenged he has responded that he would prefer to return to gaol' than be subjected to community-based supervision.[468] It is no surprise, then, that the RMR author recommended that Mr Dunn be subjected to a CDO instead of an ESO given his preference for incarceration. Neither the RMR nor the evidence otherwise clearly exposed why Mr Dunn preferred incarceration. But as someone who had been subjected to multiple periods of incarceration, supervision, and only short periods at liberty he has a long history of interacting with the criminal justice system and understanding of the stringency of community supervision. It is difficult to see how his desire to return to gaol over being supervised could be indicative of anything but how harmful supervision can be.

3.3.2. Indeterminacy of an ESO's control

The state is always in control of a person's life once they are subjected to an ESO, which reinforces their status as an Other, whose life is subject to close control and rapid change at the EO's will. Most ESOs establish indeterminate parameters which can be varied by the EO, making the conditions of control difficult to understand and work within and use

[467] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [113] (N Adams J) After these proceedings the THRO Act was amended and a set of conditions that had to be ordered '[u]nless the Supreme Court orders differently' was written into law: *Terrorism (High Risk Offenders) Act 2017* (NSW) s 29(1A).

[468] Ibid [114] (N Adams J). RMR authors commonly ask a person about their feelings towards community supervision.

of enforcement measures more likely. Most ESOs contain a condition like Condition 3 in Mr White's ESO, which allows an EO to issue further 'reasonable directions', which Mr White 'must follow'. In other words, most ESOs contain a condition that allows the executive to make further directions to a person under control which carry the force of law and breach of which can be punished with incarceration. The direction must be 'reasonable', but the little case law there is shows how broadly the condition has been interpreted.

Since Mr White's case, the THRO Act was amended to contain "mandatory" conditions, the 'reasonable direction' condition being one of them.[469] Since then, the condition has commonly been phrased as:

> The defendant must submit to the supervision and guidance of any enforcement officer responsible for the supervision of the offender for the time being and obey all reasonable directions of an enforcement officer (including in respect of providing a schedule of movements).[470]

Mr White, like many others subjected to ESOs, was also subjected to other conditions which rendered their ESO indeterminate and able to be varied by the EO. The ESO sought by the plaintiff and made by the court is clearly designed to act permissively in affording power to an EO to further surveil, control and punish a person. For example, Condition 7 required Mr White not to deviate from an approved schedule of movement 'except in an emergency'. If an emergency arose, he was required to notify his EO and 'comply with any reasonable directions received thereafter'. By Condition 8, he must 'truthfully answer' questions about 'where he is, where he is going and what he is doing'. By Condition 35, he also must 'obey any reasonable directions [...] about the use of phones, tablet devices, data storage devices computers and other devices…access to the internet and certain internet content.'

Whether these additional conditions are legally necessary given the broad scope of Condition 3 is uncertain. But politically, the conditions demonstrate the subjugation of a person deemed to be a high risk offender to the will of the state. The reiteration of the call

[469] See Chapter 2.

[470] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 29(1A)(a); See also, *State of New South Wales v Ibrahim (Final)* (n 190) [363]-[364] (Walton J).

to obedience across different aspects of life bears iterative force regardless of whether these additional conditions are legally necessary. The ESO manages a person's life through direct and indirect violence and the threat of incarceration on failure to comply.

'Reasonable direction' conditions are perhaps the strongest example of the way that people subjected to ESOs are rendered *homines sacrii*.[471] Whilst their bodies exist, they exist so entirely under the control of the state, and forever on the cusp of punishment, for they are undesirable subjects who must be controlled violently. It is one thing for the court to make conditions binding a person subjected to THRO proceedings, even acknowledging all the faults with the jurisdiction operating in a state of exception.[472] But another thing completely to give the EO broad authority to issue further directions at will which bind a person on an ESO, and leave limited recourse for people like Mr White and his state funded Legal Aid solicitors to challenge their legality.

Difficulties notwithstanding, the ambit of 'reasonable direction' conditions has not gone unnoticed by people defending THRO proceedings who have resisted the making of such conditions, mostly unsuccessfully.[473] For example, in the Azar case, the statutory reasonable direction condition was challenged as too broad.[474] In rejecting Mr Azar's proposed amended condition, Davies J cited a CHRO case with approval that said 'reasonable necessity should not be limited only to enforcement of conditions; there may be other aims – not least, rehabilitation generally – that should be able to underpin a reasonable direction.'[475] Thus the court, another arm of the state to the executive which seeks to have an ESO made, affords wide discretion to the executive in interpreting what may constitute a reasonable direction under an ESO. Rather than acting as a check or balance on executive power, the court enables the expansive exercise of power sought by the executive through the reasonable direction condition which contributes to the harm

[471] Introduced in the introduction to this Chapter and discussed further in section 4.1.

[472] Developed further in Chapter 5.

[473] See for e.g., *State of New South Wales v XX* (n 259) [97]-[98] (Beech-Jones CJ at CL); *State of New South Wales v BP (No. 2)* (n 259) [19]-[21] (Wright J).

[474] *State of New South Wales v Azar (Final)* (n 261) [113] (Davies J).

[475] Ibid; citing from *State of NSW v Biber (No 2) (Final)* [2021] NSWSC 104 [61] (Button J).

that an ESO can cause to a person and can enable direct violence of incarceration on breach of any condition.

The *Fayad* case saw a partially successful challenge to the reasonable direction condition. In that case, Wright J made a condition which defined what constituted a reasonable direction. Under Mr Fayad's ESO reasonable direction 'means (and is limited to) a direction which is reasonably necessary for ensuring compliance with, or enforcement of, the conditions of this order or otherwise to manage the risk posed'.[476] Mr Fayad proposed wording which omitted 'or otherwise to manage the risk posed'. In varying the statutory condition, Wright J identified an 'expectation that the ESO would be implemented and enforced with common sense' and warned that if he were wrong, then Mr Fayad should seek a variation to the conditions.[477] Mr Fayad sought the variation to the statutory condition because it rendered the order 'uncertain' and extended beyond what is 'necessary for the management of [his] risk'.[478] His Honour characterised Mr Fayad's concerns about enforcement as 'not fanciful or far-fetched' but did not accept that there had been a 'deliberate misuse of power'.[479] In making these comments, Wright J had an incident in mind which I address further in Chapter 5, where Mr Fayad was asked a series of questions and it was unclear whether Mr Fayad answered questions from his EO, waiving his privilege against self-incrimination, because he felt directed to do so or did so voluntarily.[480]

While the legal effect of Wright J's decision to define 'reasonable direction' in this judgment is questionable, hope lies in Wright J's openness to questioning the EO's conduct and his effort to circumscribe their discretion. That said, I am not sure that the definition made any material change to the condition at all. Surely the reasonableness of a direction required that it must relate to addressing the risk that the ESO seemed to

[476] *State of New South Wales v Fayad (Variation of Conditions)* (n 259) [37] (Wright J).

[477] Ibid.

[478] Ibid [26] (Wright J).

[479] Ibid [27] (Wright J).

[480] Ibid [27]. See also [42]-[45] (Wright J); *State of New South Wales v Fayad (Final)* [2021] NSWSC 294 [74]-[83] (Wright J) ('*State of New South Wales v Fayad (Final)*').

manage?[481] Intentions notwithstanding, the reworded discretion to make a reasonable direction in respect of Mr Fayad still affords broad scope to the EO, to even more closely manage his conduct through issuing directions.

Even stronger recognition by the court of misuse of the reasonable direction condition appears in the *Hardy* case. Albeit recognition alone without changes being made to the condition which bears consequences. On Mr Hardy's first ESO he was subjected to conditions requiring him to submit a schedule of movements and be subjected to electronic monitoring.[482] On his second ESO, and after a period of compliance with strict ESO conditions, Harrison J (as his Honour then was) removed the schedule of movements and electronic monitoring conditions because they were 'oppressive, invasive and disproportionate', especially when the reasonable direction condition allows flexibility to manage emergent risk.[483] In the third ESO proceedings, the plaintiff argued for the reimposition of electronic monitoring and a schedule of movements conditions.[484] Justice Johnson sought assurance, which the plaintiff gave, that those conditions would not be implemented by issuing a direction, if he omitted them.[485] In the judgment, Johnson J stated that the reasonable direction condition 'is not intended to operate as a type of backdoor way of introducing a requirement for a schedule of movement'.[486] In yet further ESO proceedings, however, Campbell J observed that only two days after the delivery of Johnson J's judgment, a direction was issued which 'in substance replicated' conditions that Johnson J declined to make.[487] Consequently, Mr Hardy sought for the reasonable direction condition to be wholly omitted.[488] Justice Campbell, however, made

[481] See, for example, the CHRO case *State of New South Wales v BG (Final)* [2019] NSWSC 200 [36]-[37] (Fagan J).

[482] *State of New South Wales v Hardy* (n 446) [31] (Campbell J).

[483] Ibid [32] (Campbell J); *State of New South Wales v Hardy* [2021] NSWSC 323 [42]-[45] (Harrison J).

[484] *State of New South Wales v Hardy* (n 446) [33] (Campbell J).

[485] Ibid.

[486] Ibid; *State of New South Wales v Hardy (Final)* [2021] NSWSC 900 [418] (Johnson J).

[487] *State of New South Wales v Hardy* (n 446) [34] (Campbell J).

[488] Ibid [28] (Campbell J).

the condition but specified that it could only be used to introduce a bare form of schedule of movements, and not used oppressively as it had been previously.[489]

The actions of CSNSW in Mr Hardy's case cannot be seen as anything other than an attack on the court. The indeterminacy of an ESO is plain in this case, because a judgment has been issued making clear the terms of the ESO to which Mr Hardy is subjected giving some certainty about the conditions to which he must adhere. But within a couple of days, Mr Hardy was subjected to a direction making the conditions that the court declined to make. This case shows the arbitrariness of ESOs despite the complexity of the regulatory regime which allows for their creation. The ESO ruptures certainty for a person subjected to one. This rupturing of certainty contributes to the harm that an ESO causes to a person subject to such an order. Not only is a person subjected to an ESO always at risk of having the terms enforced on breach through incarceration, but the person is always at risk of having the terms of the order change with limited recourse for review. The power to change an order where breach can lead to incarceration is emblematic of the violence that the state inflicts on people subjected to THRO orders.

3.3.3. THE ESO AS A PATH TO INCARCERATION

What happens when the threat of physical violence attached to an ESO is realised and a person is charged, convicted and punished for breaching an ESO condition? While the ESO is violent in itself by allowing for close surveillance and control of a person which causes harm, the terms of the ESO are always grounded in a threat of physical violence through incarceration on breach. The conditions attached to an ESO are expansive and technical. No aspect of a person's life is untouched. The previous discussion shows how easy it can be to fall into technical breach, inadvertent breach, breach because of emergency or unforeseen circumstances, and breach through otherwise legal conduct.

There are few public examples of what types of ESO breaches are acted upon by the Police Force and CSNSW, and little law to draw on regarding the sentences are delivered for ESO breaches. Mr White's case presents a glimpse of what breaches are actioned, and what consequences attach to those breaches. What will become clear is that the ESO despite being a stringent framework for surveillance and control in some circumstances like

489 Ibid [36] (Campbell J).

Mr White's becomes a smooth pathway towards incarceration's violence. By constructing offences under the criminal law by which people can be resentenced to incarceration it also avoids questions of human rights and legitimacy that otherwise arise for post-sentence detention regimes as it brings the person back under the remit of the criminal law. The offence of failure to comply is constructed in orthodox criminal law terms and known to the criminal law from a range of jurisdictions.[490] Breach proceedings adopt the orthodox practices of a criminal prosecution, and are usually prosecuted in the NSW Local Court by Police Prosecutors with proof of all elements is required beyond reasonable doubt.[491] By removing the person from the liminal space created by the THRO Act and situating them once again with the known space of the criminal law, questions about the THRO Act's legitimacy and concerns about incarceration without charge neutered.

On 7 September 2018, Mr White was charged with five breaches of his ISO, refused bail, and incarcerated.[492] On 7 November 2018, the five charges were "rolled up"[493] and Mr White entered a plea of guilty to one charge.[494] The breaches concerned Mr White 'post[ing] publicly accessible images depicting "skinheadpride", "Australian Oi! Skins", "skin head" and an individual holding what appeared to be a Molotov cocktail'.[495] The length of his incarceration is unclear. Whilst the link to white supremacy for some words and phrases is clear, the conduct fell short of engaging in physical violence or engaging directly with a terrorist group or radicalised people. Nonetheless, incarceration was determined to be appropriate, despite the court having discretion to sentence in other ways.

Incarceration, when a person is subjected to an ESO, leads to the ESO's suspension, which means that it continues upon release. But insofar as an ESO enables a person to begin to

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490 For similarly structured offences see, for example, *Marine Safety Act 1998 (NSW)* s 12(2); *Water Management Act 2000 (NSW)* s 20B(2); *Law Enforcement (Powers and Responsibilities) Act 2002* s 39(b).

491 See also Chapter 2.4.

492 *State of New South Wales v White (Final)* (n 181) [4] (N Adams J).

493 Rolling up charges is a prosecutorial practice where on a plea of guilty, if the gravamen of the offending can be reflected in less charges, certain charges are withdrawn and the facts are amended to reflect two or more instances of one offence. See *R v Glynatsis* [2013] NSWCCA 131.

494 *State of New South Wales v White (Final)* (n 181) [4] (N Adams J).

495 Ibid [99] (N Adams J).

reconnect with the community, the consequences of incarceration can be devastating. Mr White's removal from society would have severed any mental health, social and community supports, including any rapport or relationships he may have begun to cultivate with medical and support professionals. Re-incarceration may lead to loss of employment, housing, admission to study or rehabilitation.[496] On release, Mr White would have to start these processes again while continuing to be constrained by his ESO.

Without the ESO's surveillance and control which smooths a pathway towards reincarceration under the criminal law, Mr White's conduct may not have been unlawful, let alone led to incarceration. For conduct which was not directly violent, Mr White's liberty was removed but importantly, his engagement with the community is severed and the state reiterates his enduring status as an Other who is always waiting to be (re)subjected to incarceration's violence. So, the THRO Act, a regime purportedly constructed to prevent harm, stymies rehabilitation and causes harm to people subjected to it as they become endlessly subjected to incarceration's violence through inevitable breach proceedings.

On 25 October 2019, Mr White attended a barbeque with alcohol. Mr White was observed arriving at the barbeque in a private car.[497] He was previously refused permission to attend with a friend in a private car by his EO.[498] Approval was, however, given for him to attend via public transport.[499] Mr White was found to have consumed alcohol in breach of his ESO.[500] He was charged with two ESO breaches for travelling to the barbeque by unapproved transportation and for possession and consumption of alcohol, to which he

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[496] For more on this in the context of the CHRO Act, see Ripperger (n 75) 172–174. There have been more repeat applications for CHRO orders. As the CHRO Act has operated for much longer than the THRO Act, there is a better developed understanding of the impacts of ESO breaches which result in multiple short periods of incarceration. See, *State of New South Wales v McQuilton (Final)* [2019] NSWSC 265 [65]-[67]; [104] (Fagan J); *State of New South Wales v Grooms (Final)* [2019] NSWSC 353 [69]-[70]; [91]-[92] (Fullerton J); *State of New South Wales v Carr* [2020] NSWSC 643 [19]-[24] (Hamill J).

[497] *State of New South Wales v White* (n 260) [17] (Schmidt AJ).

[498] Ibid.

[499] Ibid.

[500] Ibid.

entered pleas of guilty.[501] He was sentenced to 13 months incarceration, 8 months without parole.[502]

The examples of breaches show that the thin veneer of risk management and promotion of rehabilitation can easily fall away. Alcohol consumption was linked with an increased likelihood of reoffending, which goes towards justifying why otherwise lawful conduct is rendered unlawful by Mr White's ESO. In separate proceedings, a psychologist gave evidence that 'Mr White's decision to drink alcohol […] was connected with not wanting to lose friends'.[503] But what harm was done by Mr White attending the barbeque in a car instead of via public transport? In particular how was the harm so grave as to require incarceration? There is no suggestion that Mr White was disorderly or violent. For CSNSW to know that he arrived in the car, they were clearly surveilling the barbeque, so were watching and able to detect any disorderly conduct. An ESO gives licence to CSNSW and Police to closely surveil high risk offenders and, because of their broad conditions, affords them licence to exercise their discretion to charge a person and cause further incarceration. The settings are cultivated to demonstrate that a person subjected to THRO orders is an Other who lies so far outside of what is permissible within society that they must always be monitored and even slight missteps punished. Even seemingly minor changes to a schedule like travelling via a car compared with travelling via public transport can lead to incarceration. The monitoring and control are intrinsically linked parts of the whole schema of violence enabled by the THRO Act. While the "harm" of the breach and the "risk" presented by the person subjected to THRO orders is foregrounded, the harm caused to the person by the state through instances of surveillance, control and incarceration, individually and when aggregated together over the duration of an ESO, is obscured.

Mr White was also incarcerated for one breach of his ESO between 9 July 2020 and 23 November 2020.[504] While not clearly articulated in the judgments, this breach appeared to be a failure comply with a condition prohibiting him from 'significantly' changing his

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[501] Ibid [18] (Schmidt AJ).

[502] Ibid.

[503] Ibid [48] (Schmidt AJ).

[504] *White v Director of Public Prosecutions* (n 273) [5] (Beech-Jones CJ at CL) (as his Honour then was).

appearance without approval.[505] He shaved off a beard.[506] It is doubtful whether shaving one's beard can be considered a "significant" change in appearance by any measure, but it is difficult to judge without seeing before and after photographs. Nonetheless, the risk that this condition and breach action pertains to is unclear, and again further demonstrates the pattern of surveillance and control that the *White* proceedings clearly identify. Through surveillance and control, the THRO Act is calculated to mark a person as Other and does so by enforcing obedience with seemingly arbitrary ESO conditions. This breach action not just enforced obedience and compliance, but also policed Mr White's appearance far beyond anything allowed under the general law. The eradication of agency for a person subjected to an ESO is directly harmful.

On 13 April 2021, Mr White was arrested and charged with four ESO breaches.[507] These offences occurred between 23 November 2020 and 27 January 2021 and concerned Mr White using the following aliases on social media: 'ausskinhead'; 'Chelseafc Sharp'; 'Blackplaguepileup Hatchetrick'; and, 'Skinoioioi Aus'.[508] 'Chelseafc Sharp', according to agreed facts, 'is a reference to Chelsea Football Club and "Sharp" is an acronym for "Skinheads against Racial Prejudice"'.[509] 'Blackplaguepileup Hatchetrick' was 'a reference' to Mr White's band.[510]

In the sentence appeal proceedings, Beech-Jones CJ at CL (as his Honour then was) reported that the Magistrate who heard the breach proceedings considered Mr White's 'level of non-compliance with his ESO and previous bonds as "quite startling"', and considered the offence before the court to display '"flagrant disregard" for the ESO'.[511] When addressing the gravamen of the offending, the Magistrate said:

> [A]s far as the extensive conditions are concerned, this is a lower level of breach … as compared to other requirements as to where he can go, what other things he can engage

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[505] *State of New South Wales v White* (n 260) [20] (Schmidt AJ).

[506] Ibid.

[507] *White v Director of Public Prosecutions* (n 273) [4] (Beech-Jones CJ at CL).

[508] Ibid [5] (Beech-Jones CJ at CL).

[509] Ibid.

[510] Ibid.

[511] Ibid [6] (Beech-Jones CJ at CL).

> in. I accept also the submission that there is no evidence of antisocial associations [...] His behaviour in continuing to identify with these names is, as I said, a contemptuous indication to the court orders.[512]

The sentence imposed for the four offences was sixteen months' incarceration with a non-parole period of twelve months.[513] The sentence was confirmed on appeal.[514] Despite the offences falling at the lower end of objective seriousness the sentence delivered was towards the higher end of the available range. Again, despite the use of white supremacist monikers in some aliases, it is hard to understand the harm or nexus between these actions and Mr White being involved in actions which give rise to terrorist acts or violent extremism, particularly given how closely Mr White was being monitored. The technical breaches of the conditions seem intent on reiterating Mr White's construction as an Other *vis-à-vis* the state which is clearly displayed by the language used by the sentencing Magistrate. When decontextualised as offence entries on a criminal history, Mr White appears to have repeatedly failed to comply with his ESO conditions. But insofar has his ESO is calculated to mitigate an unacceptable risk of committing a serious terrorist offence the breaches appear trivial and minor. What is clear, however, is that regardless of the extent to which any breaches of an ESO work towards the mitigation of terrorist risk, the ESO regime facilitates a smooth pathway for people subjected to THRO orders to be reincarcerated and to have their status as a controlled Other reaffirmed.

Despite the THRO Act constructing a regime of surveillance and control backed by the threat of incarceration, it is also marred by arbitrariness and indeterminacy of enforcement which leaves the person subjected to an ESO in a state of uncertainty. The uncertainty causes a different type of harm for people subjected to THRO proceedings which is violent in itself. This is in addition to the violence caused by being subjected to the conditions which confine, constrain and control the person.

Mr White downloaded Snapchat and WhatsApp to his phone without permission to do so, which was prohibited.[515] But given other ESO conditions he was also prohibited from

[512] Ibid [8] (Beech-Jones CJ at CL).

[513] Ibid.

[514] Ibid [44] (Beech-Jones CJ at CL).

[515] *State of New South Wales v White (Final)* (n 181).

deleting apps or any material from his phone.[516] So Mr White was left in limbo having acted unlawfully by downloading apps, but not been breached for that conduct. He simultaneously could not prevent ongoing breach because he was unable to delete the apps. Without being issued with a direction to remove the apps, CSNSW lays a trap for further breach and incarceration. Downloading encrypted messaging apps seems to pose a clearer risk than removing facial hair or travelling in a private car instead of public transport. But enforcement action was not taken for the former breach, but the latter two. The indeterminacy and arbitrariness with which breaches of an ESO will be charged and punished introduces greater uncertainty which exacerbates the state's level of control over a person.

Another example is that in 17 July 2018, police searched Mr White's bedroom and seized:

> [B]usiness cards for "Arms and Ammo", "Lakes Army Disposal" and "Newcastle Armoury Military and Sporting Firearms". There were also a number of books on skinheads, Adolf Hitler, "Gestapo Chief" Heinrich Mueller, the Schutzstaffel, "the truth about neo-paganism", "Auschwitz, the Nazis in the final solution", "the Birth of the Nazis", and "Nazi Germany and the Jews".[517]

He also had books on similar themes, '[a] crudely sketched swastika' drawn on furniture, and clothing bearing white supremacist and Nazi symbols.[518] The plaintiff's evidence 'show[ed] that [Mr White] had maintained contact with extremist culture (not just the music side of skinhead culture) up until the time the laptop was seized.'[519] For example, one of the files that Mr White accessed was a song called "Aryan – Coonshooting Boogie", a call for racialised violence.[520] But Mr White was not prosecuted for breaching his ESO in relation this conduct.

It is unlikely that this conduct would have been criminalised under the general law without being subjected to an ESO, but it is surprising given the expansiveness of the powers to surveil and control under an ESO that Mr White was either (a) not breached

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[516] Ibid [171] (N Adams J).

[517] Ibid [103] (N Adams J).

[518] Ibid.

[519] Ibid [107] (N Adams J).

[520] Ibid [118] (N Adams J).

under a condition of his ESO; or, (b) issued with a direction to prevent him from continuing to engage with white supremacy and violent extremism to avoid any doubt about whether the conduct was permitted. If engagement with themes of racialised violence is not subjected to breach proceedings, it calls into question the THRO regime's tether to risk management and protection of the community. Of all of the breaches that Mr White engaged in, these are the clearest that would demonstrate an ongoing risk of committing a terrorist act or engaging in violent extremism. But no breach proceedings appear to have been commenced.

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The THRO regime is violent. At times the violence is direct, at others indirect. Sometimes it is physical in form, sometimes non-physical. In this Chapter, I have exposed the violence of the THRO Act in order to tell a different story to the narrative that the THRO Act is preventive.

A CDO's violence comes from incarceration. Prisons are inherently violent places. Incarceration is intended to cause pain. But pain is also inflicted within prisons. The THRO Act, by offering incarceration in prison as an option outside of the criminal law serves to demonstrate the Otherness of the people who are subjected to a CDO. The THRO Act also renders indeterminate periods of incarceration as orders can be sought endlessly by the executive, if the person meets the relevant statutory criteria.

An ESO's violence comes from its high degree of surveillance and control which sometimes enables physical violence and violations of bodily autonomy. At other times, the surveillance and control destroy and degrades a person's sense of self and agency which causes harm. At all times while subjected to an ESO, the threat of physical violence through incarceration is present. I have argued that the THRO Act lays a clear path for reincarcerating people subjected to an ESO. While subjected to an ESO, a person's life is forever indeterminate. Indeterminacy about the scope of the conditions, indeterminate about whether something that is legal will become illegal, indeterminate as to whether they will be reincarcerated, and indeterminate as to whether another ESO will be sought in the future.

4. The THRO Act and Othering

In Chapter 3, I began charting a parallel critical course to preventive justice critiques of post-sentence supervision and detention regimes like the *Terrorism (High Risk Offenders) Act 2017* (NSW) (THRO Act). I introduced violence as a lens through which to interpret exercises of state power using the THRO Act. In that Chapter, I focussed on direct violence: harm directly caused by an agent. In this Chapter, I focus on one specific form of indirect violence, Othering, to expand my analysis of how the THRO Act enacts violence.

In this Chapter, I argue that the THRO Act constructs people as Others. Othering is indirectly violent itself and assists in rendering permissible direct and indirect violence perpetrated by the state and people against the Other. Othering, as I will explain in the first section of this Chapter, refers to a political process of constructing the identity of a person as oppositional to the state and its permissible subjects. In casting a person as an Other, the state dehumanises them, marks them as not properly belonging, and in so doing, permits them to be subjected to further violence. I will also show how Othering through the THRO Act is intrinsically connecting to processes of Othering that exist elsewhere within the state.

In analysing and deconstructing the narratives of the Other constructed by the state, principally the executive, using the THRO Act, I seek to denaturalise this construction so as to imagine just and emancipatory futures.[521] I analyse 'the concrete ways in which power penetrates subjects' very bodies and forms of life'.[522] In so doing, I attempt to unsettle settled categories that construct people as Others and (re)iterate their harmfulness at the expense of their humanity. The people categorised as Other by the THRO Act are diverse and transgressive. At times they cause harm, but I hope to show

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[521] THRO subjects themselves, resist this categorisation in many ways, often unsuccessfully (see examples in Chapter 2). They always retain their agency and capacity to resist being constructed as Others. On denaturalisation of categories of Other as critique, see, Jagose (n 125) 98; See also, on resistance through reclamation of identity markers, Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1990) 43(6) *Stanford Law Review* 1241, 1297; and Chelsea Watego, *Another Day in the Colony* (University of Queensland Press, 2021) 46 on Aboriginal resistance.

[522] Agamben (n 357) 8.

that the Othering work that the THRO Act enables provides an incomplete representation of people. It provides a representation of people which causes harm.

I begin with a short explanation of Othering as a form of indirect violence. I then consider the main manifestations of the Other which arise in THRO proceedings. I consider Othering narratives of the terrorist, criminal, mentally ill person and racialised Others. I finally analyse how the plaintiff constructs the Other through THRO proceedings.

In examining the THRO Act as an enabler of Othering I consider narratives primarily presented by the executive –the body that brings proceedings for the state – and the court –the body that determines proceedings. Sometimes the court affirms the narrative presented by the executive, sometimes it rejects the narrative (wholly or in part). These patterns reflect the differing roles of the executive and court within the state and will be mentioned throughout this Chapter. But the central focus will remain how the state through its agents presents a narrative of the Other.

Before proceeding, it is important to make an obvious point: the whole purpose of the THRO Act is to allow the state to construct people as Others. It is a regulatory regime which allows the state to label a person as a "high risk offender" – the phrase is even in the title of the Act – and then treat them differently. The label "high risk offender" itself demonstrates just how extreme Othering is under the THRO Act.[523] People Othered under the THRO Act are not merely criminal offenders (a well-known category of Other), nor do they simply pose a risk to state and society. They pose both a high risk and are criminal offenders. Crucially, their risk is associated with terrorism, the ultimate threat to the state which also has a significant impact on society. A terrorist high risk offender, by their very being is presented as a risk to the state and society by the executive and requires the court to affix a grave label which befits their dangerous status. Once a person has been indelibly labelled a high risk offender, the structurally violent work of the state continues as courts are urged to detain or subject them to supervision which eviscerates their freedom or liberty. In some circumstances the Othered person is medicated into

[523] It is well known that the criminal law has a communicative or expressive function: RA Duff, *The Realm of Criminal Law* (Oxford University Press, 2018) 103; See also, Michelle Madden Dempsey, 'The Voice of the Criminal Law' (2024) 18 *Criminal Law and Philosophy* 599; Klaus Günther, 'Criminal Law, Crime and Punishment as Communication' in AP Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas Von Hirsch* (Bloomsbury Publishing Plc, 2016) 123.

submission, in others cases, while formally at liberty is subjected to such close constraint that they barely have any agency. Even if the court does not accept the executive's narrative that a person is a high risk offender, the executive's narrative remains on the public record through a published judgment and in all Police Force and Corrective Services NSW file notes. The THRO Act is purpose-built to Other.

4.1. On "Othering"

What does it mean to "Other"? What does the constructed identity of the "Other" signify? Emmanuel Levinas identified the Other as that which was not, and could not be knowable to the "Self".[524] The Self being 'self-evident' and 'unproblematic'.[525] The concept of Othering has been widely adopted by critical scholars, especially feminist,[526] queer,[527] and post-colonial perspectives.[528] While Othering can occur in different domains,[529] I focus on Othering by the state – particularly through narratives presented by the executive – and analyse how this is influenced by and contributes to other logics of oppression.

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524 Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* (Springer Netherlands, 1980) 215; Emmanuel Levinas, *Otherwise than Being or Beyond Essence* (Springer Netherlands, 1991) 4–5; See also Butler (n 125) 196–198.

525 Jagose (n 125) 18; See also, Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (South End Press, 2011) 30–31.

526 See, for example, Mohanty (n 124); Seyla Benhabib and Drucilla Cornell, *Feminism as Critique: On the Politics of Gender* (University of Minnesota Press, 1987).

527 See, for example, Jagose (n 125); Louise Boon-Kuo, Erica R Meiners and Paul Simpson, 'Queer Interruptions: Policing Belong in the Carceral State' in Peter Aggleton et al (eds), *Youth, Sexuality and Sexual Citizenship* (Routledge, 1st ed, 2018) 34; Puar (n 132).

528 See, for example, Achille Mbembe, *Necropolitics*, tr Stephen Corcoran (Duke University Press, 2019); Mohanty (n 124).

529 For example, racialised and gendered Othering which leads to intimate partner violence can happen in interpersonal relationships and family units, as well as being influenced by and influencing racialised and gendered constructions of the Other by the state or its agents like police or public healthcare workers, see Crenshaw (n 521); Another example would be how homosexuality was constructed as a medicalised category of oppression, see Michel Foucault, *The History of Sexuality: Volume 1: An Introduction*, tr Robert Hurley (Vintage Books, 1990); and on how psychology as a field of medicine has Othered Aboriginal peoples. Pat Dudgeon, 'Decolonising Psychology: Self-Determination and Social and Emotional Well-Being' in Brendan Hokowhitu et al (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge, 2020) 100. See also Althusser (n 10) on the differing roles of repressive and ideological state apparatus.

There are similar concepts to the "Other", such as the "deviant",[530] the "enemy",[531] or the *homo sacer*,[532] which I will draw on to explain the concept. However, I mostly use the language of "Othering" throughout this Chapter. I also draw on the concept of *homo sacer*.[533] The term "Othering" imports that one must do something to construct someone as an Other against the Self. Othering is as a process, not merely the expression of an immutable truth or natural state of being.[534] The concept of *homo sacer* clearly draws the connection between Othering and violence.

Using Othering as a lens through which to understand the THRO Act assists in exposing how it enacts a state process to construct a person as against the state and society, in part, by engaging other logics of oppression.[535] To put it another way, "Othering" under the THRO Act is clearly linked to instantiations of different constructions of Others through – among other things – racism,[536] sexism[537] and homophobia.[538] Othering, when used

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[530] See, for example, Robyn Wiegman and Elizabeth A Wilson, 'Introduction: Antinormativity's Queer Conventions' (2015) 26(1) *differences* 1; Emma K Russell, 'Queer Penalities: The Criminal Justice Paradigm in Lesbian and Gay Anti-Violence Politics' (2017) 25(1) *Critical Criminology* 21; Or from a different angle, see Bernadette McSherry, Alan Norrie and Simon Bronitt, 'Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Bloomsbury Publishing Plc, 2008) 3.

[531] See, for example, Michael Hardt and Antonio Negri, *Empire* (Harvard University Press, 2000); Susanne Krasmann, Oxford University Press, *Oxford Research Encyclopedia of Criminology and Criminal Justice* (at 24 January 2018) 'Enemy Penology'; Carlos Gómez-Jara Díez, 'Enemy Combatants Versus Enemy Criminal Law: An Introduction to the European Debate Regarding Enemy Criminal Law and Its Relevance to the Anglo-American Discussion on the Legal Status of Unlawful Enemy Combatants' (2008) 11(4) *New Criminal Law Review* 529.

[532] Agamben (n 357).

[533] Ibid.

[534] Jagose (n 125) 16–19; Crenshaw (n 521) 1297; RW Connell, *Masculinities* (Allen & Unwin, 1995) 35; 71; Watego (n 521) 26; Spivak (n 370) 70; Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Routledge, 2000) 17; Irene Watson, 'Settled and Unsettled Spaces: Are We Free to Roam?' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2007) 15, 27.

[535] Mbembe (n 528) 132; Loughnan (n 87) 203–204.

[536] See, for example, Mbembe (n 528); Frantz Fanon, *The Wretched of the Earth*, tr Constance Farrington (Penguin, 2001); Jasbir K Puar, '"The Turban Is Not a Hat": Queer Diaspora and Practices of Profiling' (2008) 4(1) *Sikh Formations* 47; Hage (n 534); Aileen Moreton-Robinson, 'Writing off Indigenous Sovereignty: The Discourse of Security and Patriarchal White Sovereignty' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2007) 86; Watson (n 534).

[537] See, for example Mohanty (n 124); Benhabib and Cornell (n 526).

[538] See, for example, Jagose (n 125) 16–17; Butler (n 125) 31–32.

through legal processes like the THRO Act, is rarely just about that individual law. Othering is always about wider power relations within a state, which are influenced by logics of oppression that are not exclusively state-based, signify lack of belonging and legitimise harm.[539]

In the process of Othering, the state, particularly through the executive, controls the production of knowledge which constructs the subject as an Other. The state uses the category of Other to signify the subject's relationship to the state and the people whom the state considers to properly belong and constitute it.[540] That is, the Other is constructed as outside of and against those who belong and the state, and by their very being poses a challenge to the state itself. "Orientalism", for example, is a canonical example of racialised Othering explored by Edward Said, who said:

> The Orient that appears in Orientalism, then is a system of representations framed by a whole set of forces that brought the Orient into Western learning, Western consciousness, and later, Western empire. If this definition of Orientalism seems more political than not, that is simply because I think Orientalism was, itself, a product of certain political forces and activities. Orientalism is a school of interpretation whose material happens to be the Orient, its civilisations, peoples, and localities.[541]

So, Othering moves beyond just marking one as an Other who does not belong, because it is aided by other logics of oppression to harm the Othered subject. That is, the Other ought not to belong because they are against the Self, but also because they are marked as an Other against the state through otherwise existing logics of oppression. Others are marked as subjects who may harm the state and its proper subjects. Thus, the Other is not just unequal to the Self but dangerous, necessitating a response beyond mere signification as Other.[542] In labelling someone as an Other the indirect violence begins as the process causes pain and psychological harm for the person.

But Othering is not just labelling alone, it permits violent action by the state to mitigate or eliminate the perceived threat posed by the Other's existence. The construction of a

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[539] Jagose (n 125) 53–54; Ahmed (n 124) 43–44; Spade (n 525) 21–22.

[540] Mbembe (n 528) 162. Ibid 132; Crenshaw (n 521) 1296–1297; Foucault (n 529) 4; Spade (n 525) 24.

[541] Edward W Said, *Orientalism* (Penguin, 2003) 202–203.

[542] Mbembe (n 528) 132; 162; Hardt and Negri (n 531) 13; Ahmed (n 124) 62–80; Moreton-Robinson (n 536) 101; Watson (n 534) 18; Spade (n 525) 21.

person as an Other orients them as not merely different, but against the state and the subjects who belong. The violence consequent on Othering is important because it ensures that the Other can never belong and ossifies their perpetual status as an Other.[543] Hardt and Negri, who prefer the language of "enemy", say:

> Today the enemy, just like the war itself, comes to be at once banali[s]ed (reduced to an object of routine police repression) and absoluti[s]ed (as the Enemy, an absolute threat to the ethical order).[544]

But as the category Other is constructed, it is not homogenous and unstable itself.[545] There are different instantiations of the Other and the Self, the only commonality being that the Other is always constructed in opposition to, and as a threat to, the Self (however they are constructed).[546] Accordingly, the violence faced by Others varies depending on the content of the signification that is constructed. Different intersecting types of Othering are deployed when the THRO Act is used at different times. The Other in THRO proceedings is always constructed as a terrorist[547] and criminal.[548] But is sometimes also racialised with negative stigma attached to First Nations' identity,[549] or constructed as mentally ill and uncontrollable,[550] and sometimes a combination of categories. The

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543 Cf Achille Mbembe, who says that the Other is always desperate to prove their belong and sense of humanity: Mbembe (n 528) 132.

544 Hardt and Negri (n 531) 13.

545 Crenshaw (n 521) 1242–1245; Mohanty (n 124) 191; 223–224; Rita Kaur Dhamoon, 'Relational Othering: Critiquing Dominance, Critiquing the Margins' (2021) 9(5) *Politics, Groups, and Identities* 873, 875.

546 Dhamoon (n 545) 876–877. Mohanty (n 124) 191; Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989(1) *University of Chicago Legal Forum* 139, 140; Sumi Cho, Kimberlé Williams Crenshaw and Leslie McCall, 'Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis' (2013) 38(4) *Signs: Journal of Women in Culture and Society* 785, 787–788.

547 See, Puar (n 132).

548 See, Loughnan (n 87) 7.

549 Stephane Shepherd, 'Violence Risk Assessment and Indigenous Australians: A Primer' (2018) 43(1) *Alternative Law Journal* 45; Eileen Baldry, Bree Carlton and Chris Cunneen, 'Abolitionism and the Paradox of Penal Reform in Australia: Indigenous Women, Colonial Patriarchy, and Co-Option - ProQuest' (2015) 31(3) *Social Justice* 168; Watego (n 521); Crystal McKinnon, 'Striking Back: The 1980s Aboriginal Art Movement and the Performativity of Sovereignty' in Brendan Hokowhitu et al (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge, 2020) 324, 326–327.

550 See, Helen Punter, 'Policing Persons with Mental Illness: Preventive Justice or Preventing Injustice?' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2018) 75.

person subjected to THRO proceedings, however, is never constructed as someone who belongs or ought to belong within the state and its society.

The concept of the *homo sacer* or bare life is useful in connecting Othering and violence. The *homo sacer* lies at the point of indistinction between the two forms of life as understood by the Ancient Greeks.[551] The first is *'zoē',* 'the simple fact of living common to all living beings'.[552] The second is '*bios',* 'which indicated the form or way of living proper to an individual or a group'.[553] The *homo sacer* is a life that 'may be killed and yet not sacrificed',[554] a life lived outside divine and human made laws.[555] The state of exception, which, as I will explore in Chapter 5, suspends the otherwise prevailing juridical order and allows unpunishable violence against *homines sacrii*.[556] So practically, *homo sacer* 'simply meant a life that could be killed'.[557] In rendering people *homo sacer* – constructing them as an Other – the state 'politici[s]e[s]' life by placing it beyond the juridical order which denies a person's right to live a full life and enables violence.[558]

The *homo sacer*, the Other, is prominent in eras marked by biopolitics. Biopolitics, Agamben said, carries an 'essential characteristic', the 'constant need to redefine the threshold in life that distinguishes and separates what is inside from what is outside'.[559] Biopolitics sees the state exercise control over life itself. This, in turn, affords the state great power over a person, how they live and are represented within society. So, the state, by '[a]t once excluding bare life from and capturing it within the political order' means that the construction of the Self and Other becomes 'hidden foundation on which the

[551] Agamben (n 357) 76; Giorgio Agamben, 'State of Exception' in Kevin Attell (tran), *The Omnibus Homo Sacer* (Stanford University Press, 2017) 161, 187.

[552] Agamben (n 357) 5.

[553] Ibid.

[554] Ibid 10.

[555] Ibid 63.

[556] Ibid 70.

[557] Ibid 73.

[558] Ibid 75.

[559] Ibid 109.

entire political system rested.'[560] Naturally, control of life also concerns control of death, and the distinction between the two is becoming increasingly blurred.[561]

In placing control of the person at the core of the state's functions, the concept of *homo sacer* is useful for seeing the stakes of Othering and how it is both violent and enables other violence. Othering is principally about constructing markers of identity which differ from the Self. Othering is therefore indirectly violent by simply constructing people as subjects who not only fall outside of the proper subjects of the state and society but also pose a threat to its existence. Othering also enables further violence against the Other because of their threatening status.

4.2. WHO IS THE OTHER?

To this point in the Chapter, I introduced the way in which Othering is inextricably linked to other logics of oppression which are called in aid to emphasise the Othered subject's status in THRO proceedings. I also emphasised the violence that can be enacted upon othered subjects when the control of lives becomes central to politics. I now examine how Othering under the THRO Act is linked to other logics of oppression.

When constructing people as Others in THRO proceedings, the state is not making the category of Other anew, but rather reproducing and extending from existing constructions of the Other. This is important, because by using existing categories of Others as the foundation for Othering under the THRO Act, it assists the state in legitimising direct violence through the THRO Act. As with the techniques that the state uses to Other, the categories of Others are manifold. In this section I identify the main categories of Others that are used by the executive and court through THRO proceedings. Calling in aid existing constructions of the Other is powerful, because it allows the state to rely on known categories of Other against whom the state has already legitimised the use of violence. I focus on the categories of the terrorist, the criminal, the mentally ill person and the racialised Other.

[560] Ibid 11.

[561] Ibid 101–102.

4.2.1. THE TERRORIST OTHER

The terrorist Other is the most obvious category of Other that the state calls in aid to allow violence against people subjected to THRO proceedings. "Terrorism" is, after all, the first word in the Act's title. The executive argues that the defendant is a terrorism related high risk offender, and the court needs to find this to be the case before making THRO orders.

Since the attacks on the Twin Towers in New York, eternalised as "9/11", the Western world has waged a "war on terror".[562] The terrorist Other has been constructed against a backdrop of serious political violence which generates public spectacle often through randomness, scale of deaths, injuries and brutality.[563] People who are considered to be terrorists are driven by many factors, but often fundamentally hold a grievance or perceived grievance with the state.[564] Often the political demands of people who engage in terrorist acts hold ideologies or political views which are difficult to reconcile with liberal values,[565] which place them within the category of the Other who simply cannot be known by the Self and must be denounced and restrained.[566]

The terrorist has been represented as the most serious threat to Australia too, despite Australia remaining comparatively unscathed from terrorist attacks.[567] Australia joined Western allies in the war on terror which manifested in various ways.[568] One of which

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[562] Tamara Tulich, 'A View Inside the Preventive State: Reflections on a Decade of Anti-Terror Law' (2012) 21(1) *Griffith Law Review* 209, 211–212.

[563] Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2010) 6; Shahram Dana and Ben White, 'Terrorising Innocence: Australia's Counter-Terrorism Laws Trump Freedom of Liberty' (2021) 27(2) *Australian Journal of Human Rights* 352, 353.

[564] Saul (n 563) 314–315.

[565] Cassie McLinden and Elaine M Barclay, 'Australian Media Portrayals of Domestic Terrorism: The Sydney Siege and Parramatta Shooting' (2018) 29(3) *Current Issues in Criminal Justice* 209, 220; Saul (n 563) 314–315.

[566] McLinden and Barclay (n 565) 212; Saul (n 563) 3–4.

[567] Shandon Harris-Hogan, Lorne L Dawson and Amarnath Amarasingam, 'A Comparative Analysis of the Nature and Evolution of the Domestic Jihadist Threat to Australia and Canada (2000–2020)' (2020) 14(5) *Perspectives on Terrorism* 77, 94.

[568] Tulich, 'A View Inside the Preventive State: Reflections on a Decade of Anti-Terror Law' (n 562) 212; See generally, Kathleen Gleeson, *Australia's 'War on Terror' Discourse* (Routledge, 1st ed., 2014); Biplab Debnath, 'Did "History" and "Geography" Collide?: Examining Australia's Allegiance toward the USA-Led "War on Terror" and Its Implications for Regional Engagement under the Liberal–National Coalition of John Howard' (2024) 19(2) *The International Journal of Interdisciplinary Global Studies* 1; Jack Holland, 'The

was a flurry of law making in the immediate post-9/11 period.[569] Australia's criminal law was amended, pre-crime surveillance and detention regimes strengthened, and police powers increased.[570] Australia also joined Western allies in waging an aggressive war in Afghanistan as retribution and defence against the perceived global terrorism threat from Afghanistan.[571] The terrorist Other and the threat that they were presented as posing to the Australian State led to swift actions so that their threat could be neutralised.

The THRO Act is one of the laws made to defend Australia from the terrorist Other. Rather than incapacitating and exacting retribution on people convicted of terrorist offences, the THRO Act is seen as preventive. The THRO Act's focus is on stopping terrorist acts before they happen, so it targets people who present a prospective risk, and have a history of criminal offending but need not have committed a terrorist offence. The anxiety with which the terrorist Other is perceived is so strong that a regime of lawful preventive detention has been enacted. The terrorist Other is so far from being a proper subject of the state, that the state is perceived as having no choice but to incapacitate them using whatever means.

The terrorist Other label diffuses difference and elides nuance, which can lead to physical and psychological violence. As will be seen later in this Chapter, Mr Dunn presents an example of this. His threats in isolation show a dangerous person who poses an existential threat to the state. But Mr Dunn's views are complex. Justice Adams observed that Mr Dunn 'does not accept that the Australia criminal justice system is fair'.[572] Naomi Prince opined that Mr Dunn 'has a significant history of making statements and threats supporting of politically motivated violence and revenge-based violence "in the

Language of Counterterrorism' in Richard Jackson (ed), *Routledge Handbook of Critical Terrorism Studies* (Routledge, 2016) 203.

569 John Battersby, 'Terrorism Where Terror Is Not: Australian and New Zealand Terrorism Compared' (2018) 41(1) *Studies in Conflict & Terrorism* 59, 66. See generally, Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011).

570 See, for example, Linda Briskman, 'The Creeping Blight of Islamophobia in Australia' (2015) 4(3) *International Journal for Crime, Justice and Social Democracy* 112; Williams (n 4); Hardy and Williams (n 1). See also Adrian Cherney and Kristina Murphy, 'Being a "suspect Community" in a Post 9 / 11 World: The Impact of the War on Terror on Muslim Communities in Australia' (2016) 49(4) *Australian & New Zealand Journal of Criminology* 480, 488 on policing practices specifically.

571 Debnath (n 568).

572 *State of New South Wales v Dunn (a Pseudonym)* (n 190) [48] (N Adams J).

name of Allah" and for retribution due to the mistreatment of Muslims.'[573] Dr Ellis considered that Mr Dunn 'has no specific ideological goal, but feels that "the system" is "unfair"'.[574] Dr Seidler further identified that Mr Dunn's early life in Pakistan 'exposed [him] to cultural trauma and violence, the pressures of migration and cultural dislocation and the risks associated with an ostensibly lawless, hedonistic and abusive home environment'.[575] But by invoking the category of the terrorist Other, nuanced understandings about Mr Dunn become unavailable and the complexity of a person, their motivations, intentions and psychosocial context becomes obscured. This shows that the terrorist Other is inherently threatening and in need of the state's violent control.

4.2.2. The criminal Other

Another category of Other invoked by the executive and accepted by the courts in THRO proceedings is the criminal. While the terrorist Other poses an innate existential risk to the state, the criminal Other does not. The criminal shows disregard for laws made in a democratic society which can justify their removal from society for periods of time or subjecting them to "correction" in the community.[576]

While in the past the convicted criminal who had served their sentence was entitled to reintegration into the community with a presumption of harmlessness, that entitlement has eroded over time.[577] Working with children checks and criminal record checks on employment are prevalent.[578] These checks are even now required for people who participate in community activities and organisations. Policing practices have become pre-emptive leading to surveillance and harassment once people are released from

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[573] Ibid [64] (N Adams J).

[574] *State of New South Wales v Dunn* (n 236) [132] (Wilson J).

[575] Ibid [78] (Wilson J).

[576] See generally David Brown et al, *Criminal Laws* (Federation Press, 7th ed, 2020) 14.

[577] Ashworth and Zedner (n 172) 7; Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press, 2012) 189; Henrique Carvalho, *The Preventive Turn in Criminal Law* (Oxford University Press, 2017) 108.

[578] See generally Nathan Stormont, 'Not Child-Related: Unnecessary Working with Children Checks as Irrelevant Criminal Records Discrimination' (2022) 48(2) *Monash University Law Review* 160.

prison into the community.[579] Post-sentence supervision and detention regimes, like the THRO Act, have also become prevalent, which require a conviction to establish eligibility for such orders which can lead to ongoing incarceration and supervision indefinitely.[580] All this is without considering the social stigma and frenzied media attention that "criminals" attract.[581]

The connection between the THRO Act and the criminal Other is clear. Noone can be subjected to a THRO order unless they have been convicted of a sufficiently serious criminal offence. So, everyone who is subjected to THRO proceedings is already marked as a criminal Other, which is called in aid throughout THRO proceedings to justify their further designation as a terrorist Other and substantiate the executive's claim that they continue to pose a threat to society. Whilst the criminal Other does not necessarily pose an existential threat to the state in the same way that the terrorist Other does, they are increasingly treated with a suspicion of ongoing dangerousness. The criminal Other, like the terrorist Other is undesirable within the state.

The executive in THRO proceedings reinforces the person's preexisting construction as a criminal Other to strengthen their claim of the person's ongoing dangerousness to justify their ongoing incarceration and supervision. Moreover, the reiteration of their status as an Other contributes to the violence of Othering whereby the person is designated as outside the community of belonging. The dual designation of a person subjected to proceedings as a terrorist and criminal makes it difficult to defend the proceedings. Even if the plaintiff is wrong or overreaching in claiming that a person is a terrorist, the person has already been convicted of a criminal offence and often continues to utter threats of violence or enact violence. So, the state's perception of a person's perceived undesirability continues to be reinforced through the THRO proceedings. While the category of criminal Other exists generally in relation to anyone who is convicted of a

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[579] Brown et al (n 576) 433–439; Vicki Sentas and Michael Grewcock, 'Criminal Law as Police Power: Serious Crime, Unsafe Protest and Risks to Public Safety' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 75.

[580] See Tulich, 'Post-Sentence Preventative Detention and Extended Supervision of High Risk Offenders in New South Wales' (n 318); Dyer and Pallas (n 56); Andrew Dyer, 'Irreducible Life Sentences, Craig Minogue and the Capacity of Human Rights Charters to Make a Difference' (2020) 43(2) *University of New South Wales Law Journal* 484.

[581] McLinden and Barclay (n 565) 211; On the media and Islamophobia particularly, see, Briskman (n 570) 116.

criminal offence and not subjected to post-sentence supervision and detention, its invocation for people subjected to post-sentence supervision and detention proceedings shows the person that the liberal presumption of harmlessness once their sentence expired does not and ought not apply to them. This prolongs the effect of a person being marked as a criminal Other.

Beyond invoking criminal histories and drawing heavily from the facts of a person's past criminal offending, the executive invokes the category of the criminal Other in various ways. The executive obtains risk assessments which speak to the person's risk of further violent offending.[582] The executive makes submissions about whether a person has completed counselling, treatment and programmes to address their criminal offending.[583] Ultimately THRO proceedings seek to demonstrate that if the person is not supervised or detained, they will not only engage in terrorism or violent extremism and solidify their status as a terrorist Other, but will also reiterate their status as a criminal Other through criminal offending. The Othered status of the person subjected to THRO proceedings then enables direct forms of violence to be used against the person.

4.2.3. THE MENTALLY ILL OTHER

Some people subjected to THRO proceedings are constructed as Others because they live with mental illness. Mental ill health has long been the cause of stigmatisation and exclusion from society as people's lives are marked with perceived aberrance and qualitative difference compared with the ideal life presented by the state.[584] Mental ill health is often a marker that leads to direct violence being enacted against people through forced restraint, medication and institutionalisation, often involuntarily.[585]

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[582] *State of New South Wales v Dunn* (n 236) [128] (Wilson J).

[583] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [121] (N Adams J).

[584] Bernadette McSherry, 'Preventive Justice, Risk of Harm and Mental Health Laws' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2018) 62, 66–68; Punter (n 550) 90.

[585] Carroll et al (n 437) 16–18; See generally, Kerri Eagle, Todd Davis and Andrew Ellis, 'Unfit Offenders in NSW: Paying the Price for Gaps in Service Provision' (2020) 27(5) *Psychiatry, Psychology and Law* 853; Lisa Brophy et al, 'Community Treatment Orders and Supported Decision-Making' (2019) 10 *Frontiers in Psychiatry* 414.

The effect of Othering people who live with mental ill health is that they are often ostracised from society as their mental ill health is seen to draw suspicion and signify outsider status within the state.[586] There is also a strong urge towards medicalisation of mental ill health, irrespective of the costs to physical health, employability and relationships.[587] Medicalisation, however, can lead to respectability and control which can diminish a person's Othered status and allow them to participate in society with their Othered status masked and their threat to the state mitigated.[588]

Medicalisation is embedded within the THRO Act's very structure. Proceedings must be commenced with a Risk Assessment Report these reports are ordinarily prepared by a CSNSW employed psychologist.[589] Following a preliminary hearing orders for independent psychological and/or psychiatric assessments are made.[590] While incarcerated, a person subjected to THRO proceedings is often subjected to observation, counselling, participation in programmes and forced medication (seen through Mr Dunn's case considered below). In rare cases a person may also be subjected to the control of the Mental Health Review Tribunal (MHRT) and on a Forensic Community Treatment Order (FCTO) (as seen in both Mr Dunn and GB's cases considered below).

While not all people subjected to THRO proceedings live with mental ill health, it is not because the state does not seek to construct them as such. The very structure of the THRO Act ensures that a person subjected to proceedings can be labelled as an Other in as many ways possible. The THRO Act, in requiring psychological and psychiatric assessments,

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[586] McSherry, 'Preventive Justice, Risk of Harm and Mental Health Laws' (n 584) 64; This leads generally to an overrepresentation of people with mental ill health being incarcerated: Ruth McCausland and Eileen Baldry, 'Who Does Australia Lock Up? The Social Determinants of Justice' (2023) 12(3) *International Journal for Crime, Justice and Social Democracy* 37, 43.

[587] See generally Richard Hallam, *Abolishing the Concept of Mental Illness* (Routledge, 2018) especially, Chapter 1; Meredith R Bergey, 'The Changing Drivers of Medicalisation' in Bruce Cohen (ed), *Routledge International Handbook of Critical Mental Health* (Routledge, 2017) 153.

[588] Hallam (n 587) 17–18; Sathyaraj Venkatesan and Arya Suresh, 'Critique of DSM, Medicalisation and Graphic Medicine' (2022) 14(2) *Journal of Graphic Novels and Comics* 233, 236; Simone Fullagar, 'Foucauldian Theory' in Bruce Cohen (ed), *Routledge International Handbook of Critical Mental Health* (Routledge, 2017) 39, 43.

[589] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 23(1)(b); s 37(4)(b).

[590] Ibid s 38(5); s 24(5).

ensures that everyone who is subjected to THRO proceedings has their mental health scrutinised.

But a person's mental health does not exist in a vacuum, so it is no surprise that the psychiatrists and psychologists are often the participants in THRO proceedings who offer the most nuanced descriptions of people subjected to THRO proceedings. In their effort to understand causes and effects, they come to understand a person's life history and motivating factors, despite ultimately being engaged to prepare reports to justify attempts to Other and violently control a person under the THRO Act.

4.2.4. THE RACIALISED OTHER

Some people subjected to THRO proceedings are constructed as racialised Others. Racialisation refers to 'the ways that racial categories are constructed' and can be used as 'an analytical frame to reveal the historical socio-political making of these categories'.[591] Racialisation affixes a "Race" to non-white people and is always associated with distancing the racialised Other from the Self.[592] Alana Lentin writes about how 'race thinking constructs gradations of acceptability that are made apparent in law and policy via the recourse to degrees of blood purity, differential susceptibility to civilisation, or hierarchies of societal assimilability'.[593] There has also been a long historical association between racialised Others and heightened criminality.[594] As with Othering generally, racialisation is violent in effect.

Australia has a long, torrid, and violent history of racialisation. This history started with the founding mythology for the modern Australian state, the doctrine of *terra nullius*, that this land belonged to no-one.[595] This declaration was made despite the continuous

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[591] Anita Harris, 'Making Whiteness and the Racialisation of Australian Youth Citizenship' (2024) 45(4) *Journal of Intercultural Studies* 589, 591.

[592] Ibid; drawing from Helen Ngo, *The Habits of Racism: A Phenomenology of Racism and Racialized Embodiment* (Lexington Books, 2017) xiii.

[593] Alana Lentin, 'No Room for Neutrality' (2022) 45(3) *Ethnic and Racial Studies* 485, 489.

[594] See generally, Vicki Sentas, 'Beyond Media Discourse: Locating Race and Racism in Criminal Justice Systems' in Monish Bhatia, Scott Poynting and Waqas Tufail (eds), *Media, Crime and Racism* (Springer International Publishing, 2018) 359; Megan McElhone, 'Gangland and Task Force Gain: An Alternative Account of Middle Eastern Crime in Sydney, Australia' (2023) 31(3) *Critical Criminology* 793.

[595] Moreton-Robinson (n 536) 87.

presence of First Nations' people in the land now referred to as Australia for many thousands of years prior to the arrival of white explorers and colonists. The Australian state and the Australian people continue to struggle in reckoning with the racism of the modern State's foundation.[596] "Closing the Gap" is the euphemism given to the policy agenda that refers to improving the life chances of First Nations people.[597] "The Gap" exists in almost every aspect of public policy from literacy to life expectancy, child removal rates to incarceration.[598] Some suggest that First Nations people are the most incarcerated globally.[599]

So, it is unsurprising that racialisation also manifests in THRO proceedings to reinforce the racialised subject's status as Other. Racialisation manifests in three main ways. The first is in relation to First Nations people subjected to proceedings. The second is in relation to Muslim people who are made subject to THRO proceedings. The third is in the very small number of Non-Muslim white people being subjected to THRO proceedings and orders.

The racialisation process for First Nations people commenced with the declaration of *terra nullius* and continues today as indicated above. GB's case is one of the few to which I repeatedly return throughout this Thesis. GB is identified as an Aboriginal man in the judgment. THRO proceedings have been used against another four Aboriginal men, two others like GB who are presented by the executive as Islamic extremists,[600] and one who

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[596] Watego (n 521) 46; Singh warns that First Nations people who claim sovereignty are at risk of being captured within the eligibility criteria of the THRO Act: Singh (n 97).

[597] 'Closing the Gap' (2024) https://www.closingthegap.gov.au/; 'National Agreement on Closing the Gap', *Closing the Gap* (July 2020) https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap.

[598] Kirstie Wellauer and Stephanie Boltje, 'Latest Closing the Gap Data Shows Only Five out of 19 Targets Are "on Track". Will the next Generation Get a Fair Go?', *ABC News* (online, 6 March 2024) https://www.abc.net.au/news/2024-03-06/closing-the-gap-targets-progress-report-2024/103546578. See also, Matthew Fisher et al, 'Stakeholder Perceptions of Policy Implementation for Indigenous Health and Cultural Safety: A Study of Australia's "Closing the Gap" Policies' (2021) 80(2) *Australian Journal of Public Administration* 239; Archie Thomas et al, 'First Nations Media in the Closing the Gap Era: Navigating the New Self-Determination' (2023) 0(0 (online first)) *Media International Australia*.

[599] 'Uluru Statement from the Heart' (2017) https://ulurustatement.org/the-statement/view-the-statement/; Thalia Anthony, 'FactCheck: Are First Australians the Most Imprisoned People on Earth?', *The Conversation* (online, 6 June 2017) http://theconversation.com/factcheck-are-first-australians-the-most-imprisoned-people-on-earth-78528.

[600] *State of New South Wales v Ceissman* (n 218); *State of New South Wales v RC (No2)* [2019] NSWSC 845.

was a drug legalisation activist who did not accept the authority of the Australian state.[601] First Nations people are the Others born from Australia's origin myth, so it is unsurprising that their racialised identities as people who do not constitute part of the state are weaponised through THRO proceedings. By invoking the category of the First Nations Other, the state ensures that all of the negative associations that have been constructed as carried by that identity marker are brought to bear in THRO proceedings.

The racialised Othered identity of Muslims in Australia is multifaceted, but stems from two very powerful loci. The first is the myth of a "White Australia" which propounds that anyone other than white people are not proper subjects within the state.[602] The second is the association between Muslims and terrorism that has been constructed in the post 9/11 period which I have already considered above.[603] Of the thirty-three people who have been subjected to THRO proceedings, twenty are presented by the executive as associated with Islam. This is perhaps unsurprising as racialised Others haunt the white psyche in Australia as the quintessential Other with different religious beliefs, languages, foods, cultures and customs. By invoking the characterisation of a person as a Muslim Other in THRO proceedings, it identifies the person as immediately different and threatening.

There is a small proportion of people subjected to THRO proceedings who are neither identified as First Nations nor Muslim. Of the thirty-three people subjected to THRO proceedings only ten fit this category. Only three of the ten people have been subjected to THRO orders.[604] This is despite Australian intelligence agencies continuing to warn of a rise in white supremacy and extreme right wing ideology.[605] The very small number of white people, people who are generally seen as proper subjects of the state, from THRO proceedings, further demonstrates that the THRO Act is used as a tool of Othering. It is

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[601] *State of New South Wales v Dickson (Preliminary)* (n 186); *State of New South Wales v Dickson (Final)* (n 186).

[602] Moreton-Robinson (n 536) 97.

[603] See also Briskman (n 570) 116; Sentas (n 594); Cherney and Murphy (n 570).

[604] *State of New South Wales v White (Final)* (n 181); *State of New South Wales v Hardy* (n 446); *State of New South Wales v Holt (No 8)* (n 245).

[605] See generally Blackbourn (n 100) 77; Shandon Harris-Hogan, 'Is Far-Right Violence Actually Increasing in Australia?: Tracking Far-Right Terrorism and Violence in Australia Between 1990–2020' (2023) 17(2) *Perspectives on Terrorism* 1, 8; 21; See also Singh (n 97).

otherwise hard to understand how a purportedly preventive counter-terror tool is not being used more against people who are increasingly seen as posing a threat to the state and society.

4.3. Constructing the Other

In this section I examine how the state, primarily through the executive, constructs a subject as an Other. Constructing a subject as an Other is indirectly violent but also legitimises direct violence to be perpetrated against the Other. Using examples, I examine six strategies evident from the case law that have been effective in constructing a person as a "high risk offender". Each strategy represents the person subjected to proceedings as an Other who needs to be subjected to the state's violence under the THRO Act. The strategies that I examine are rejecting the self-narrative presented by the person subjected to proceedings; decontextualising events; splitting criminal and medical histories; selectively emphasising medical evidence; selectively appealing to experts; and Othering people by association. While I address each of the strategies separately, they are interlinked and feed into each other. For example, sometimes rejecting a self-narrative can decontextualise an event. Sometimes they are all used, at other times only some of them are used in a case.

But before I analyse the six strategies, I examine how a person is already prefigured as an Other before proceedings commence which is then used by the plaintiff during proceedings to reinforce their othered status. At times the prefiguring can be because of a person self-identifying as a terrorist, at others because parts of the state, usually agencies within the executive like CSNSW, have designated them as such. I separate this out from the other six strategies, because the prefiguring occurs before the proceedings are commenced but the evidence is then used in the proceedings with some force.

4.3.1. Prefiguring status as an Other

The executive as plaintiff refers to evidence that prefigures the person subjected to THRO proceedings as a terrorist Other. This evidence sometimes takes the form of self-expression, self-identification as a terrorist or with a terrorist organisation. But it also takes the form of designations that have been applied to a person while incarcerated. Even if the evidence used to prefigure a person as a terrorist is legally tenuous, it is rhetorically and affectively powerful. It also demonstrates how the state's process of

Othering a person is complex, multi-layered and overlapping. By prefiguring a person's status as an Other based on preceding conduct, the plaintiff presents the person subjected to THRO proceedings as someone who is already otherwise an Other and the THRO proceedings are used to conclusively determine that fact which leads to their ultimate designation as a threat requiring violent control.

A good example is GB who self-identified as a terrorist. On 21 June 2020, he reportedly said 'Take me to Goulburn Supermax, I want to be with Bassam Hamzi. I am a terrorist',[606] and on 15 July 2018, he wrote 'ISIS' three times on his cell walls using his blood.[607] I address GB's connection to Hamzi below in the section on Othering by association. I also deal with the psychiatric evidence which identified that GB had little knowledge about ISIS later in this Chapter. GB was never convicted of a terrorist offence and beyond his self-identification as (1) a terrorist; and, (2) having a relationship with ISIS, there was no evidence to support his assertions. The psychiatrists made it clear that GB was prone to utter threats or declare a relationship to ISIS when he felt threatened or was particularly mentally unwell. Nonetheless, the plaintiff relied on these facts to support their argument that GB was a high risk offender who required the violent control of the THRO Act. While references to ISIS and self-declaring himself a terrorist may engender fear, they fall short of GB making threats of interpersonal violence, let alone carrying out terrorist acts. They are forceful, however, in demonstrating that GB poses a threat to the state.

Beyond self-identification as a terrorist, it was noted by the plaintiff that GB had received previous designations because he posed a terrorist threat. The first was a 'National Security Interest designation'.[608] It was also submitted that one Magistrate considered GB a terrorism related offender under the *Children's (Criminal Proceedings) Act 1987* (NSW) but did not revoke his parole[609] and another Magistrate made a determination that 'he was unable to be satisfied that [GB] would not engage in, incite or assist others to engage

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[606] *State of New South Wales v GB by his Tutor* (913) [2020 NSWSC 913 [24](68) (Lonergan J) ('*State of New South Wales v GB by His Tutor*').

[607] Ibid [24](57)(m) (Lonergan J).

[608] Ibid [56](60) (Lonergan J).

[609] Ibid [52](c) (Lonergan J).

in, terrorist acts or violent extremism' if released to parole, so his parole was revoked.[610] None of these decisions resulted in criminal convictions for terrorist offending. The National Security Interest designation is a classification applied using opaque criteria and opaque evidence by CSNSW. At least the factual findings by Magistrates were based on evidence. But still the reliance on all three matters prefigures GB's status as a terrorist Other by reference to conclusions alone without interrogating the basis for those conclusions. The plaintiff in constructing GB as an Other reiterates its preferred conclusion to prove that GB is an Other who requires violent control through THRO orders.

Mr Dunn presents another good example of how a person's status as a terrorist Other can be prefigured before THRO proceedings and then used within the proceedings. Following his repeated threats of violence and self-identification as a member of ISIS, he was designated as an 'extreme threat inmate' in October 2017.[611] The Risk Management Report filed in the proceedings and prepared by an employee of CSNSW also identified that he was a 'National Security Inmate'.[612] Again, without understanding the processes that lead to affixing these categories and criteria applied, these categories carry little meaning. But they carry rhetorical force. The executive and court in Mr Dunn's case placed weight on Mr Dunn's preceding categorisation as a terrorist by CSNSW which has prefigured him as an Other and smoothed the pathway towards THRO orders being made against him. If parts of the executive have already designated a person a terrorist and they are more intimately engaged with the person, then why would the court calls into question those designations?

4.3.2. Strategy 1 - Rejection of self-narrative

The plaintiff often rejects the self-narrative offered by the person subjected to THRO proceedings. This technique is an appropriate starting point through which to explore the six strategies of Othering, because it gives an insight into how people subjected to THRO proceedings describe what is happening and the narrative that the plaintiff tells about them during proceedings. In turning to critical theory to excavate the politics of the law,

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[610] Ibid [56](62) (Lonergan J).

[611] *State of New South Wales v Dunn* (n 236) [101] (Wilson J).

[612] Ibid [57] (Wilson J).

I try to draw attention to the human dimension of what the THRO Act allows the state to do. Exposing how the state rejects the self-narrative of people subjected to THRO proceedings is one way of doing this, which presents a clear picture of how the executive's use of THRO proceedings is violent.

Examining the recorded calls between Mr Dunn and his partner, CD provides an insight into how the executive's application against Mr Dunn is seen by him as a rejection of how he perceives himself because it is incongruous with his self-perception. The calls also demonstrate how the executive's actions towards Mr Dunn cause confusion and pain.

All calls from Mr Dunn to CD, were made between 30 April 2017 and 22 April 2018. At times he made multiple calls each day. I set out excerpts from the calls recorded in the judgments which are representative of key themes in the conversations. Some calls are more coherent than others and they are often difficult to follow. I extract excerpts at length, to show Mr Dunn's own words which powerfully illustrate my argument. The excerpts are:

1. 'I just want to do something. I'm frustrating […] I just want to knock someone and come to gaol for a long time, you know? [...] They'll get what they're pushing for you know? I'll tell them youse got what you wanted. You know? Youse want to leave a normal person alone until youse force him to do something wrong […] I want to knock someone that does computering like that Curtis Chen'.[613]
2. 'I want to go back to Pakistan – you know what I mean? [...] And I seen tourists from Australia – they're coming to Pakistan […] I swear I'm going to chop their head off'.[614]
3. 'I don't want to have no love for Aussies. I don't want have no love the disbelievers. I want to have only love for Muslims. In those Muslims they have disbelievers – if they like disbelievers they're not Muslims to me. They'll fuck them. They're dogs.'[615]

[613] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [88] (N Adams J).

[614] Ibid [89] (N Adams J).

[615] Ibid [90] (N Adams J).

4. ‘If my mother knows a disbeliever – behead her, burn her head off [...] You know? I don’t have – I don’t want to be here. You know – if extremist – if this is wrong that I want to be wrong. You know? I want to be them.’[616]
5. ‘Fuck Australia. Fuck them. I can’t wait to wake up one day in the news and see there’s a big bomb blast, 100 Aussies dead, you know, mother fuckers, you know. I can’t wait for it […] I will take the rap for it, as long as there’s a big bomb blast in Australia there’s a big bombing, I will put my hand up for it, and I’ll be honoured to put my hand up for it and say ‘Suck shit, mother fuckers’[…] I don’t call this life anything anyway.’[617]
6. These comments were seemingly about a Police Officer: ‘I’m flying straight to Pakistan but I want to get them. You know? I’m going to fuck their mums. You know? I’m not going to let them go […] I want to make sure a chop his hands off – not his head off [...] I’m going to blast him in his head you know what I mean?’[618]
7. ‘I swear I’m going to do extra prayers when I see Australia get hit by terrorists – Allah – I can’t wait for them to blow up something in Australia or like a truck or something going through people like Spain and stuff. I will do extra praise you know? I want to celebrate.’[619]
8. ‘My problem is I’m head-fucked. My problem is to do how [sic] many Muslims are dying overseas…My problem is not to do with drugs…I’m saying I’m head-fucked knowing that how many Muslims these dogs – the Australian Army the putrid dogs – kill overseas.’[620]
9. ‘I’m a normal person and they’re making me into somebody that I’m not, you know. So if they’re going to make me into somebody that I’m not and they’re going to accuse me of it and going to go on with it and treat me like that, then I have to live up to those expectations […] If you accuse someone of terrorism, a terrorism doesn’t sit with a tag at home and thinking, “I have to apply this way.” A terrorist

[616] Ibid.

[617] Ibid [92] (N Adams J).

[618] Ibid [93] (N Adams J).

[619] Ibid [94] (N Adams J).

[620] Ibid [95] (N Adams J).

thinks of how to beat this, how to get this tag off me and kill people […] So if they're accusing me of terrorism, I have to become a terrorist, you know what I mean?'[621]

10. 'Well, I swear to Allah, I'm not a Muslim if I don't smash their head in when my case is finished […] They were coming to take me off everything, obviously, like, their scum, their Aussies, what do you expect? That's what Aussies do, you know. Aussies will go to your country and call your terrorist and kill your people in the name of terrorism […] I don't want to hurt no-one. I've made so many threats, so hopefully they take me to supermax, but it doesn't seem like it works through the threats, you know, it looks like I have to do a physically, you know.[622]
11. 'Youse wanted something, youse keep accusing me of violence, here you got it. I wasn't a violent person but now you just keep pushing me. You've got it.'[623]

The calls present an intimate picture of a person tormented by the state. The plaintiff is constructing Mr Dunn as a terrorist in the proceedings, but he does not perceive himself that way. He continues to utter threats of violence, he signals an intention to celebrate terrorist attacks on Australia and Australians, but denies being a terrorist himself. Mr Dunn is riddled with inconsistency and appears to have difficulty processing how his life is unfolding. The state causes pain and anguish in his life, which feels outside his control. At all times these calls were monitored and Mr Dunn was incarcerated. So, the threats which were directed at people who were not in custody were impossible to be carried out. Mr Dunn's words display frustration, resignation, and hopelessness. The pressure of the state is crushing Mr Dunn and this is conveyed through these calls.

Perhaps his threats to return to Pakistan or leave Australia in these calls and elsewhere are indicative of a desire to escape state control. A desire to escape from a state that constructs him as an Other who ought to be subjected to violent control. His repetition of the theme that the plaintiff is constructing him as a subject that he is not through the proceedings, is telling. Mr Dunn is aware of the power relations where the state is

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621 Ibid [98] (N Adams J). Along similar lines: 'They're making is someone to be like that I'm not, bub, someone – you know, like what the hell, you know […] Like I like big charges, you know. Like I don't mind […] if I got Super Max, I don't mind, but I want to go on TV […] In a way, at least, they like make me famous straight up' at [99].

622 Ibid [100] (N Adams J).

623 Ibid [101] (N Adams J).

manipulating the legal order to demonise him, as proxy for the radical Muslim terrorist, and in so doing, enables violence against him. From the commencement of proceedings to incarceration, the plaintiff's violence destroys the Other's spirit. Mr Dunn is resigned to his designation as Other, musing that it may be easier for him if he actually made good on his threats.

Mr Dunn's grievances with the state are also intrinsically linked to world politics. He shows concern for Muslims who are being killed overseas by western military forces including the Australian Army. This drives disgust directed at Muslims who are friends with non-Muslims. This is unsurprising given Mr Dunn's early life spend in Pakistan riddled with armed conflict which was addressed by the psychiatrists who assessed him. While Mr Dunn may not express his concerns with erudition and sophistication, many people both in the Global South and the Global North would share his concerns about pointless deaths and foreign interventions into geopolitical conflicts.[624] But Mr Dunn's sense of grievance and its legitimacy remains unaddressed through the THRO proceedings.

Mr Dunn's general sense of grievance with the state was reflected in his psychiatric assessments, in particular the one conducted by Dr Ellis. Justice Wilson, drawing from Dr Ellis' report stated:

> Like Dr Eagle, Dr Ellis noted that [Mr Dunn] was an "extreme threat inmate", who continually threatens acts of terror and asserts his desire to join ISIS from within custody. He considered that [Mr Dunn] "feels that white Caucasian wealthy people are treated more leniently in the legal system than poor Muslim people". The defendant demonstrated an attitude of being "generally angry at the political situation in the world", but denied knowing much about jihad or having an intention to commit a terrorist act […] He told Dr Ellis that he "wants to be left alone and to get help for his problem with drugs and black magic." […] Despite his claim not to support terrorist ideology, the defendant to Dr Ellis that he wanted to go to Goulburn Supermax so that he could be with known terrorists. He said that if the government wanted to label him as a terrorist "he will act and behave like one".[625]

[624] See, for example., Puar (n 132) 227–228; Mbembe (n 528) 83–85; Ilia Xypolia, 'From the White Man's Burden to the Responsible Saviour: Justifying Humanitarian Intervention in Libya' (2022) 31(1) *Middle East Critique* 1; Pugliese (n 138) 50–51; Swati Parashar and Michael Schulz, 'Colonial Legacies, Postcolonial "Selfhood" and the (Un)Doing of Africa' (2021) 42(5) *Third World Quarterly* 867; Debnath (n 568) 8.

[625] *State of New South Wales v Dunn* (n 236) [124]-[126] (Wilson J).

This evidence, instead of presenting Mr Dunn's identity as complex and tortured, is rather presented by the plaintiff and accepted by the court as proof of dangerousness and the need to subject him to the violence of the THRO Act. The outcome of the proceedings is to affix him with the label that he consistently rejects. In denying Mr Dunn's knowledge of his own life and experience, the indirect violence of Othering is made plain through these phone calls. The resignation, frustration, pain and helplessness are evident.

While Mr Dunn's clear denials of being a terrorist are somewhat unique, his sense of frustration and grievance with the state because of the THRO proceedings is not. Mr White also described his frustrations with the THRO proceedings against him. During an assessment by Ms Sweller, a psychologist, for the purpose of proceedings varying Mr White's ESO conditions, he:

> [E]xpressed his frustrations with the intensity of that monitoring. [Ms Sweller] considered that his hostility to those in authority may be reinforced by the conditions of his supervision, and that his sense of injustice may also be reinforced by his externalisation of responsibility for his behaviour.[626]

Elsewhere Schmidt AJ remarked that Mr White 'felt that he has been purposefully treated unfairly and victimised by the system as a whole'.[627] There is little interrogation of whether Mr White's concerns are borne out in the evidence, but rather as someone who is presented as an Other by the plaintiff, Mr White's sense of grievance is delegitimised as the violence of the THRO Act continues to be perpetrated against him.

Similarly, GB explained to Dr Singh, psychiatrist, that he made threats against Youth Justice staff because 'they hurt me and disrespected me'.[628] He made an explicit threat to 'blow up' a Youth Justice office 'because he was frustrated and angry and […] "[Youth Justice] call every day they ask stupid questions"'.[629] Dr Singh opined that GB's threats were often expressed when he 'felt angry, scared or emotionally dysregulated'[630] and

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[626] *State of New South Wales v White* (n 260) [53], as expressed by Schmidt AJ.

[627] Ibid [59] (Schmidt AJ).

[628] *State of New South Wales v GB by His Tutor* (n 606) [61] (Lonergan J).

[629] Ibid.

[630] Ibid [62] (Lonergan J).

were a response to 'relative lack of power in the situation he finds himself in'.[631] If not explicitly, implicitly, according to Dr Singh, GB was sensitive to the power imbalance between himself and the state and his comments to her reflected this.

Thus, a common experience for people subjected to THRO proceedings is that feelings of powerlessness and frustration are expressed by people about how the plaintiff seeks to construct them as terrorist Others. This is perhaps unsurprising given that most people subjected to THRO proceedings have not been convicted of terrorist offences and many live with cognitive impairments and serious mental health concerns. But it is crucial to the executive's construction of people as high risk offenders that the person's sense of grievance and frustration is delegitimised in constructing them as an Other. It is also crucial for the court to accept the denial of the self-narrative and feelings of people subjected to THRO proceedings if they seek to Other a person and affirm the executive's Othering narrative.

Rejection of a person's capacity to speak with authority about their own experience aids in their construction as an Other and is violent in itself. Rejecting a person's ability to speak and know oneself, as these examples make clear, induces hopelessness as people act out against the state bolstering the state's representation of them as a threat to its very existence which needs to be mitigated through THRO orders. So not only does the rejection of self-narratives from people subjected to THRO proceedings assist in constructing a person as an Other, it is violent as it causes harmful resentment and distrust as the person sees that the state does not want them to belong.

4.3.3. Strategy 2- Decontextualising events

A second strategy that the plaintiff uses to construct people as Others is by decontextualising events that are used by the plaintiff to justify a conclusion that a person is a terrorist high risk offender. My first example of this concerns an important series of events related to Mr Dunn which commenced on 17 June 2017. These events were crucial to the court's assessment that Mr Dunn posed an ongoing unacceptable risk of committing a serious terrorist offence because of utterances of violent threats. But the plaintiff's presentation of these events denuded them of essential context about Mr Dunn

[631] Ibid [71] (Lonergan J).

having been in psychosis immediately prior. This important context casts the threats in a completely different light, the threats take on a new character when placed in context which could have led to a different interpretation which may have warranted a different response to ongoing incarceration. But by taking these events outside of their broader context, they provide evidence for the plaintiff's argument that Mr Dunn was an Other who required violent control.

On 17 June 2017, Mr Dunn was released from custody to parole.[632] On 19 June 2017, he was admitted to hospital 'in a drug-induced psychosis'.[633] He reportedly intimidated police[634] called to assist paramedics who had difficulty treating him.[635] Police observed Mr Dunn 'hunched over on his knees' and 'periodically spit[ting] into a cardboard box.'[636] Mr Dunn said that he was affected by 'black magic'.[637] The threats giving rise to later criminal charges included the following statements which are essential to include to provide detailed context for my analysis:

1. 'If I wasn't in these handcuffs I would grab your Glock and shoot you with it. I am going to kill you all';[638]
2. 'You think you run this place but my boys run this fucking area. I will call the Darwich's [sic] and the Haouchar's and they will fucking […] fix you all up';[639]
3. 'I will fucking blow you all up cunts and rape your mothers and sisters. I will get you all in the name of Allah and one day you will see';[640]

[632] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [58] (N Adam J).

[633] Ibid [58] (N Adams J).

[634] Ibid.

[635] Ibid [78] (N Adams J).

[636] Ibid.

[637] Ibid.

[638] Ibid [79] (N Adams J).

[639] *State of New South Wales v Dunn* (n 236) [79] (Wilson J).

[640] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [80] (N Adams J).

4. ‘My mother was the one helping Osama and worked with the Taliban plotting his attack and worked hand in hand with him. I will carry on what my mother did and blow up Australia’;[641] and,
5. ‘I never wanted to live in this country anyway, I want to go to Syria and Turkey and live how real men live but fucking ASIO cancelled my passport.’[642]

On 21 June, three days after his admission to hospital with psychosis, the charges laid on 19 June 2017 and separate charges were before the Local Court for the first time and Mr Dunn pleaded guilty and requested that he be sentenced immediately.[643] Mr Dunn reportedly said, ‘[g]ive me a sentence with no parole so I can sit on the plane straight away as soon as I get out of gaol, and that day, I go back to my country in Pakistan, you know what I mean because for some reason, this country is not working out for me.’[644]

During the proceedings, the Magistrate left the bench[645] and Mr Dunn was alleged to threaten to blow up a police station and bomb the City to Surf.[646] Some, but not all, threats were recorded on court recording devices.[647] At his preliminary hearing, Mr Dunn denied all unrecorded comments.[648] The unrecorded comments, according to police witnesses, were:

> I’m going to blow up Holroyd Police and that fucking officer. I want to be judged under Sharia Law…I want to go back to Supermax with all my friends, you know, the terrorists, the Quamis.[649]

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[641] Ibid.

[642] Ibid.

[643] Ibid [59] (N Adams J).

[644] Ibid [81] (N Adams J).

[645] Ibid [82] (N Adams J) The reason for the Magistrate leaving the bench is not recorded in the judgments.

[646] Ibid [60] (N Adams J).

[647] Ibid [82] (N Adams J).

[648] Ibid.

[649] Ibid [83] (N Adams J).

Mr Dunn's recorded comments were:

> I am going to remind you of this attitude downstairs. I am going to fuck your mum doggy styles downstairs [...] Fuck, and I had the biggest party the other day when they tried to kill them people in Yemen, the terrorists, you know [...] I can't wait for this country to be bombed. If I had my choice, I would choose the City to Surf, you know, because there is a lot of fucking Malcolm Turnbull or these mother fuckers, you know, saying that he is going to crash our Halifa (?) [original transcription note], is he going to crash us this and that, you son of a bitch [...]
>
> As soon as I go back to gaol, I am knocking officer, bang, I am stomping on his head. I am going to the SuperMax, fuck this. You are just kidding yourself. Five, six months, you think I care about five, six months […] As soon as I get the first chance in gaol, one big bomb on your officer, two steps from where it is. If it is the Aussie one, I will be very happy. Fuck youse and your country; punch it up your arse, and your Aussie pride. I bet youse, you are going to remember me in your history books. You never had someone talk like this in front of your Judge.[650]

Mr Dunn's conduct at the sentencing hearing, led to him being charged with assaulting police and causing actual bodily harm and two counts of intimidating police.[651] He was also charged with threaten sabotage.[652] By the final hearing, the threaten sabotage charge was withdrawn and Mr Dunn had pleaded guilty to other offences resulting in two years' incarceration.[653] The threats uttered by Mr Dunn in the courtroom attained widespread media coverage.[654]

I interpose essential context which was absent from the analysis of the events in both judgments. In June 2017, CSNSW staff described Mr Dunn as '"psychotic – delusional in the context of cultural beliefs", bearing antisocial traits and "manipulating the system"' upon his admission to the Mental Health Screening Unit while incarcerated.[655] According to Wilson J, a forensic psychiatrist at the time said that Mr Dunn had '"overvalued ideas that were culturally appropriate", rather than having psychotic traits', and when

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[650] Ibid [84] (N Adams J); also extracted at *State of New South Wales v Dunn* (n 236) [21] (Wilson J).

[651] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [60] (N Adams J).

[652] Ibid [60] (N Adams J). An offence contrary to *Crimes Act 1900* (NSW) s 203C(1).

[653] *State of New South Wales v Dunn* (n 236) [23] (Wilson J).

[654] Mazoe Ford, 'NSW Inmate Allegedly Said Sydney's City 2 Surf Would Be a "good Place" to Blow Up', *ABC News* (online, 5 June 2018) https://www.abc.net.au/news/2018-06-05/nsw-inmates-alleged-desire-to-bomb-sydney-city-to-surf/9836644; Natalie Wolf, 'Alleged City2Surf Terror Plot Revealed in Court', *News.com.au* (online, 6 June 2018) https://www.news.com.au/lifestyle/real-life/news-life/alleged-city2surf-terror-plot-revealed-in-court/news-story/f191426016b2db6c559c8d220a9268b8.

[655] *State of New South Wales v Dunn* (n 236) [92] (Wilson J).

discharging him summarised his diagnosis as 'substance induced psychosis and antisocial personality disorder'.[656] So at a time very close to the threats being uttered, Mr Dunn was subjected to close psychiatric scrutiny which determined that he was displaying signs of psychosis and delusion: symptoms of significant psychiatric illness. This is in addition to him uttering the first threats on 17 June 2017 in the context of police attending to assist paramedics because Mr Dunn was also displaying signs of psychiatric illness.

There is much that could be said about these events which are central to the plaintiff's construction of Mr Dunn as an Other. The threats uttered are barely coherent and beg the question: was Mr Dunn unwell at the time that they were made? The threats were not placed within the context of Mr Dunn's particularly poor mental health proximate to the time that the threats were uttered. The psychiatric evidence from CSNSW evident from other parts of the judgments describes that Mr Dunn was showing signs of psychosis close to his release to parole. Another question that remains unaddressed in the judgments is what state was Mr Dunn in when he was released from prison two days before these events commenced? Psychosis is not a condition that abates quickly.[657]

When Mr Dunn's mental health circumstances are removed from consideration of the threats that he uttered over the period following 17 June 2017, the threats present as alarming. But placed within the context of close proximity to a hospital presentation for psychosis and other evidence that suggested an increase in symptoms of poor mental health, the threats take a different character. The change in character also leads to questions about the appropriateness of a criminal justice response or whether a health-based response would have been more appropriate, at least in the first instance, to ascertain whether Mr Dunn had capacity to enter a plea and be sentenced days after discharge from hospital.

It is possible that the executive – through CSNSW and/or the Justice Health Network – was acutely aware of how unwell Mr Dunn was. But as someone who was already labelled

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[656] Ibid.

[657] Olesya Ajnakina et al, 'Hospitalisation and Length of Hospital Stay Following First-Episode Psychosis: Systematic Review and Meta-Analysis of Longitudinal Studies' (2020) 50(6) *Psychological Medicine* 991, See generally; Parunyou Julayanont and Uma Suryadevara, 'Psychosis' (2021) 27(6) *Continuum: Behavioural Neurology and Psychiatry* 1682; National Institute of Mental Health (USA), 'Understanding Psychosis' (2023) https://www.nimh.nih.gov/health/publications/understanding-psychosis.

as an Other – an incarcerated criminal offender – it may have served the state's interests to release him while mentally unwell to wait until he committed further offences so that he could be incarcerated again and labelled a more serious Other – a terrorist – thus making it easier to remove him from society where, in the state's view, he does not belong. A less cynical possibility would be that Mr Dunn "slipped through the cracks" as his mental ill health was not properly appreciated by CSNSW, an agency that is not appropriately resources to respond to the growing burden of mental ill health within prisons.[658] So as an Othered subject, denuded of context, Mr Dunn is violent towards police officers (the people that the state represents as keeping society safe) and utters threats to the very existence of the state and its values. The natural course must be to label him as an Other to set him apart from the subjects of the state and then treat him as a *homo sacer* through the ensuing direct violence of incarceration under the THRO Act enabled by his Othered. Incarceration under the THRO Act, which was only enabled because Mr Dunn was labelled a high risk offender, provides the pathway for incapacitation which guarantees safety to the state and its subjects. But without the indirect violence of Othering, this would not so easily occur.

4.3.4. Strategy 3 - Splitting criminal and medical histories

A third method that the plaintiff uses to construct a person as an Other, is to split inextricably linked personal histories which allow the plaintiff to craft a selective narrative about a person subjected to THRO proceedings. This is most commonly seen through criminal histories and medical histories being addressed separately. But when they are overlaid on each other, different risk analyses emerge.

Mr Dunn's judgments provide a strong example of this as his criminal history is dealt with upfront. His medical history is dealt with separately, and mostly through reports from expert psychiatrists appointed to assess his risk of committing a terrorist offence. By separating Mr Dunn's criminal and medical history, a singular narrative of Mr Dunn as a dangerous criminal is more easily presented which solidifies his status as a dangerous Other who poses a threat to people and the state and requires violent control. But in

[658] Carroll et al (n 437) 3; Charlotte Lennox, Beth Angell and Kimberlie Dean, 'Editorial: Mind the Gap! Criminal Justice and Health Transitions for Those with Severe Mental Illness' (2023) 14 *Frontiers in Psychiatry*; Christie C Browne et al, 'Continuity of Mental Health Care during the Transition from Prison to the Community Following Brief Periods of Imprisonment' (2022) 13 *Frontiers in Psychiatry*.

backgrounding Mr Dunn's medical history and need for ongoing treatment Mr Dunn's ability to become well and re-enter society is denied.

Mr Dunn's criminal record began in 2003 – the year that his family supports fell away – when he was sentenced for assaulting police who attended a house party.[659] He reportedly said 'I'm going to get a gun and put a bullet through your head copper cunts' and threatened to blow up police vehicles.[660] The Risk Assessment Report indicated that Mr Dunn had 'over 150 police events recorded and over 40 charges', which provides an insight into the volume of his convictions.[661] He was first incarcerated in 2008.[662] I will not recount all of Mr Dunn's criminal history which is replete with drug use,[663] violence, threats of violence and robberies,[664] often accompanied by weapon use.[665] But it is recounted at length in the judgments.

Separate from, but intrinsically connected to, Mr Dunn's criminal history, however, is that Mr Dunn was subjected to traumatic experiences before he moved to Australia from Pakistan,[666] used drugs from a young age[667] and lived with serious psychiatric illness.[668] However, the force of his criminal history is invoked upfront in the judgment as he is constructed as violent, dangerous, and unpredictable first. Which led to conclusions being drawn like the following where N Adams J said Mr Dunn:

> Has made statements advocating support for engaging in terrorism acts. He has been making threats towards police officers, corrective services officers and other persons in

[659] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [50] (N Adams J).

[660] Ibid.

[661] Ibid [104] (N Adams J); *State of New South Wales v Dunn* (n 236) [35] (Wilson J).

[662] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [52] (N Adams J).

[663] *State of New South Wales v Dunn* (n 236) [74]-[75] (Wilson J).

[664] Ibid [77] (Wilson J); *State of New South Wales v Dunn (a Pseudonym)* (n 190) [50]-[62] (N Adams J).

[665] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [108] (N Adams J); *State of New South Wales v Dunn* (n 236) [130] (Wilson J).

[666] *State of New South Wales v Dunn* (n 236) [96] (Wilson J); *State of New South Wales v Dunn (a Pseudonym)* (n 190) [108] (N Adams J).

[667] *State of New South Wales v Dunn* (n 236) [74]-[75] (Wilson J); *State of New South Wales v Dunn (a Pseudonym)* (n 190) [111] (N Adams J).

[668] *State of New South Wales v Dunn* (n 236) [105]; [127] (Wilson J).

> authority since he was 13 years of age. The materials show me that there has been an escalation in these threats in recent years. Since about 2014, the threats have started to include references to his support for ISIS, his anger at Australian soldiers overseas, the perceived mistreatment of Muslims and specific threats to commit violence to further his cause.[669]

This shows the careful work of a court which has been co-opted into legitimising the violence that can be perpetrated against people using the THRO Act under a veil of fairness and legality. By selectively constructing a narrative which begins with a story of serious criminality and only then draws in contextual factors when assessing risk, the narrative about Mr Dunn is framed by criminality first to emphasise his status as a violent Other. By splitting the narratives of criminality and medical history, it also sets the two against each other rather than considering them as inextricably linked.

In the risk assessments by the forensic psychiatrics who examined Mr Dunn, his medical history begins to be considered. Justice Wilson observed that Mr Dunn 'emphasised the normality of violence in Pakistan' to Dr Eagle, who reported that '[h]e said that he incited violence and makes violent threats because he "can't control it"'.[670] Dr Eagle identified that Mr Dunn believed that he was 'cursed with black magic' and did not trust law enforcement agencies.[671] Dr Eagle spoke to Mr Dunn's wife who observed that Dunn 'needed hospital, not gaol, it doesn't help him'.[672] Dr Eagle recognised that Mr Dunn had poor coping skills, few positive role models and a life of trauma which meant that his 'identified psychotic illness is accompanied by psychological vulnerabilities.'[673] Dr Ellis' account was consistent with Dr Eagle's,[674] and recounted that Mr Dunn experienced his first hallucinations at 13 years old and believed in 'black magic, Djinns (or genies) and

[669] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [135] (N Adams J).

[670] *State of New South Wales v Dunn* (n 236) [76] (Wilson J).

[671] Ibid [79] (Wilson J).

[672] Ibid [98] (Wilson J).

[673] Ibid [107] (Wilson J).

[674] Ibid [120] (Wilson J).

witchcraft. He thought he was under police surveillance.'[675] Mr Dunn told Dr Ellis that he 'loves drugs'.[676]

These contextual assessments cast Mr Dunn's threatening behaviour and criminal history in a different light, but remain framed by risk, rather than being framed as medical evidence which could inform necessary treatment. Undoubtedly, an assessment of criminal history is important for assessing prospective risk (to the extent that can be done). But the court frames the narrative about Mr Dunn as one of a criminal offender from the outset, so then views all of the evidence through that lens, when clearly Mr Dunn's life requires more careful scrutiny. That said, the THRO Act's purpose is to allow the state to construct a subject as Other, and the argumentation and structures, successfully allow the executive to present such narratives to the court which are adopted when the court makes THRO orders, as explored further in Chapter 5. So, it is unsurprising that means of analyses are adopted which denude people of necessary context to Other and enact violence against them in THRO proceedings.

GB's case provides a contrasting example to Mr Dunn's case. While the executive split criminal histories from medical histories to construct GB as an Other, the court adopted a more nuanced approach and ultimately dismissed the application. The executive enumerated multiple incidents which demonstrated GB's relationship to violent extremism. Many were instances of GB threatening violence against Youth Justice staff. For example, on 2 February 2017, he placed a note on his cell window which said 'you are gonna die you dogs'.[677] Later that month he kicked and spat at a staff member and said 'you just wait cunt, you will have another Parramatta, just wait'.[678] After summarising GB's history as presented by the executive, Justice Lonergan stated:

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[675] Ibid [121] (Wilson J).

[676] Ibid [122] (Wilson J).

[677] *State of New South Wales v GB by His Tutor* (n 606) [24](57)(a) (Lonergan J). E4E is taken to stand for "eye for an eye", see *R v Hraichie (No 3)* [2019] NSWSC 973 [64] (Johnson J).

[678] *State of New South Wales v GB by His Tutor* (n 606) [24](57)(a) (Lonergan J). GB was ostensibly referring to the murder of Curtis Cheng, a police accountant in Parramatta. See Josh Bavas, 'Man Jailed for 28 Years over Curtis Cheng Shooting Has Conviction Quashed', *ABC News* (online, 27 August 2021) https://www.abc.net.au/news/2021-08-27/mustafa-dirani-wins-appeal-over-curtis-cheng-death-conviction/100413692.

> Without any criticism, I observe that the focus of this summary is upon [GB's] history of offending and conduct the focus of this application. Some of that conduct is listed under the heading: "incidents in custody related to [GB's] violent extremism", a conclusionary heading I consider to be without real basis and contrary to other evidence, in particular, the assessments by psychiatrists and psychologists. I add to those important matters, other important matters, in particular the nature of the defendant's psychiatric diagnoses, the timing and nature of the flare ups of florid illness.[679]

Commencing the paragraph 'without any criticism' is peculiar. Justice Lonergan is suggesting that the plaintiff has presented an, incomplete, at best, or, misleading, at worst, account of GB's life. Her Honour then completes the account, by extensively referring to medical evidence. This move by Lonergan J is important because it demonstrates how the court can counter narratives selectively constructed by the plaintiff aimed at constructing a subject as an Other.

So Lonergan J read GB's criminal history with his medical history through a long explanation that contextualised the plaintiff's narrative. GB lived with consistently poor mental health over a long time. In July 2017, Dr Joanne Shannon, forensic psychiatrist, wrote to a psychiatrist at a CSNSW residential youth facility that GB was:

> Emotionally dysregulated, reacting impulsively and aggressively when he perceives he is mistreated. He has at times reported auditory hallucinations to harm himself and his actual self-harm has at times been significant [...] His perception may be partly reality based as he can be very difficult to manage and [Youth Justice] staff have needed to use force'.[680]

GB was admitted to the psychiatric facility under the care of Dr Kasinathan. During that time, he was diagnosed with 'schizophrenia, a form of psychosis, post-traumatic stress disorder and conduct disorder'.[681] He was admitted again in February 2019 because of a risk posed to himself and others.[682] After his second admission, Dr Kasinathan opined:

> Initially when acutely agitated he would voice thoughts of committing terrorist acts which are interpreted by staff to be impulsive and vague threats without any intentional plans.

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[679] *State of New South Wales v GB by His Tutor* (n 606) [25] (Lonergan J).

[680] Ibid [26] (Lonergan J).

[681] Ibid [27] (Lonergan J).

[682] Ibid [29] (Lonergan J).

> In subsequent weeks, he gradually improved in his behaviour and renounced any terrorist affiliations.[683]

Elsewhere, Dr Kasinathan identified that GB 'has repeatedly renounced any support for an ideology that justifies use of violence' and that GB had 'genuinely' withdrawn threats of violence.[684]

Dr Kasinathan's evidence was supported by GB's evidence during Local Court proceedings in June 2018. Justice Lonergan described the relevant part of the evidence as, GB 'denied any intention to commit a terrorist act and seemed to offer the position that he said those things without meaning them.'[685] The plaintiff urged Lonergan J to, in her Honour's words, 'treat that evidence with circumspection and, in effect, not believe it'.[686] Her Honour rejected that submission, noting 'the denying of any real intent is consistent with' medical evidence created between 2018 and May 2020.[687]

Closer to the hearing date, GB engaged in more severe self-harm requiring stronger psychiatric intervention.[688] In March 2020 he reportedly ceased using antipsychotic medication 'due to unbearable side-effects [including] faecal incontinence'[689] and relapsed into substance abuse.[690] In April 2020, assaults were reported against Youth Justice staff who observed expressions of suicidal ideation,[691] and reports of self-harm.[692] On 7 April 2020, GB was transferred to an adult prison so that a higher level of care could be offered.[693]

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683 Ibid [30] (Lonergan J).

684 Ibid [72] (Lonergan J).

685 Ibid [83] (Lonergan J).

686 Ibid [84] (Lonergan J).

687 Ibid.

688 Ibid [39]; [43]; [44]-[47] (Lonergan J).

689 Ibid [32] (Lonergan J).

690 Ibid.

691 Ibid [33] (Lonergan J).

692 Ibid [36] (Lonergan J).

693 Ibid [35] (Lonergan J).

Dr Yolisha Singh, psychiatrist, provided the most up to date assessment of GB at the hearing, so Lonergan J paid close attention to her assessment of GB's criminal history, medical history and purported terrorist risk. Her Honour accepted Dr Singh's assessment that GB posed a 'moderate risk of engaging in, or inciting or assisting others to engage in, terrorist acts or violent extremism' on the VERA-2R assessment.[694] When considering the individual components of VERA-2R, however, Dr Singh appointed a low rating for 'commitment to an ideology that justifies the use of extreme violence'.[695] Dr Singh also reported that GB displayed poor knowledge and awareness of Islam, despite having converted six years earlier.[696] Dr Singh, in Lonergan J's words, observed that GB was 'highly susceptible to influence, control and indoctrination' particularly because he desired to belong.[697] Dr Singh also observed that GB displayed poor knowledge of ISIS.[698] Dr Singh's overall assessment was that 'the expressions by [GB] to commit acts of violent extremism were expressed when he felt angry, scared or emotionally dysregulated and he has not made any firm commitment to engage in acts of violent extremism'.[699] Crucially, Dr Singh opined that some of GB's extremist comments coincided with a 'heightened emotional state and […] auditory hallucinations.'[700]

But while the plaintiff's argument that GB was an Other because of his relationship to violent extremism was weak, there can be no doubt that an argument that GB was profoundly unwell was strong and persuasive in convincing Lonergan J that GB required some form of state intervention, just not intervention under the THRO Act. So, while THRO orders were not made, GB had been and would continue to be subjected to other state control.

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[694] Ibid [56] (Lonergan J).

[695] Ibid [58] (Lonergan J).

[696] Ibid [59] (Lonergan J).

[697] Ibid [60] (Lonergan J).

[698] Ibid also supported by Dr Ellis at [68].

[699] Ibid [62] (Lonergan J) Confirmed by Dr Ellis who considered that GB's threats were intended to create fear amongst Youth Justice staff.

[700] Ibid [67] (Lonergan J).

But in the face of all this evidence, it begs the question as to why the plaintiff sought to Other GB as a terrorist at all when there were alternative means of control that could lead to him becoming well. I think the answer lies in returning to the force of the signifier "terrorist" as marking GB as an Other of the highest order within the state. While all forms of Other are outside the realm of properly belonging within the state some categories attract particularly severe consequences because of the gravity of their status as people who cannot even safety coexist with the state let alone belong as part of it.[701] Rather than grappling with the presentation of threats to the state in a sophisticated way, the state took a pathway of Othering, restraint and violence to address problems that could be solved in other ways.

GB's case stands in stark contrast to Mr Dunn's case about how medical and criminal histories were considered by the court. In Mr Dunn's case the criminal and medical histories were successfully split by the plaintiff and the split was accepted by the court which made the orders sought and indelibly marked Mr Dunn as a terrorist Other. But in GB's case the executive tried to split criminal and medical histories. But Lonergan J rejected the narrative presented by the plaintiff and saw the two as inextricably linked. Justice Lonergan did not just cast doubt on the narrative presented by the plaintiff, she declined to make THRO orders. Whereas in Mr Dunn's case, an IDO then CDO was made.

4.3.5. Strategy 4 -Selective appeals to expertise

The plaintiff and sometimes the court selectively appeal to expertise in constructing a person as an Other during THRO proceedings. At times, the expertise is misplaced because the person is not an expert at all. At other times while the person may have some expertise, it may not be the appropriate expertise or best expertise available. The THRO Act, however allows for less rigorous testing of evidence than in other proceedings which allow incarceration and supervision.[702] Selective appeals to expertise often support the evidence from witnesses who work for executive based agencies like CSNSW. As explored throughout this chapter, there is a degree of (re)iteration of evidence that a person is violent, even if the source material is limited. This approach, however, is effective in constructing what becomes a chorus of agreement that the person subjected to THRO

[701] Saul (n 563) 3–4; Baudrillard (n 1) 24–25.

[702] Explored in Chapter 5.

proceedings is an Other who can only be controlled with the THRO Act's violence. I draw from three examples in the Dunn proceedings to demonstrate how selective appeals are made to expertise. Using these examples, I show that the way that the evidence is presented and considered goes beyond simply adopting a litigation strategy, but demonstrates a selectiveness in the presentation of evidence.

The plaintiff tendered a report written by Mick Marshall, Acting Director of the ESO Team at CSNSW, to address how Mr Dunn could be managed by CSNSW while incarcerated or the community. The report largely restated and affirmed conclusions drawn by other CSNSW witnesses, especially Naomi Prince the CSNSW psychologist who wrote the Risk Assessment Report filed with the proceedings and the Risk Management Report prepared by staff in Mr Marshall's team.[703] If Mr Dunn was subjected to a CDO, Marshall suggested that an FCTO be obtained, which was obtained before the final hearing.[704] Mr Marshall, who did not have clinical training, considered it imperative that Mr Dunn's mental health was stabilised before 'intervention for violent behaviour and substance use could commence'.[705] Weight was placed on Mr Marshall's evidence by the court. Mr Marshall has no expertise in ascertaining how a person's thoughts and behaviour may cause harm like a psychiatrist or psychologist does. However, his evidence which confirmed the other evidence given by CSNSW employees with the legitimacy carried by his title, was called by the plaintiff to reiterate those propositions and add iterative force. The reliance on Mr Marshall's evidence also reiterates the tenor of THRO proceedings, which is that the executive, as plaintiff, best knows how people should behave and that the person subjected to proceedings is an Other. It becomes difficult for the court faced with significant evidence called by the plaintiff to resist what is said about a person: that they are dangerous and ought to be restrained.

Another type of evidence on which the court relied and gave a high degree of prominence is evidence from the CSNSW Intelligence Group and CSNSW officers. This evidence often simply records conversations with Mr Dunn or observations made by officers. But at other times it presents analysis and interpretation which is relied on by the plaintiff and

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[703] *State of New South Wales v Dunn* (n 236) [50]-[61] (Wilson J).

[704] Ibid [62] (Wilson J).

[705] Ibid.

the court as authoritative. For example, in November 2015, notes drafted after Mr Dunn threatened violence against CSNSW officers stated 'he is a FULL supporter of ISIS & was glad that the plane was shot down [emphasis in original].'[706] Her Honour then indicated that 'on 31 October 2015 a flight was destroyed by a bomb above Egypt and ISIS claimed responsibility.'[707] The notes are presented as recording a conversation with Mr Dunn. But the expression of him being a "FULL" supporter of ISIS is unusual. It is unclear if this was a poorly expressed recount of something that Mr Dunn said in conversation, or whether it is a conclusion drawn by the author based on that conversation. The emphasis of "FULL" being written in capital letters is not unusual for such reports, but adds to their absurdity as official documents which emphasise Mr Dunn's status as an Other.

The day after, another note records that Mr Dunn said 'he will be the first to behead a [CSNSW officer]. [CSNSW officers] are all infidel cunts and his families is [sic] going around to our homes when he finds out who we are so they can rape our wife's [sic] and female daughters […] I BELIEVE THESE THREATS ARE REAL […] ISIS IS COMING [emphasis in original].'[708] Mr Dunn uttered these threats while incarcerated. It is clear from the judgments that he is also estranged from his family members who reside outside of prisons. So, the statement "I BELIEVED THESE THREATS ARE REAL" is difficult to follow. Perhaps the intention was simply to convey that if Mr Dunn was at liberty, the writer believed the threats to be credible?

A lot of weight is placed on Intelligence Reports and notes written by CSNSW staff during proceedings. But the writers of the reports and notes are not always made available for cross examination. Notes like the ones mentioned above assert conclusions without exposing their reasoning to them or without allowing Mr Dunn to test the evidence through cross examination. Notes like this demonstrate that whether Mr Dunn is subjected to THRO orders or not, some within the state already consider him to be a dangerous Other. By referring to multiple instances where Mr Dunn has been prefigured as a terrorist Other, it gives the proceedings a sense of being a set piece to derive a

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[706] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [75] (N Adams J).

[707] Ibid.

[708] Ibid [76] (N Adams J) Cf. Intelligence report at [29], where the writer acknowledged that the threats may not have been credible.

conclusion that has already otherwise been reached. The question then becomes will the court act on the reports presented as authoritative by the plaintiff that this person is an Other and do what needs to be done to protect the state, or will they refuse and allow a threat to endure?

Whilst the evidence from the CSNSW Intelligence Group is typically afforded significant weight in THRO proceedings, it sometimes comes under scrutiny. A senior CSNSW Officer interviewed Mr Dunn and in Wilson J's words, assessed him as 'constituting a threat to national security, with a potential motivation in "religious extremism"'.[709] Justice Wilson observed that the report contained 'unsubstantiated evidence […] as to the extremist views the defendant held' which concerned the superiority of Muslims, a need to 'destroy Australia' and threats to collect the personal information of CSNSW officers.[710] Her Honour further observed that Mr Dunn's 'access to resources necessary to commit the threatened acts was questioned' but connections between his family and organised crimes were acknowledged.[711] So while the plaintiff often calls evidence from CSNSW officers and written intelligence reports as quasi expert evidence on Mr Dunn and his conduct, this example shows how the court can be reticent to accept that evidence.

The plaintiff also calls evidence from people as experts under the law of evidence, but there can be an incongruity between their expertise and the proceedings in which they give evidence. For example, in the *Dunn* proceedings, the plaintiff briefed Dr Rodger Shanahan, as an expert on terrorism. Dr Shanahan was described by Wilson J as bearing 'significant expertise in terrorism and political violence'.[712] Dr Shanahan, a retired army officer, held a PhD in Arabic and Islamic Studies.[713] His thesis was about Shi'a Lebanese politics.[714] Dr Shanahan reproduced the purported threats made by

[709] *State of New South Wales v Dunn* (n 236) [30] (Wilson J).

[710] Ibid.

[711] Ibid [31] (Wilson J).

[712] Ibid [138] (Wilson J).

[713] Ibid.

[714] Ibid.

Mr Dunn in his report, adding to the force of a submission that Mr Dunn utters threats of violence and is an Other.

In interpreting the threats made by Mr Dunn, Dr Shanahan identified that beheading, as paraphrased by Wilson J, 'is advocated by the so-called Islamic State as a means of engendering fear in its perceived enemies.'[715] He identified that bombings 'of Western targets' was also advocated by the Islamic State.[716] In Wilson J's words, Dr Shanahan considered that 'some of the comments and threats that [Mr Dunn] has made in recent times can be linked to terrorist incidents', an example was Mr Dunn's expressions of hope that a truck be driven through a crowd like in Spain occurring within days of an identical Islamic State claimed act.[717] Dr Shanahan's evidence, according to Wilson J, demonstrated that Mr Dunn's threats were 'consistent […] with a narrative of the West at war with the Islamic religion and peoples, and an expressed hatred of Australian soldiers.'[718]

The degree to which Dr Shanahan held relevant expertise is questionable. Lebanese politics is different from politics in Pakistan or ISIS territories. Shi'a politics is also different to ISIS politics, which is based on Sunni Islam.[719] Moreover, given that Mr Dunn often uttered threats directed at Australian military personnel there was a potential perceived conflict of interest in Dr Shanahan giving evidence as a former Australian army officer. It is precisely people like Dr Shanahan that Mr Dunn held grievances with. It is not inconceivable that Dr Shanahan may have felt hostility towards Mr Dunn because of his remarks about Australian military personnel.

The plaintiff using Dr Shanahan to provide expert evidence adds legitimacy to the inferences that it sought to have the court draw in the proceedings. These inferences all supported the designation of Mr Dunn as a terrorist Other. Dr Shanahan drew the connection between ISIS and Mr Dunn both denying that the West was engaged in a

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[715] Ibid [140] (Wilson J).

[716] Ibid [141] (Wilson J).

[717] Ibid [143] (Wilson J).

[718] Ibid [142] (Wilson J).

[719] Among a complex patchwork of other Muslim Salafist ideologies: See generally Haroro J Ingram, Craig Whiteside and Charlie Winter, *The ISIS Reader: Milestone Texts of the Islamic State Movement* (University Press, 1st ed, 2020) especially Chapter 1; Michael Griffin, *Islamic State: Rewriting History* (Pluto Press, 1st ed, 2015).

virtuous war against ISIS. Dr Shanahan also considered that Mr Dunn's threats of violence and lauding of ISIS activities were sometimes uttered proximate to terrorist activities that occurred in real world politics.

Some of Dr Shanahan's evidence states matters obvious to casual viewers of world politics. Any casual observer of world politics knows that there is animosity between some Middle Eastern and Muslim countries and the West because of foreign intervention in internal politics.[720] But because these connections were confirmed by a person purported to hold expertise by the plaintiff, these views are invoked as expressions of truth, particularly when juxtaposed with the angry, often incoherent, commentary from Mr Dunn. In so doing the plaintiff controls the narrative which is legitimised by appeals to expertise to verify views already repeatedly expressed by CSNSW staff that Mr Dunn is a terrorist Other. Accordingly, it is easier to dispel Mr Dunn's own poorly expressed grievances about politics. Even if in other fora those views would be cast in a different light. Dr Shanahan's evidence provides a clear example of how the plaintiff uses selective appeals to expertise in constructing people subjected to THRO proceedings as Others.

4.3.6. Strategy 5 - Selectively foregrounding and backgrounding parts of medical evidence

Medical evidence is central to any risk assessment in THRO proceedings. But not all medical evidence is given equal weight, and the plaintiff and the court selectively foreground and background parts of the medical evidence to construct a narrative of people subjected to THRO proceedings as Others. The selective use of medical evidence is crucial to the state's project of Othering and allowing violence against people subjected to THRO proceedings. This even occurs in relation to matters that medical experts seem uniquely placed to offer expertise about, such as whether a person's medical needs could be met in prison. The final hearing in Mr Dunn's case presents two clear examples of how this can occur. The first concerns the timeframe within which Mr Dunn lived with schizophrenia. The second concerns whether prison is an appropriate environment to address Mr Dunn's mental health needs.

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[720] See, for example, Troels Burchall Henningsen, *Western Intervention and Informal Politics: Simulated Statebuilding and Failed Reforms* (Routledge, 2021); see also Mbembe (n 528) 4–7. This animosity unsurprisingly reinforces racialised policing of migrant communities McElhone (n 594) 793–795.

It is important to note that the medical evidence is given in the context Mr Dunn being detained in prison and subjected to an IDO while diagnosed with a psychiatric illness. So, his capacity to give informed consent to assessment and treatment is impaired, but assessment and treatment is in turn crucial to him being able to demonstrate to the court that he is not a terrorism related offender. The volume of the medical evidence in THRO proceedings demonstrates how the THRO Act's processes not just allow, but require, the state to exercise a high degree of control over the person subjected to proceedings. While the medical evidence is principally gathered in aid of making a determination of whether a person is an Other, in itself it breaches the person's autonomy and contributes to the THRO Act's overall violence.

Dr Sarah-Jane Spencer, Clinical Director of Custodial Mental Health Services and Programmes with CSNSW, prepared an affidavit for the proceedings and gave oral evidence.[721] Her evidence was afforded significant weight and demonstrates the level of psychological and psychiatric control evinced over people subjected to THRO proceedings. Dr Spencer's senior role meant that she was ultimately responsible for supervising the 'assessment and management of prisoners' requiring mental healthcare in prison.[722]

Dr Spencer diagnosed Mr Dunn with schizophrenia which, in her words, was 'characterised by periods in which he experiences persecutory delusional beliefs and perceptual abnormalities'.[723] Agreeing with other psychiatric evidence, Dr Spencer observed that Mr Dunn's poor mental health was influenced by drug use and an antisocial personality disorder.[724] Under Dr Spencer's supervision, Mr Dunn consented to commencing injected antipsychotic medication to be administered monthly.[725] Dr Spencer also gave evidence about a FCTO that had been sought and granted by the

[721] *State of New South Wales v Dunn* (n 236) [151] (Wilson J) Dr Spencer had all relevant custodial records, Drs Ellis' and Eagle's reports and had assessed Mr Dunn four times.

[722] Ibid [150] (Wilson J).

[723] Ibid [154] (Wilson J).

[724] Ibid.

[725] Ibid [155] (Wilson J).

MHRT for a six month term.[726] The FCTO required Mr Dunn to have regular contact with mental health professionals, monthly urinalysis and consent to injected antipsychotic medication.[727] Dr Spencer observed that should Mr Dunn be released from custody, the FCTO would be varied to a CTO.[728] The effect being that he would remain subject to forced psychological and psychiatric surveillance, medication and treatment just outside of prison.

Dr Spencer also gave oral evidence during the proceedings. She observed, as paraphrased by Wilson J that by the final hearing date, Mr Dunn 'now had some capacity to recognise that some of his past beliefs were not based in reality, although it appeared that he maintained his belief […] in Djinns and having been the subject of "black magic"'.[729] Further, Mr Dunn was not 'forming new delusions'[730] and saw that his new medication regime was helping.[731] Dr Spencer outlined plans for Mr Dunn's treatment if he relapsed into psychosis while incarcerated.[732] She, however, noted that if released to the community, he could return to illicit drug use,[733] and that methylamphetamine and ice – recent drugs of choice – exacerbated psychosis.[734] If Mr Dunn remained treatment compliant, Dr Spencer 'expected' his 'mental health to remain stable'.[735]

In contrast to Dr Spencer who made a recent diagnosis of schizophrenia, Dr Eagle observed that Mr Dunn displayed 'manifestations of psychotic behaviour' spanning from 2013 to 2018.[736] Dr Eagle's report identified numerous instances in the evidence where signs of psychosis were present but not diagnosed, or provisional diagnoses of

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726 Ibid [156] (Wilson J).

727 Ibid.

728 Ibid [157] (Wilson J).

729 Ibid [159] (Wilson J).

730 Ibid [160] (Wilson J).

731 Ibid [159] (Wilson J).

732 Ibid [162] (Wilson J).

733 Ibid [164] (Wilson J).

734 Ibid [163] (Wilson J).

735 Ibid [167] (Wilson J).

736 Ibid [80] (Wilson J).

schizophrenia were made but neither explored nor confirmed.[737] While not explicitly critical of CSNSW, the point was firmly made. Despite the significant degree of surveillance to which Mr Dunn was subjected to while in prison, his diagnosis and medication appeared to be insufficient for a time. This is significant given that Dr Eagle and Dr Ellis clearly identified that Mr Dunn's utterances of threats of violence were linked to his psychiatric health.

In relation to anti-psychotic medications, Dr Eagle reported that Mr Dunn said they '"stop the thoughts" but "make [him] tired"'.[738] When considering non-medication based treatment, Dr Eagle reported that Mr Dunn expressed willingness to complete the violent offender treatment programmes while incarcerated.[739] She further reported that he had completed EQUIPS Aggression and expressed interest in drug rehabilitation programmes.[740] He showed an intention to obtain work and engage with medical support for his mental health, importantly he told Dr Eagle that he wanted to 'avoid Islamic extremist associations'.[741]

Dr Eagle's overall assessment was that Mr Dunn lived with schizophrenia and relapsing psychosis which were 'characterised by bizarre persecutory delusions, referential beliefs and auditory hallucinations.'[742] She found that he had a 'severe substance use disorder' and antisocial personality disorder, with a clear link between Mr Dunn's poor mental health and substance use.[743] Dr Eagle opined that Mr Dunn's mental illness had been 'overlooked, minimised and untreated' and that it was central to his 'grievances, distorting the perception of events, impairing his judgment and reducing his levels of self-

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737 See, for example, ibid [82]; [87]; [92] (Wilson J).

738 Ibid [97] (Wilson J).

739 Ibid [103] (Wilson J).

740 Ibid.

741 Ibid.

742 Ibid [105] (Wilson J).

743 Ibid [105]; [107] (Wilson J).

control.'[744] But Dr Eagle's evidence in this regard was backgrounded and evidence to the contrary was not closely interrogated despite her opinions.

Dr Ann Marie De Santa Brigida, psychologist, made the first recorded schizophrenia diagnosis for Mr Dunn in November 2017.[745] On the De Santa Brigida report, N Adams J said:

> [H]e is likely to be non-compliant with community-ordered treatment and it is imperative that he be correctly diagnosed and treated [...] She also believes that there is a direct nexus between the defendant's offending and his psychological issues.[746]

Dr Spencer was ultimately responsible for Mr Dunn's clinical care in prison. However, it is not clear from the judgment that she was pressed by Mr Dunn's counsel on his diagnoses or care while incarcerated. The court also did not draw out the clear tension in the evidence about whether Mr Dunn was correctly diagnosed and treated while incarcerated. It foregrounded Dr Spencer's evidence, and backgrounded other evidence that raised questions about her evidence. Evidence is selectively emphasised by the plaintiff in constructing Mr Dunn as an Other, which necessarily supports the making of THRO orders. In Mr Dunn's case the court accepted the plaintiff's narrative. The narrative was that Mr Dunn was recently diagnosed with schizophrenia which exacerbated the need for his incarceration. In drawing the connection between Mr Dunn's diagnosis of schizophrenia and his terrorist risk, the executive, as plaintiff, sought to construct him as not only a terrorist Other but an Other with schizophrenia which made him particularly unstable and required state control.

Another aspect of the evidence in Mr Dunn's case which shows how expert opinions can be backgrounded in favour of other evidence concerned whether prisons were therapeutic environments. The independent forensic psychiatrists gave strong evidence that prisons were poor therapeutic environments. Obviously, this evidence was rejected, as Mr Dunn was incarcerated under the THRO Act. Doctors Ellis and Eagle foregrounded Mr Dunn's psychiatric illnesses and drew strong connections between those illnesses and

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[744] Ibid [105] (Wilson J).

[745] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [112] (N Adams J).

[746] Ibid.

his purported terrorist threats. Both also prioritised clinical care and stabilisation of his mental health in their recommendations for how Mr Dunn should be managed to mitigate his risk. Dr Ellis strongly preferred an ESO as a way forward for treating Mr Dunn.[747] Dr Eagle preferred a short CDO with intensive medical treatment in prison, notwithstanding her clear concerns about Mr Dunn's past treatment in prison.[748]

Dr Eagle considered that Mr Dunn would need 'at least 1-2 years and up to 5 years' intensive treatment before his risk would reduce.[749] Dr Eagle further recommended that he receive ongoing psychiatric support while in prison, be subject to an FCTO and be administered injected and oral antipsychotic medication.[750] She further recommended that he undertake drug rehabilitation treatment and participate in programmes to address violent offending but acknowledged that his aggression may prevent entry into programmes.[751] Dr Eagle considered that supervision in the community without Mr Dunn's mental ill health being stabilised would be 'not be effective'.[752]

Dr Eagle also gave evidence at the hearing about Mr Dunn's care and treatment in custody in the period immediately before the final hearing. While she was 'reassured' that more intensive psychiatric care had commenced since her initial assessment, she considered it too early to determine whether Mr Dunn had stabilised.[753] Dr Eagle observed that any risk of deteriorating mental health exacerbated Mr Dunn's terrorism risk,[754] and opined:

> I think that the escalation of the grievances that have been experienced by Mr Dunn do appear to have coincided with an increase in his identification with violent extremist groups. And this, this may reflect a shared grievance or, or any idea, or an association by him of having a shared grievance with these groups. But it does appear to be more and more used to justify violence as a, as a means to an end [...] this may reflect in increased commitment to that violent extremist ideology.

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[747] *State of New South Wales v Dunn* (n 236) [184] (Wilson J).

[748] Ibid [114] (Wilson J).

[749] Ibid [114] (Wilson J).

[750] Ibid.

[751] Ibid [115]-[116] (Wilson J).

[752] Ibid [113] (Wilson J).

[753] Ibid [169] (Wilson J).

[754] Ibid [170] (Wilson J).

> I agree with Dr Ellis that his mental illness has most likely made him certainly more unstable and more vulnerable to perceived persecution and to influences from these types of ideologies. I don't necessarily think it's the only factor. I think that most prominent factor appears to be the increasing sense of grievance.[755]

Dr Eagle continued to assert that many factors, not just Mr Dunn's schizophrenia impacted on his terrorism risk. She maintained the recommendation in her report that Mr Dunn would require up to two years of treatment before his terrorism risk was sufficiently mitigated.[756] Dr Eagle thought that Mr Dunn would have difficulty complying with an ESO, particularly because of his history of quickly returning to illicit drug use when able to.[757]

Nonetheless, Dr Eagle identified that incarceration, in Wilson J's words 'was not typically an optimal environment for mentally ill persons'.[758] Dr Eagle said:

> There are harms associated with Mr Dunn remaining in the custodial environment unnecessarily and without receiving assertive psychiatric care. So at the moment he's not receiving assertive psychiatric care, he's getting [antipsychotic injections] and he's being reviewed as needed. If he were in a hospital environment…he could have access to clinicians on a daily basis that could actually monitor his mental state assertively as opposed to responding to reports by other non-mental health clinicians. However, otherwise I think that really the barrier to being able to be safely transition into the community is really the development of risk management plans, and that should be done as expeditiously as possible so that he can get into a more therapeutic environment and receive adequate care in the community.[759]

Dr Ellis' views were more strongly expressed than Dr Eagle's, but appear less frequently in the judgment. According to Wilson J, Dr Ellis opined that 'a custodial environment was not conducive to good mental health'.[760] In the event that a CDO was made, Dr Ellis considered three months an appropriate duration.[761] But he did not recommend a CDO, his preferred management plan was through a strict ESO.[762] Strict conditions would

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[755] Ibid [172] (Wilson J).

[756] Ibid [173]-[174] (Wilson J).

[757] Ibid [176] (Wilson J).

[758] Ibid.

[759] Ibid.

[760] Ibid [184] (Wilson J).

[761] Ibid.

[762] Ibid [135] (Wilson J).

involve monitoring, psychiatric treatment and encouragement to obtain employment.[763] Dr Ellis observed that ongoing incarceration may hinder Mr Dunn's 'community reintegration necessary to prevent recidivism'.[764]

Notwithstanding the risks of ongoing incarceration explained by the psychiatrists for the stabilisation of Mr Dunn's mental health, Wilson J ordered that Mr Dunn be incarcerated for nine months. Her Honour rejected the expert evidence about incarceration and instead foregrounded the evidence of Mr Dunn posing a terrorist risk, even if incarceration could prolong the risk that he posed to the community because of prison being a poor therapeutic environment. Justice Wilson said:

> I have not overlooked the concerns expressed by Dr Ellis that detaining [Mr Dunn] for more than a short period […] could exacerbate his perception of being oppressed by a hostile western State, but that outcome seems likely no matter what [...] If the Court does anything other than dismiss the State's claim, it is possible if not probable that [Mr Dunn] will feel that he has been unjustly treated because of his religious beliefs. That may in turn feed into his professed extremist world views. However, to avoid that outcome is not a reason for doing nothing, and neither is it a justification for a minimalist approach. All of the objective evidence is that [Mr Dunn] subscribes to a violent, dangerous and wholly repellent ideology, not entirely explained by mental illness, and perhaps, not at all.[765]

Justice Wilson foregrounded the views of CSNSW and psychologists and psychiatrist who worked for the executive over the views of the independent psychiatrists. By foregrounding the evidence of some over the evidence of others, the complexity of Mr Dunn's pattern of threatening behaviour is smoothed over in favour of a less careful narrative of Mr Dunn being intrinsically threatening to the state warranting his ongoing incarceration as a high risk offender. By foregrounding some evidence over other evidence the executive and court is able to present a clearer narrative of someone as an Other who ought to be subjected to the state's violence. While it is always the court's role to weigh and balance evidence from different parties in proceedings against one another, the THRO Act has created a framework which requires that certain evidence be privileged over others, for example, psychological or psychiatric evidence. Further, proceedings are commenced while a person has been closely examined through a period of incarceration by CSNSW. The corollary is that CSNSW provides people to give evidence in THRO

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[763] Ibid.

[764] Ibid.

[765] Ibid [205]-[207] (Wilson J).

proceedings who have the most temporally proximate knowledge about the person subjected to proceedings. In this context, it is unsurprising that a court may foreground CSNSW based psychological and psychiatric evidence and background any evidence to the contrary when proceedings are determined.

4.3.7. Strategy 6 - Othered by association

Another technique used by the plaintiff to construct a person subjected to THRO proceedings as an Other is to assert that they associate with people who are connected with terrorism. At times this reasoning is accepted, but at other times it is rejected. Given that the published judgments are the only materials available, it is difficult to tell whether evidence is adduced in proceedings about how the alleged associate is connected with terrorism or violent extremism. Logic that draws connections between people and subject matter because of an association is not only compelling[766] but an important step in the iterative process of Othering and allowing the THRO Act's violence against a person. In asserting that a person is an Other because they are connected with other Others, the state reiterates the Othered status of all. In this section I draw on two examples from the GB case and Mr Dunn's case to demonstrate how the plaintiff seeks to Other by association.

GB was neither charged with nor sentenced for terrorism offences. Nonetheless, on 21 December 2018, Magistrate Sheedy, on application by the state in different proceedings, revoked GB's parole and found that he was a 'terrorism related offender' under s. 59(1)(e) of the CCP Act,[767] because of an association between GB and someone described only as 'WE', who was incarcerated for 'terrorism related offences'.[768] GB reported to Youth Justice staff that he was converted to Islam by WE while

[766] For a history of 'guilt by association' in Australia see Arlie Loughnan, 'Consorting, Then and Now: Changing Relations of Responsibility Special Issue: Criminal Law' (2019) 45(2) *University of Western Australia Law Review* 8, from 11; Ananian-Welsh (n 109); On guilt by association and terrorism laws see generally, Aidan Ricketts, 'Freedom of Association or Guilt by Association: Australia's New Anti-Terrorism Laws and the Retreat of Political Liberty' (2002) 6(6) *Southern Cross University Law Review* 133; Sorial (n 229).

[767] *State of New South Wales v GB by His Tutor* (n 606) [24](52)(c) (Lonergan J).

[768] Ibid.

incarcerated.[769] Justice Lonergan elsewhere observed that GB was '"converted"'[770] by two people in a Youth Justice prison 'who are known to be persons engaged in terrorist activity'.[771] As seen in Chapter 2, terrorist offences have such a broad ambit under the Australian law that they encapsulate a range of conduct from recklessly giving money to someone who is associated with a terrorist organisation through to carrying out a terrorist act. It is also important to recall that WE, GB and the unnamed person were all under the age of eighteen to be detained in a Youth Justice prison. So, taking these points together, their ability to coherently form ideologies may be impaired as may their involvement in terrorist activity. Making bald assertions that people have been convicted of terrorism related offences without giving more context, particularly when the bald assertion is meant to provide conclusive proof that another person is a terrorism related offender is dangerous. This is especially dangerous when the THRO proceedings were about GB and drawing an association between him and other purported terrorists. Despite how problematic the evidence may be, it is undoubtedly useful in constructing GB as an Other by association, and in so doing, reinscribing the Othered status of the associates.

GB also reportedly knew another person through a mosque, HG, who was said to be connected to terrorism.[772] The reference to the mosque is interesting, because nothing further is said about it. Is the mosque also associated with terrorism or just HG? Without further information about the connection between HG, GB and the mosque, it is hard to conclude whether the mere mention of the mosque was to gesture towards the spectre of Islam as a religion purportedly opposed to Australian values, a view often presented by Australian politicians and media.[773] The spectre is unfounded, but continues to capture

[769] Ibid [24](57)(c) (Lonergan J).

[770] Adopting her Honour's original quotation marks, ostensibly to indicate that she questioned the applicability of the term to the facts.

[771] *State of New South Wales v GB by His Tutor* (n 606) [96] (Lonergan J).

[772] Ibid [24](57)(c) (Lonergan J).

[773] Benafsha Askarzai, 'The Burqa Ban, Islamophobia, and the Effects of Racial "Othering" in Australian Political Discourses' (2022) 68(2) *Australian Journal of Politics & History* 218, 223–225. See also, Tejaswini Vishwanath Patil and Helen Jacqueline McLaren, 'Australian Media and Islamophobia: Representations of Asylum Seeker Children' (2019) 10(9) *Religions* 501; Kurt Adam Sengul, 'Performing Islamophobia in the Australian Parliament: The Role of Populism and Performance in Pauline Hanson's "Burqa Stunt"' (2022) 184(1) *Media International Australia* 49.

the Australian psyche[774] which gives iterative force to any suggested association between Islam (writ large) and terrorism and feeds Islamophobia which Others Muslims not just through the criminal justice system, but elsewhere in Australian society and culture.

No further information is given about the nature of the associations between GB and HG. No information about how they came to know each other, the frequency of their contact and whether they were still in contact at the time of the THRO proceedings. Given that people who are incarcerated often move between prisons, it is not even clear whether GB, HG and WE remained incarcerated in the same prison or whether HG and WE remain incarcerated at all. The plaintiff asserted the simple fact of associations at some time to prove that GB is a terrorism related offender who needs to be Othered because he poses a threat to the state and needs to be subjected to violence and control.

On 21 June 2020, GB reportedly said 'I want to be with Bassam Hamzi'.[775] Again, this statement was used by the executive to suggest that there may be an association between GB and Hamzi. This suggestion was rejected as Lonergan J considered it 'highly unlikely' that there was any association between GB and Hamzi and observed that Hamzi had been incarcerated since before GB was born.[776] Given the conclusion formed by Lonergan J, which must have been known by the plaintiff, it is difficult to understand why such evidence was worth adducing on any legal analysis. Perhaps the plaintiff considered the evidence demonstrative of some form of idolisation. But without more evidence about GB's level of knowledge about Hamzi, what he has done and who he is, it is difficult to make that appraisal. The evidence seems to be baldly asserted to provide conclusive proof that if GB wants to be with Hamzi then he must be a terrorist. The use of Hamzi's name is synonymous with terrorism in Australia.[777] He has clearly already been Othered

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[774] Randa Abdel-Fattah, *Islamophobia and Everyday Multiculturalism in Australia* (Routledge, 2017) 3–5.

[775] *State of New South Wales v GB by His Tutor* (n 606) [24](68) (Lonergan J).

[776] Ibid [103] (Lonergan J).

[777] Jamie McKinnell, 'NSW Closes "terror" Loophole for Inmates', *AAP Bulletin Wire* (online, 27 May 2018) https://www.proquest.com/docview/2044520519/abstract/B1DF074285584953PQ/1. Such is his notoriety that even other terrorist offenders are banned from communicating with him: Margaret Scheikowski, 'Bans Re-Imposed on Sydney Terror-Plotter', *AAP General News Wire* (online, 1 December 2021) https://www.proquest.com/docview/2604947940/citation/9FCF38430E1747D5PQ/1.

and villainised by the state, so seeking to draw any affinity between GB and him is useful in demonstrating the GB is an Other who also poses a grave risk to the state.

Finally, the plaintiff sought to rely on a connection between Damien Featherstone, Featherstone's partner and GB as another association which proved that GB was a terrorism related offender.[778] While not as publicly notorious as Hamzi, Featherstone's connections to Hamzi and the violent Brothers 4 Life group are known.[779] GB had committed an offence with Featherstone: possessing a loaded and unauthorised firearm in a public place.[780] GB also breached parole by travelling to visit Featherstone's partner.[781] Justice Lonergan cited the following passage from the plaintiff's submissions:

> Despite [a magistrate's] observation that there was little cogent evidence that the defendant currently holds any affiliation with others who support terrorist acts of violence extremism, there is some suggestion that [GB] may be the father of a child whose mother is the sister-in-law of Damien Featherstone. [The magistrate] remarked that this was a matter warranting further investigation as it is a potential risk factor of the community.[782]

Justice Lonergan characterised the relationship between GB and Featherstone as 'fairly long term'.[783] Justice Lonergan ultimately rejected the evidence that Featherstone's partner posed a terrorism risk. Her Honour observed '[t]he State was unable to point to any evidence that indicated that [Featherstone's partner] is a terrorist risk or threat [...] The complaint seems to be confined to her being the partner of Mr Featherstone' before rejecting that evidence.[784] The evidence of the connection between GB and Featherstone was the clearest of all of the associations that the plaintiff sought to draw. But still, the

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[778] *State of New South Wales v GB by His Tutor* (n 606) [24](52)(a); [24](52)(g) (Lonergan J).

[779] Ibid [35] (Lonergan J), where the connection between Featherstone and Hamzi is mentioned; See also, Gordon Taylor, 'Former Brothers for Life Chapter Leader Damien Featherstone Jailed over Canberra Crime Spree', *ABC News* (online, 16 August 2019) https://www.abc.net.au/news/2019-08-16/man-jailed-over-violent-crime-spree-in-canberra/11422942; Blake Foden, 'Former Brothers 4 Life Chapter Leaders Damien Featherstone Pleads Guilty over Alexander Maconochie Centre Hostage Situation', *Canberra Times* (online, 17 August 2022) https://www.canberratimes.com.au/story/7864154/former-gang-leader-pleads-guilty-over-jails-first-hostage-situation/.

[780] *State of New South Wales v GB by His Tutor* (n 606) 24(52)(a) (Lonergan J).

[781] Ibid [24](52)(g) (Lonergan J).

[782] Ibid [24](63) (Lonergan J).

[783] Ibid [97] (Lonergan J).

[784] Ibid [102] (Lonergan J).

logic of the argument was the same: GB must be a terrorist because he associates with terrorists. With each association the iterative force of the argument that GB must be an Other because he associates with people who are also Othered in the same way grows.

Despite arguments about associations being made by the plaintiff, Lonergan J was not convinced of the usefulness of such arguments. When summing up the balance of evidence concerning GB's associates, Lonergan J stated 'all those nominated individuals are in custody for a long period' which 'ameliorates' the 'prospect of [GB] realistically being instructed or manipulated by them.'[785] The evidence propounded by the plaintiff of terrorist associations could be reduced to an assertion that GB had friendships with or knew terrorist offenders, and committed a violent offence with another. While the submissions around associations are legally weak when used by the plaintiff to construct GB as a high risk offender, they are forceful, even if they can be reduced to bald assertion. Even though the plaintiff's arguments were rejected in part by the court, they still contribute to the violence of Othering. The plaintiff has still used the arguments to suggest that GB must be an Other because he has friends and associates are too. While GB may not ultimately have been subjected to THRO orders because of these proceedings, the state was clearly able to construct him as a threat, which is harmful itself.

Othering by association is commonly used by the plaintiff during THRO proceedings. I draw another example from Mr Dunn's case.[786] In Mr Dunn's case despite references to having friends and associates who were convicted of serious crimes, some of whom are now housed in Supermax, N Adams J observed 'there is no evidence […] that this is in fact the case.'[787] Justice Wilson identified these friends as 'National Security Interest inmate, Greg Ceissman, and would-be Syrian fighter Osman Haouchar'.[788] Mr Ceissman has been subjected to THRO orders,[789] and Mr Haouchar is alleged to have been implicated in gang-

[785] Ibid [101] (Lonergan J).

[786] For another example, see *State of New South Wales v Elmir (Final)* (n 312).

[787] *State of New South Wales v Dunn (a Pseudonym)* (n 190) [97] (N Adams J).

[788] *State of New South Wales v Dunn* (n 236) [101] (Wilson J).

[789] *State of New South Wales v Ceissman* (n 314).

related murder[790] and bears the CSNSW designation of "National Security Interest inmate".[791] All of the questions that applied to GB's case about the duration, quality and proximity of the associations apply to Mr Dunn's case. Nonetheless, the argument was still advanced by the plaintiff and it served an important function in Othering Mr Dunn. The difference in Mr Dunn's case is, however, that whilst the associates are named and appear to have strong connections to terrorism there is no evidence that the association between Mr Dunn and the person exists at all.

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This Chapter has considered how the THRO Act is used by the state to Other people subjected to proceeding. Othering is a process where a person is constructed as a threat to the state and society. In this way, Othering is indirectly violent as it seeks to construct people as not belonging and enables direct violence to be perpetrated against people because of their Othered status. This Chapter has closely examined how the plaintiff and the court work to construct subjects as Others through THRO proceedings. In using critical theory to interpret how the THRO Act operates in practice, the relations of power that underpin its use can be exposed. Examining the relations of power that underpin the THRO Act's use assist in deepening scholarly understandings of post-sentence supervision and detention regimes.

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[790] Ava Benny-Morrison, 'Man Returns from Turkey-Syria Border to Face Questioning over Michael Ibrahim Shooting', *Sydney Morning Herald* (online, 25 November 2015) https://www.smh.com.au/national/nsw/man-returns-from-turkeysyria-border-to-face-questioning-over-michael-ibrahim-shooting-20151125-gl7p71.html.

[791] *State of New South Wales v Dunn* (n 236) [101] (Wilson J).

5. The state of exception: the THRO Act, evidence and procedure

In Chapters 3 and 4, I argued that the *Terrorism (High Risk Offenders) Act 2017* (NSW) (THRO Act or Act) enacts violence and Othering. In this Chapter, I examine how the THRO Act is able to enact violence and Othering – seemingly illiberal ends – lawfully. In the final part of my parallel course to the powerful preventive justice critiques of post-sentence detention and supervision regimes, I use Giorgio Agamben's concept of the state of exception to understand how the THRO Act operates in practice. In this Chapter, I argue that the THRO Act creates a state of exception which abrogates part of the law which otherwise continues to exist in other domains. The effect of the THRO Act creating a state of exception is that it can enact violence and Othering lawfully.

The state of exception refers to a phenomenon where the law is used to suspend the otherwise prevailing juridical order. For Agamben, that suspension situates what is "lawful" within liminal space which traverses violence and law. When the law is situated in liminal space, people can be subjected to violence which may otherwise have been unlawful without a state of exception. By analysing in parallel to preventive justice scholarship and using critical theory, I show the usefulness of expanding the approaches used to analyse post-sentence regimes like the THRO Act.

I begin this Chapter by exploring the state of exception. I then closely analyse how the THRO Act, suspends parts of the law of evidence to create a state of exception which allows for evidence to be more permissively gathered and used by the executive in THRO proceedings. The Chapter ends with an examination of how the THRO Act suspends parts of the law of procedure to create a state of exception by focussing on the preliminary hearing and altered burden of proof in THRO proceedings. I deal with the law of evidence before the law of procedure, because the executive's broad evidence gathering powers can be used even before proceedings commence. By examining how the state of exception is created with respect to the law of evidence first, it informs my analysis of the law of procedure because all legal proceedings must be conducted using evidence.

5.1. On the state of exception

A state of exception occurs when the state uses law to suspend the otherwise prevailing juridical order. To explain the state of exception, I draw from Giorgio Agamben's works particularly *Homo Sacer*[792] and *State of Exception*.[793] The state of exception is particularly apt for an analysis of post-sentence regimes. When applied, it exposes relations of state power where law suspends itself and creates liminal space between legality and illegality, violence and law. In that liminal space, the state controls people using violence that is thinly veiled as protected by legality. Analysis of the law and state power at its limits provides unique insights, particularly about the effect of power on people.

Agamben's work is part of the critical theoretical tradition. Agamben explores concepts genealogically, paying close attention to their Ancient Greek or Roman foundations and use through the rise of fascist and autocratic states of the mid-twentieth century.[794] Despite achieving widespread use globally in diverse academic disciplines relating to politics and law, Agamben's work has not been applied to the study of post-sentence regimes in Australia, but has been mentioned.[795] Agamben's work is more popularly referred to in Australian refugee and asylum seeker literatures[796] and policing literatures.[797] While I focus on Agamben's work in this part of my Thesis, I acknowledge the rich literatures that have developed around his work,[798] including the powerful

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792 Agamben (n 357).

793 Agamben (n 551).

794 Ibid 170-184 (on the history of the state of exception in Europe) and 185-196 (on its ancient foundations). There is a large body of scholarship on Agamben and Greek and Roman philosophy, see for example, Christopher Pye, 'Agamben at the Gates: Timon of Athens and the Political-Aesthetic Foundations of the Polis' (2022) 22(1) *Journal for Early Modern Cultural Studies* 177; Tom Hawkins, 'Agamben, "Bare Life" and Archaic Greek Poetry' (2018) 15(1) *Mouseion: Journal of the Classical Association of Canada* 49.

795 Harry Hobbs and Andrew Trotter, 'Lessons from History in Dealing with Our Most Dangerous' (2018) 41(2) *University of New South Wales Law Journal* 319, 347; McSherry, 'Throwing Away the Key: The Ethics of Risk Assessment for Preventive Detention Schemes' (n 252) 780.

796 See, for example, Julie Macken, 'The Melancholic Torturer: How Australia Became a Nation That Tortures Refugees' (2020) 56(1) *Journal of Sociology* 9; Fiona Jenkins, 'Bare Life: Asylum-Seekers, Australian Politics and Agamben's Critique of Violence' (2004) 10(1) *Australian Journal of Human Rights* 79.

797 Deirdre Tedmanson, 'Isle of Exception: Sovereign Power and Palm Island' (2008) 4(2/3) *Critical Perspectives on International Business* 142.

798 See, for example, Stephen Humphreys, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception' (2006) 17(3) *European Journal of International Law* 677; Alison Ross, *The Agamben Effect* (Duke

critiques.[799] In exploring the state of exception, this section sets the theoretical foundations for my arguments about how the state has constructed a state of exception using the THRO Act.

The concept of sovereignty is important to Agamben's work. I take, in this context, the sovereign to be the State of New South Wales,[800] while acknowledging that First Nations sovereignty in Australia has never been ceded. In a federation like Australia, there are multiple overlapping forms of sovereignty: the Commonwealth versus the States; the Crown versus the parliament; the King of Australia versus the Governor-General/Governors. For the purposes of my analysis the sovereign is that which has controlled the creation of the THRO Act and its implementation, so that is necessarily the State of New South Wales, through parliament (the law maker), the executive (law administrator and enforcer) and the court (the arbiter). These categories are unstable, especially with the increasing tendency by parliament to regulate through delegated legislation which evades parliamentary scrutiny.[801]

Sovereignty is founded on a central paradox: it simultaneously sits within and outside of law.[802] This paradox is emblematic of how Agamben frames sovereignty as a constant site of tension between inextricable oppositions: 'the sovereign is the point of indistinction between violence and law, the threshold on which violence passes over into law and law

University Press, 2008); William Stahl, 'The Exception and the Paradigm: Giorgio Agamben on Law and Life' (2020) 19(2) *Contemporary Political Theory* 233; Ronald C Jennings, 'Sovereignty and Political Modernity: A Genealogy of Agamben's Critique of Sovereignty' (2011) 11(1) *Anthropological Theory* 23; Christos Boukalas, 'No Exceptions: Authoritarian Statism. Agamben, Poulantzas and Homeland Security' (2014) 7(1) *Critical Studies on Terrorism* 112; Daniel McLoughlin, 'The Fiction of Sovereignty and the Real State of Exception: Giorgio Agamben's Critique of Carl Schmitt' (2016) 12(3) *Law, Culture and the Humanities* 509; Jessica Whyte, *Catastrophe and Redemption: The Political Thought of Giorgio Agamben* (SUNY Press, 2013).

[799] See, for example, Alexander G Weheliye, *Habeas Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Duke University Press, 2014); Abbas Jamali, 'Why Agamben Cannot Save Us: A Political Critique of Giorgio Agamben's "Coming Politics"' (2024) 36(1) *Rethinking Marxism* 82.

[800] I acknowledge the 'unfinished business' in Australia about First Nations' sovereignty. Consideration of this is outside of the scope of my Thesis. See, Moreton-Robinson (n 536).

[801] See, for example, Gabrielle Appleby and Joanna Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power' (2015) 15(1) *Oxford University Commonwealth Law Journal* 3, 5ff; Dawn Oliver, 'Regulation, Democracy and Democratic Oversight in the UK' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State* (Oxford University Press, 2010) 243, 245; Janina Boughey, 'Executive Power in Emergencies: Where Is the Accountability?' (2020) 45(3) *Alternative Law Journal* 168; Lorne Neudorf, 'Time to Take Lawmaking Seriously: The Problem of Delegated Legislation in South Australia' (2021) 43(8) *Bulletin (Law Society of South Australia)* 10.

[802] Agamben (n 357) 17.

passes over into violence.'[803] The sovereign entails a 'dialectical oscillation between the violence that posits law and the violence that preserves it,'[804] which demonstrates the inextricability of the many oppositions. There is nothing natural about these oppositions. Crucially, 'the sovereign is precisely the one who maintains the possibility of deciding on [the points of opposition] to the very degree that he renders them indistinguishable from each other'.[805] The sovereign monopoly over delineating when law and violence are indistinguishable is central to how the sovereign controls people.

In this way, state power and control of the body are linked. Agamben goes as far as saying 'the production of a biopolitical body is the original activity of sovereign power'.[806] An 'essential characteristic' of biopolitics is the 'constant need to redefine the threshold in life that distinguishes and separates what is inside from what is outside'.[807] It is perhaps unsurprising then that Agamben calls for 'analysis of the concrete ways in which power penetrates subjects' very bodies and forms of life'.[808] Which is what I have sought to do in this Thesis by extending beyond normative analysis of the THRO Act to consider how it works in practice.

The state of exception, like the sovereign, also occupies liminal space – neither wholly inside nor outside of politics nor law.[809] Agamben refers to the state of exception as a 'no-man's-land between public law and political fact, and between the juridical order and life'.[810] In a detailed explanation of the state of exception, he says:

> What is excluded in it is not, on account of being excluded, absolutely without relation to the rule. On the contrary, what is excluded in the exception maintains itself in relation to the rule in the form of the rule's suspension. *The rule applies to the exception in no longer applying, in withdrawing from it.* The state of exception is thus not the chaos that precedes

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[803] Ibid 30. While violence and law are central to Agamben's work, and the most important for my inquiry, he considers the sovereign to lie at many points of indistinction: 'right/left, private/public, absolutism/democracy' (Ibid 7).

[804] Ibid 54.

[805] Ibid 55.

[806] Ibid 9.

[807] Ibid 109. I explored Agamben's work on the *homo sacer* in Chapter 4.

[808] Ibid 8.

[809] Agamben (n 551) 167.

[810] Ibid.

> order but rather the situation that results from its suspension. In this sense, the exception is truly, according to its etymological roots, *taken outside*, and not simply excluded [original emphasis].[811]

This again demonstrates the centrality of oppositions, blurred boundaries and liminal space in Agamben's work. In *State of Exception,* Agamben articulates how the state of exception lies in legal and political liminal space which is easy to explain in the abstract but elusive in praxis:

> [T]he state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other. The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order.[812]

So, the state of exception refers to the suspension of law by law, rather than an absence of law or anarchy. The state creates a state of exception and, in so doing, signals the sovereign's political orientation to the law which has been suspended. The sovereign's political position is evident from how the effect of the state of exception affects people. This is not to say that the state of exception may not *appear to* create anarchy as that which was considered lawful appears to become lawless and that which was once lawless appears to become lawful. But nonetheless, the state of exception operates under the veil of legality as the juridical order is used by the sovereign to suspend itself.

Agamben, rightly, posits that the state of exception is increasingly used and has devastating effects on liberal democracy:

> Indeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that – while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law.[813]

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[811] Agamben (n 357) 19.

[812] Agamben (n 551) 185.

[813] Ibid 240–241.

He also said ‘the political culture of the West does not reali[s]e that it has entirely lost its canon.’[814] But the state of exception was not always central to the modern state.[815] Agamben traces its historic use as instances of martial law or emergency powers which drastically increased in the post-World War II period.[816] The state of exception’s predecessor in civil law systems was ‘the extension of the military authority’s war time powers into the civil sphere,’[817] while in common law systems it was the ‘suspension of the constitution’ or constitutional protections for civil liberties.[818] The state of exception in the modern state combines features from both the common and civil law exceptional or emergency powers.[819]

What does the state of exception mean for the force of law? If law is used to suspend itself, despite otherwise prevailing elsewhere, what does it compel, require, punish or prohibit? Agamben’s answer is, unsurprisingly, indeterminate. He says, the state of exception:

> [D]efines a “state of the law” in which, on the one hand, the norm is in force but is not applied (it has no “force”) and, on the other, acts that do not have the value of law acquire its “force.”…The state of exception is an anomic space in which what is at stake is a force of law without law (which should therefore be written: force-of-~~law~~) [adopting Agamben’s strikethrough].[820]

One of the most significant effects of the state of exception is to disaggregate law from the force of law. Under the state of exception, ‘it is impossible to distinguish transgression of the law from execution of the law, such that what violates a rule and what conforms to it coincide.’[821] When the sovereign lies at the point of indistinction of violence and law, and a state of exception is created where there is a point of indistinction between the lawful

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814 Ibid 181.

815 Agamben (n 357) 13.

816 Ibid 3; Agamben (n 551) 169; 175–184.

817 Agamben (n 551) 170.

818 Ibid.

819 Ibid 171.

820 Ibid 198–199.

821 Agamben (n 357) 50.

and unlawful, it allows lawful violence where it would otherwise be unlawful and vice versa.

Agamben acknowledges the difficulties inherent within this concept and applying it to practical politics. He states 'the state of exception marks a threshold at which logic and praxis blur with each other and a pure violence without *logos* claims to reali[s]e an enunciation without any real reference'.[822] This makes it difficult to apply to politics. Nonetheless, it remains clear that '[t]he state of exception […] defines law's threshold or limit concept'[823] and in this way, it is apt to analyse post-sentence regimes like the THRO Act which operate at law's limits as shown in Chapter 2 and enact violence and Othering as shown in Chapters 3 and 4.

5.2. The State of Exception and the Law of Evidence

In this section, I explore how parliament, through the THRO Act, created a state of exception in relation to the law of evidence. The state of exception with respect to law of evidence manifests in three ways for all cases and one way for some cases. Firstly, the State is able to gain easy access to documents through orders and requests made by the Attorney General. Secondly, the documents provided in response to orders and requests are made admissible in THRO proceedings by law. Thirdly, the documents contain information which 'must' be considered by the court in determining proceedings. In some cases, evidence in the proceedings can be also kept secret. In all of these ways, parliament, through the THRO Act, has suspended the law of evidence that otherwise prevails in relation to criminal and civil law.

5.2.1. Allowing Greater Access to Evidence

5.2.1.1. Section 58 orders and s 59 requests to access information

As identified in Chapter 2.5, the state has broad information gathering powers contained in Part 5 of the THRO Act. Section 58 empowers the Attorney General to require a person to provide 'offender information' in 'prescribed circumstances'. Section 59 allows the Attorney General to request a court or person outside of New South Wales to provide

[822] Agamben (n 551) 200.

[823] Ibid 170.

‘offender information’.[824] The significance of these orders and requests will become more apparent in the next section where I explain how information produced in response is admissible by force of law in THRO proceedings. But it is important to observe how the Attorney General’s ability to order and request information from people to assist in the preparation of proceedings is a suspension of the usual way that litigation is conducted, particularly where the outcome could result in incarceration or supervision.

‘Offender information’ is a core concept which needs to be understood to appreciate the scope of what ss 58 and 59 allow. Until 30 October 2023, offender information was defined in s. 57 as ‘any document, report or other information that relates to the behaviour, beliefs, financial circumstances, or physical or mental condition, of an eligible offender, and includes terrorism intelligence’. Since then, the definition has been expanded to:

> (1) any document, report or other information from which the behaviour, beliefs, financial circumstances, or physical or mental condition of an eligible offender may be inferred, or
>
> (2) terrorism intelligence.

In his Second Reading Speech on the amending Act, the Attorney General said that the definition of offender information will ‘capture all documents from which such information may be inferred to ensure they can be produced to assist the assessment of the offender’s risk, regardless of whether they expressly relate to those characteristics.’[825] The amendment to the definition of offender information firstly shows the breadth of the material that the Attorney General can access through ss 58 and 59, but secondly shows how the executive approaches any obstacle to creating a state of exception. The executive simply changes the law to remove the obstacle and ensure that the juridical order remains suspended to achieve their political aims.

Schedule 2 of the THRO Regulations identifies an exhaustive list of 30 compellable persons which aids in demonstrating the breadth of information that can be accessed under ss 58 and 59. The list includes the Director of Public Prosecutions, the

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[824] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59(1).

[825] New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 October 2023, 14:32, (Michael Daley, Attorney General).

Commissioners of Police and Corrective Services and the Secretary of the Department of Communities and Justice. But not all of the people on the list are public servants. It extends to, financial institution staff, associates, family members, employers and employees of carriage or internet service providers.[826] The scope of compellable people even extends to people who may otherwise claim privilege over the release of information such as medical practitioners, former medical practitioners, executives at hospitals and health facilities or people holding religious office.[827] The Attorney General's power of compulsion extends beyond effecting officers of the state itself, but could be used against individuals that work for private and not-for-profit entities. When reading the list of compellable people with the definition of offender information, the breadth of material that the Attorney General can more easily access using ss 58 and 59 becomes clear. Without ss 58 and 59, it is unlikely that such people would voluntarily provide information to the Attorney General, or other agencies within the executive, without being required to do so through an orthodox process such as being issued with a Notice to Produce or Subpoena.

Sections 58 and 59, but especially orders under s 58, clearly show how the THRO Act constructs a state of exception which suspends the otherwise prevailing juridical order and places people subject to proceedings in liminal legal space where the usual protections around access to information are unavailable despite their being no allegation of criminal conduct. Access to information is central to the state being able to control people subjected to THRO proceedings. By gaining easy access to extensive information the executive can build a case that paints the person as an Other who requires violent control. Without the ease of access to information it would be more difficult for the state to lawfully subject people to ongoing incarceration and supervision outside of the criminal law. By providing easy access to information ss 58 and 59 are essential to the outcomes that the state seeks to achieve through the THRO Act.

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[826] *Terrorism (High Risk Offenders) Regulations 2024* (NSW) sch 2.

[827] Ibid.

5.2.1.2. The plaintiff's "disclosure" obligations

Disclosure regimes are often seen as a way to cure unfairness or inequality of arms in legal proceedings. Disclosure is required under the THRO Act, but the form of disclosure required does not cure unfairness, but creates it. In THRO proceedings, the plaintiff is required to disclose all relevant documents to a person subjected to proceedings. The obligation attaches to 'documents, reports and other information as are relevant to proceedings' irrespective of whether the plaintiff will tender the material.[828] The plaintiff is required to disclose the material available as soon as it can when proceedings are commenced.[829] The plaintiff is also required to provide ongoing disclosure 'as soon as practicable'.[830]

In 2018, the THRO Act was amended to radically reconfigure how disclosure is effected. The amendment inserted subsection 24(2A), which said that it is 'sufficient compliance' with disclosure obligations if an index of the material required to be disclosed is provided to the person defending proceedings.[831] The plaintiff must then make material available on request.[832] The THRO Act does not stipulate the level of specificity for the index. In his second reading speech the Attorney General justified the insertion of subs. 24(2A) because it would ease 'the unnecessary administrative burden' that lay with the plaintiff in 'reviewing, redacting and serving' disclosure material.[833] The Attorney General said that the provisions do not 'limit the State's disclosure obligations'.[834] In practical terms, however, the change adds two additional steps, namely, (1) reviewing an index of documents; and, (2) requesting the documents that are required, which creates a burden for defendants and their lawyers who are more poorly resourced than the plaintiff. The

[828] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 24(2). The analogous provisions that concern CDOs are at s 38. The plaintiff does not have to disclose any material that may be subject to a terrorism intelligence application: ss 24(3); 38(3). Terrorism intelligence provisions are explored below.

[829] Ibid s 24(2)(a).

[830] Ibid s 24(2)(b).

[831] Ibid s 24(2A)(a).

[832] Ibid s 24(2A)(b).

[833] New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 November 2018, 16:27, 27, (Mark Speakman, Attorney General).

[834] Ibid.

effect of such a change is difficult to quantify, particularly in an under studied jurisdiction where matters of evidence and procedure rarely feature in public judgments. That said, it is easy to see how material which may assist in defending THRO proceedings may be missed because of poor labelling in the index or the additional steps required to be taken by people defending proceedings.

I have found one instance where the defendant, Mr Cheema, raised the truncated timeframe within which his lawyers navigated the disclosure process.[835] Justice Johnson acknowledged the complaint and stated '[i]t has been the experience of the Court that considerable pressure is placed upon the legal representatives for persons who are subject to applications [...] arising from the provision of material and the timing of the provision of material.'[836] His Honour also identified a commensurate increase in the pressure that the court faces when determining applications.[837] Justice Johnson said 'I make this observation to emphasise that the general complaint [...] is not confined to the present case'.[838] In this particular case, Mr Cheema used delay as one limb of a broader argument about delay and unfairness for a permanent stay of proceedings. The argument failed because the court was not persuaded that Mr Cheema was 'deprived of a fair opportunity to engage' with the matters before the court.[839]

The insertion of subs. (2A) into s. 24 shows how even measures which were ostensibly intended to preserve some procedural fairness were quickly diluted by the parliament. In this case, the Attorney General's speech clearly shows that the dilution was out of mere convenience alone. In criminal proceedings, the prosecutor's duty to disclose is not only a regular part of proceedings, but essential to ensuring a fair trial.[840] A process somewhat

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[835] *State of New South Wales v Cheema (Preliminary)* (n 206) [43] (Johnson J).

[836] Ibid [44] (Johnson J).

[837] Ibid.

[838] Ibid [46] (Johnson J).

[839] Ibid [59] (Johnson J).

[840] *Grey v R* (2001) 184 ALR 593; *Mallard v R* (125) (2005) 224 CLR 125; *Edwards v R* (2021) 273 CLR 585 [23] Kiefel CJ, Keane and Gleeson JJ note the importance of disclosure for 'good prosecutorial practice. In dissent on the point, Edelman and Steward JJ do not consider disclosure by way of index alone in a criminal trial to be sufficient compliance with the prosecutor's duty of disclosure at [69]-[73]. See also, *Criminal Procedure Act 1986* (NSW) s 142(1)(i). On the prosecutor's duty of disclosure generally, see David Plater,

resembling criminal law disclosure is also affected in civil proceedings in a defendant led process called discovery. This is led by the defendant who controls a process requiring the plaintiff to disclose documents.[841] Proponents of the THRO Act may say, that the disclosure provisions exceed that required in civil proceedings, but such an argument fails to consider the extraordinary nature of THRO proceedings. THRO proceedings allow for incarceration and supervision orders without any allegation or conviction for a criminal offence. The disclosure provisions under the THRO Act show how even a measure intended to create fairness has suspended the juridical order and contributes to the general unfairness of THRO proceedings which occur within liminal space. The disclosure provisions are all the more important under a regime where the plaintiff is able to compulsorily acquire information using orders under s. 58.

5.2.2. Rendering evidence admissible by law

Evidence that is properly gathered using one of the powers in Part 5 of the THRO Act is admissible in any THRO proceedings by force of law. In this section, I examine how the THRO Act suspends the law of evidence that governs admissibility of evidence to demonstrate how the THRO Act creates a state of exception. I explain how the evidence is admissible by reading ss. 50 and 61 together. I examine the uncomfortable interaction between the THRO Act and the *Evidence Act 1995* (NSW), before examining how people defending proceedings have sought to use the *Evidence Act* to challenge the THRO Act's abrogation of the law of evidence. When ss 50 and 61 are read together, they not only render evidence gathered using Part 5 processes admissible, but also leave limited scope to challenge such evidence in THRO proceedings.

'The Development of the Prosecutor's Role in England and Australia with Respect to Its Duty of Disclosure: Partisan Advocate or Minister of Justice?' (2022) 25(2) *University of Tasmania Law Review* 111; and on the role of a prosecutor generally see, Kellie Toole, 'The Decision to Prosecute - The Accountability of Australian Prosecutors' in Victoria Colvin and Philip Stenning (eds), *The Evolving Role of the Public Prosecutor: Challenges and Innovations* (Routledge, 1st ed, 2018) 232.

[841] On the differences between the duty of disclosure and discovery, see *R v Warwick (No 30)* [2018] NSWSC 1051 [89]-[91] (Garling J).

5.2.2.1. Sections 61 and 50(2): suspending the Evidence Act

The general position under the THRO Act is that the civil law rules of evidence apply.[842] However, s 61 ousts the *Evidence Act*'s application with respect to information gathered using Part 5. Section 61 states '[a]ny document or report (or a copy of a document or report) provided to the Attorney General under this Part is admissible in proceedings under this Act despite any Act or law to the contrary.' Section 61 must, however, be read with s 50(2),[843] which preserved the civil law rules of evidence on all questions except admissibility in THRO proceedings including on the questions of 'relevance or probative value'.[844]

The introductory note to Chapter 3 of the *Evidence Act*, provides a useful visual representation of the steps that must be overcome before evidence is admissible under the law of evidence:

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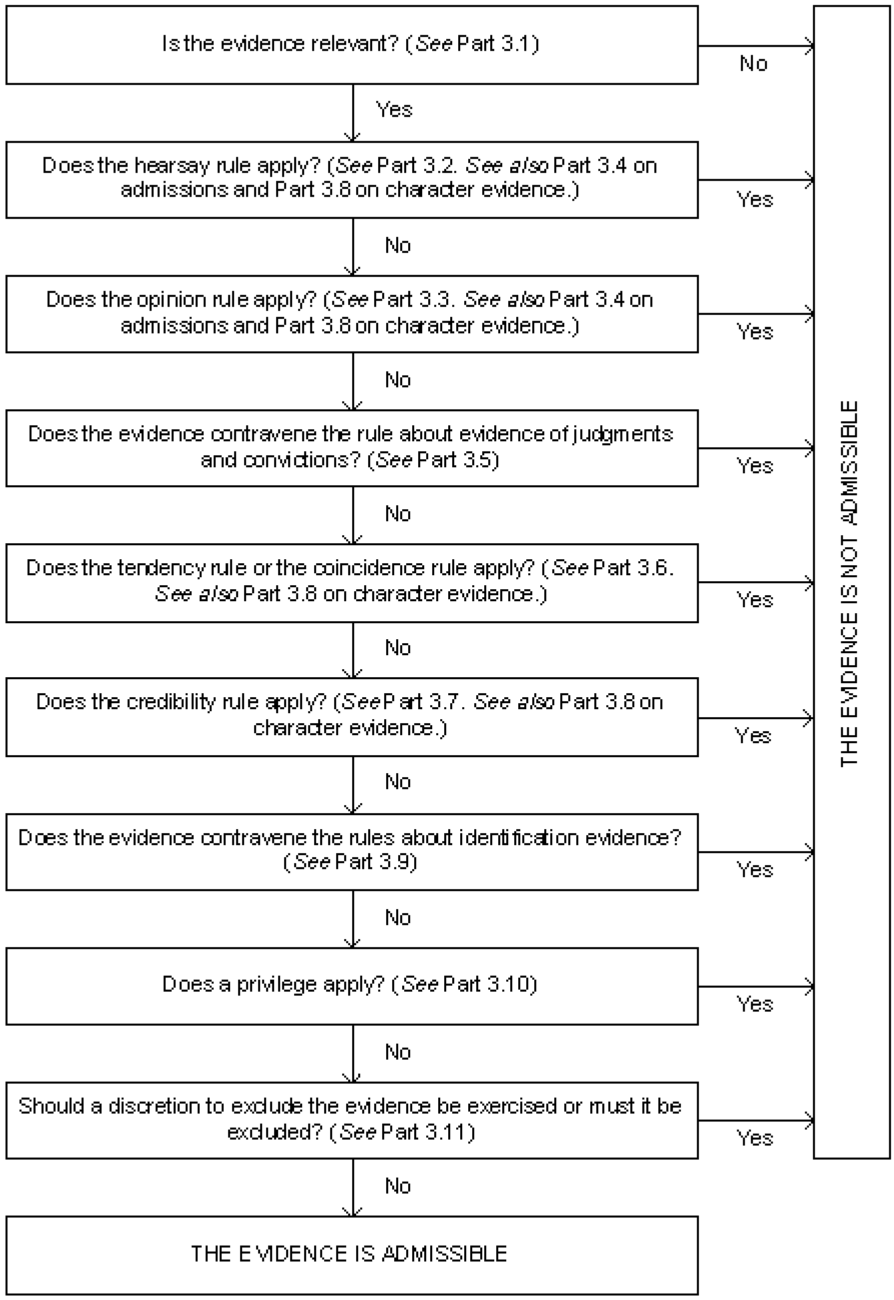
842 *Terrorism (High Risk Offenders) Act 2017* (NSW) s 50(1).

843 *State of New South Wales v Lawrence* (n 308) [28] (Johnson J).

844 *Terrorism (High Risk Offenders) Act 2017* (NSW) s 50(1).



Based on the express terms of s 50(2) the only matter preserved by the THRO Act from the admissibility requirements in the *Evidence Act* is the question of relevance. The question of probative value, also preserved, arises after evidence is admitted.[845] Accordingly many ordinary reasons to object to evidence are excluded when the evidence is gathered using Part 5 processes because of ss 50(2) and 61.

The drafting of ss 50(2) and 61 lead to a very unusual result, because, as the above diagram shows, the first hurdle to admissibility under the law of evidence is a question

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[845] *IMM v The Queen* (2016) 257 CLR 300 [37]-[40] (French CJ, Kiefel, Bell and Keane JJ).

about relevance.[846] The test for relevance is 'if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.'[847] This has led Davies J to describe the reading of s 50(2) with s 61 as 'uneasy', as relevance is the touchstone for admissibility, but under the THRO Act relevance remains a live question even after evidence is admitted.[848] This clearly shows how the THRO Act has created a state of exception. A key touchstone of the law of evidence, that evidence must be relevant to be admitted, is suspended. The suspension of the need for evidence to be relevant to be admitted, demonstrates the creation of the state of exception, but recall also that this is occurring in relation to evidence which can be compulsorily acquired using s. 58 orders.

Section 61 was introduced in the first draft of the THRO Act brought before parliament. Section 61 was not subject to justification or debate in parliament beyond its function being identified in the second reading speech in the Legislative Council.[849] Neither ss 50(2) nor 61 have been amended since the Bill passed parliament. The lack of scrutiny over very significant provisions which alter how evidence law operates is concerning, but demonstrative of the way that legislative changes concerning criminal law are often made in haste.[850] While the lack of scrutiny over these provisions is inadequate, it is hardly surprising when the THRO Act is complex and the most significant parliamentary scrutiny attached to the consequences for people – that they could be incarcerated and supervised without another criminal conviction – rather than interlocutory processes, procedural and evidentiary rules. Thus, the state of exception operates in multifaceted ways to provide advantage to the state in achieving its political ends and can allow it to evade scrutiny.

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[846] *Evidence Act 1995* (NSW) s 56.

[847] Ibid s 55(1).

[848] *State of New South Wales v Haidar* (38) [2020] NSWSC 38 [68] (Davies J) ('*State of New South Wales v Haidar*').

[849] New South Wales, *Parliamentary Debates*, Legislative Council, 22 November 2017 16:33 (David Clarke).

[850] Luke McNamara et al, 'Theorising Criminalisation: The Value of a Modalities Approach' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91, 109; Luke McNamara et al, 'Understanding *Processes* of Criminalisation: Insights from an Australian Study of Criminal Law-Making' (2021) 21(3) *Criminology & Criminal Justice* 387, 401.

Lack of parliamentary scrutiny notwithstanding, ss 50(2) and 61 have been subjected to considerable judicial scrutiny, including in the constitutional challenge brought in the *Lawrence* proceedings considered in Chapter 2. In one of the first THRO decisions, N Adams J explained that material produced under s 58 was '*prima facie* admissible' because of s 61.[851] With respect to her Honour, this appears to be a mischaracterisation of the provision's operation which renders documents admissible 'despite' other laws which may operate to render the document inadmissible. There is no room to rebut a *prima facie* assumption that the document is admissible once s 61 is engaged. Nonetheless N Adams J's construction is less repugnant to general principles of criminal law than that subsequently preferred.

Justice N Adams' preferred construction has since been departed from.[852] As Fullerton J explained:

> [Section 50(2)] should be construed to reserve to the Court the function, power and responsibility of deciding whether the evidence that is received in the proceedings, whether for final or interim relief, when assessed for its weight and relevance, establishes, in a particular case, to a high degree of probability that the eligible offender poses an unacceptable risk of committing a serious terrorism offence such as to warrant the making of an order.[853]

Justice Fullerton's decision was appealed. The Court of Appeal unanimously dismissed the appeal. On the proper construction of ss 50(2) and 61, Bathurst CJ stated:

> [Section 50(2)] applies to material admitted under s 61 and material to which the Court is required to have regard by virtue of s 39. Whilst the Court may be required to admit the material, it seems to me the effect of the section is to make it clear that after having had regard to it, if the Court concludes that it is irrelevant no further account need to be taken of it [...] it seems to me that the purpose of s 50(2) is to limit the use to be made of the classes of documents falling within s 61 and to the extent they would be irrelevant or would have little or no probative value in civil proceedings conducted in accordance with the rules of evidence.[854]

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[851] *State of New South Wales v White* (n 260) [105] (N Adams J).

[852] *State of New South Wales v Lawrence* (n 308) [28] (Johnson J); *State of New South Wales v Fayad (Final)* (n 480) [69] (Wright J); *State of New South Wales v Fayad (Preliminary)* (n 210) [69] (Johnson J).

[853] *State of New South Wales v Lawrence* (n 334) [91] (Fullerton J).

[854] *Lawrence v State of New South Wales* (n 204) [39]-[40] (Bathurst CJ), Bell P (as his Honour then was) agreeing at [99]; Leeming JA agreeing at [100]; cited with approval in *State of New South Wales v Fayad (Final)* (n 480) [64] (Wright J).

Accordingly, when considering the admissibility of evidence, the THRO Act significantly alters the otherwise prevailing order established by the *Evidence Act*. Whilst questions of relevance and probative value are retained, s. 61 renders evidence gathered using Part 5 powers admissible. This circumvents many other ways in which a person subjected to THRO proceedings could otherwise object to the tender of such evidence. Insufficient attention has been paid to the evidence gathering procedures under the THRO Act and their implications. These provisions afford significant advantage to the State and supervene over safeguards which would otherwise exist for a person subjected to criminal proceedings. Perhaps the liminality of the THRO Act has led to greater scrutiny of other aspects – such as the burden of proof or availability of incarceration without charge – which are more easily identifiable departures from the criminal law. The layers of liminal space constructed by the THRO Act foreground and obscure different matters at different times. But as adversarial proceedings are reliant on evidence being and lawfully tendered for consideration by a judge, the THRO Act's suspension of the law of evidence has serious consequences for people subjected to proceedings who can be incarcerated or supervised as a result of THRO proceedings.

An important aspect of the operation of s. 61 is that it only applies to documents provided in response to valid orders or requests made under ss 58 and 59. Consequently, s 61 does not apply to evidence otherwise acquired like affidavits and reports created for use in THRO proceedings.[855]

This is not to say, however, that a person cannot object to the plaintiff's characterisation of information as 'prescribed offender information'. A defendant could submit that it was improper for the information to be sought by the Attorney General, and provided by the producer. Whilst this objection has been taken,[856] I have not found any cases where it succeeded. The ambit of 'prescribed offender information' in the THRO Regulations is broad, so it is difficult to see how success could be achieved. But given that 'prescribed offender information' is defined in the THRO Regulations, even if an objection were successful, the executive can swiftly and simply change the regulation. This demonstrates the malleability of the rules which suspend the juridical order. Thus, the THRO Act's

[855] *State of New South Wales v Lawrence* (n 308) [29]-[30] (Johnson J).

[856] Ibid [64]-[65]; [73] (Johnson J).

construction of liminal space has varied degrees of certainty as it has been created so as to allow the state to create swift changes where necessary to achieve their political ends.

5.2.2.2. Suspending Evidence Act provisions which allow for the exclusion of evidence

With limited options available to challenge evidence obtained using Part 5 powers that is tendered in proceedings, people defending proceedings have sought other ways to challenge evidence. Applications have been made for evidence to be excluded or read down pursuant to ss 91, 135 and 136 of the *Evidence Act* but have almost always failed. Section 91 excludes evidence of judgments and convictions. Section 135 provides a discretion to refuse to admit evidence if the probative value is 'substantially outweighed by the danger that the evidence might' be, *inter alia,* unfairly prejudicial or misleading. Section 136 provides a discretion to limit the use that can be made of evidence 'if there is a danger that a particular use […] might' be, *inter alia,* unfairly prejudicial or misleading. I consider the case law concerning each section's interaction with the THRO Act in turn. The broader point which underlies this examination is: the THRO Act has been construed to suspend the law of evidence in a way which affords the plaintiff advantage. In so doing, it harms the otherwise existing rights of people subject to THRO proceedings. So, the THRO Act creates a state of exception which opens up liminal space for the state to achieve the violence and Othering examined in Chapters 3 and 4.

Section 91 of the *Evidence Act* operates to exclude 'evidence of the decision, or of a finding of fact' from admission to evidence if it is sought to be used as proof of 'existence of a fact that was in issue in that proceeding'. Section 91 further prohibits evidence of judgments and convictions which are admitted for another purpose, to be used to 'prove the existence of a fact' that was in issue in the proceedings. Decisions of the court are often found in materials obtained by the Attorney General under ss 58 and 59, so it is unsurprising that objections under s 91 have been taken.

In the *Fayad* preliminary hearing, the plaintiff sought to tender four Supreme Court sentencing decisions from proceedings against people other than Mr Fayad.[857] The

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[857] *State of New South Wales v Fayad (Preliminary)* (n 210) [63] (Johnson J); The cases were: *R v Alqudsi* [2016] NSWSC 1227 (about foreign incursion offences); *R v Sulayman Khalid; R v Jibryl Almaouie; R v IM; R v Mohamed Rashad Al Maouie; R v Farhad Said* [2017] NSWSC 1365 (about preparation for a terrorist act);

plaintiff argued that each judgment was relevant as it described an association between Mr Fayad and each of the named defendants.[858] The judgments, the plaintiff argued, provided evidence of Mr Fayad's association with people who advocated support for terrorist acts or violent extremism and were directly relevant to the assessment of Mr Fayad's risk.[859]

Justice Johnson observed that most of the evidence contained within each judgment was also found elsewhere in the plaintiff's evidence.[860] However, each judgment also contained evidence of conversations which the plaintiff presented as being with Mr Fayad or about Mr Fayad that were not elsewhere in evidence.[861] His Honour overruled the objection and admitted the four judgments, finding that they had all been obtained using s 59,[862] which compelled their admission pursuant to s 61.[863] Justice Johnson identified that the live question regarding whether s 91 applied, required consideration of the purpose for which the evidence was sought to be tendered.[864] It is, however, unclear from Johnson J's reasons why he determined in the plaintiff's favour in respect of each judgment. His Honour had clear reservations about an aspect of the *Sulayman Khalid* judgment which referred to a conversation about Mr Fayad, and gave limited the weight to that judgment.[865] Justice Wright, in the *Fayad* final hearing expressed agreement with Johnson J's approach,[866] but did not elaborate on Johnson J's reasons.

This brief example demonstrates how s. 61 of the THRO Act suspends the otherwise prevailing law of evidence to create a state of exception which the plaintiff can use to achieve more favourable outcomes for itself in THRO proceedings. This is important

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R v Biber [2008] NSWSC 535 (about foreign incursion offences); *R v Musleh (No 5)* [2018] NSWSC 1927 (about foreign incursion offences).

[858] *State of New South Wales v Fayad (Preliminary)* (n 210) [64]-[65] (Johnson J).

[859] Ibid [65] (Johnson J).

[860] Ibid [73] (Johnson J).

[861] Ibid [74]-[78] (Johnson J).

[862] Ibid [68] (Johnson J).

[863] Ibid [69] (Johnson J).

[864] Ibid [71] (Johnson J).

[865] Ibid [67]; [76] (Johnson J).

[866] *State of New South Wales v Fayad (Final)* (n 480) [45] (Wright J).

because the state of exception – by opening up easy avenues to obtain and use evidence – enables the state to use more coercive measures against people, like Mr Fayad, which would not otherwise be available or acceptable under the criminal law. Without the liminal space created by the THRO Act with respect to the law of evidence, the state would have difficulty in achieving its purpose.

The court has also considered interactions between the THRO Act and ss. 135 and 136 of the *Evidence Act*. Explaining this interaction, Wright J stated:

> Parliament has prescribed the types of evidence that will be subject to s. 50(2) of [the THRO] Act. The acceptability or cogency of that evidence was to be considered in light of the fact that the Court was not required to place any particular weight on any part of the material admissible under those provisions of the THRO Act and could take into account the fact that it had not been tested by cross-examination, or that it contained hearsay, irrelevant material or non-expert opinion. In addition, the Court had power to limit its use by making an order under s 136 of the *Evidence Act 1995* (NSW).[867]

Justice Wright clearly considered that the use of evidence rendered admissible by s 61 could be limited if s 136 of the *Evidence Act* was engaged.[868] However, when Mr Fayad sought for the use of evidence to be so limited, Wright J stated:

> When it came to formulating a limitation on use, however, I was unable to find one that would have been suitable in the circumstances where the Court's task was to assess future risk. In each case, it appeared to me to be more appropriate to deal with any issues by way of the weight to be accorded to the evidence, in light of the relevant circumstances of each document and the parties' submissions, rather than seeking to impose an ill-defined limit on use under s. 136.[869]

In the same case, where s 135 of the *Evidence Act* was invoked, Wright J found its application was displaced by the THRO Act.[870] Section 135 permits a court to refuse to admit evidence, while s 50(2) is expressly qualified to only preserve the law of evidence

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[867] Ibid [30] (Wright J).

[868] Ibid [64]-[65]; Justice Wright drew support from Bathurst CJ's comments in *Lawrence* to the effect that limiting the use of evidence under s 136 was available to the court: *Lawrence v State of New South Wales* (n 204) [39]; [78].

[869]) *State of New South Wales v Fayad (Final)* (n 480) [73] (Wright J).

[870] Ibid [50] (Wright J).

'once [something] is admitted into evidence'.[871] Accordingly, an eligible offender cannot invoke s 135 to have evidence gathered using a Part 5 power excluded.

Consequently, people subjected to THRO proceedings have limited recourse to the protections afforded by the *Evidence Act* which leaves evidence before the court that could otherwise be excluded in other proceedings. The THRO Act suspends the otherwise prevailing juridical order established by the *Evidence Act*. Regrettably parliament has done so without providing sufficient justification or explanation. The way that these provisions operate is difficult to comprehend or critique without engagement with the political purpose for which they were introduced, which makes the turn to critical theory useful.

Taking the extent of the state of exception implemented with respect to the *Evidence Act* together with other aspects of the THRO Act, it is clear that the state is afforded significant advantage to construct an identity for a person which may not otherwise be available in other legal proceedings. The state of exception created by the THRO Act creates liminal space where the boundaries between what was once lawful and unlawful are blurred as people can be incarcerated and supervised because of a prospective risk.

5.2.3. Requiring evidence to be considered by the court

As I have explained in this Chapter, the THRO Act's information gathering powers are significant because they create a state of exception in relation to the law of evidence. But the full force of the state of exception cannot be understood without reading the information gathering provisions with provisions which identify matters that the 'Court must also have regard' when determining whether to make THRO orders.[872] When read together it is clear how the information gathering powers are important for the state because they ensure that the court has admissible material before it about the matters that the state wants to be considered when applications are determined. The state of exception with respect to the law of evidence has allowed the state to craft a regime where the proceedings are conducted in a radically different way to assist in achieving the political explored in Chapters 3 and 4. I now consider how the provisions identifying

[871] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 50(2); *State of New South Wales v Fayad (Final)* (n 480) [69] (Wright J).

[872] *Terrorism (High Risk Offenders) Act 2017* (NSW) ss 25(3); 39(3).

matters which the court must take into account operate, to extend on my analysis of how the THRO Act creates a state of exception with respect to the law of evidence.

The matters identified in ss. 25(3) and 39(3), which must be taken into account by the court when determining an application for THRO orders are almost identical to each other. They are worth extracting full, so that the breadth of their scope is clear:

> (a) the reports received from the persons appointed to conduct examinations of the offender, and the level of the offender's participation in any such examination,
>
> (b) the results of any other assessment prepared by a qualified psychiatrist, registered psychologist, registered medical practitioner or other relevant expert as to the likelihood of the offender committing a serious terrorism offence, the willingness of the offender to participate in any such assessment, and the level of the offender's participation in any such assessment,
>
> (c) the results of any assessment as to the likelihood of persons with histories and characteristics similar to those of the offender committing a serious terrorism offence,
>
> (d) any report prepared by Corrective Services NSW or the NSW Police Force as to the extent to which the offender can reasonably and practicably be managed in the community,
>
> (e) any report prepared by a prescribed terrorism intelligence authority relevant to whether the offender can reasonably and practicably be managed in the community,
>
> (f) any treatment or rehabilitation programs and other programs or initiatives in which the offender has had an opportunity to participate, the willingness of the offender to participate in any such programs or initiatives, and the level of the offender's participation in any such programs or initiatives,
>
> (g) options (if any) available if the offender is kept in custody or is in the community (whether or not under supervision) that might reduce the likelihood of the offender re-offending over time,
>
> (h) for an extended supervision order—the likelihood that the offender will comply with the obligations of the extended supervision order,
>
> (i) without limiting paragraph (h), the level of the offender's compliance with any obligations to which the offender is or has been subject while—
>
> (i) on release on parole, or
>
> (ii) subject to a control order, or
>
> (iii) subject to an extended supervision order or interim supervision order,
>
> or

(iv) subject to any other order of a court,

(j) the offender's criminal history (including prior convictions and findings of guilt in respect of offences committed in New South Wales or elsewhere), and any pattern of offending behaviour disclosed by that history,

(k) the views of the sentencing court at the time the sentence of imprisonment was imposed on the offender,

(l) any beliefs or commitments of the offender (whether of an ideological, religious, political, social or other nature) that support engaging or participating in terrorism activities,

(m) any other information that is available as to the likelihood that the offender will commit a serious terrorism offence.[873]

The matters set out in ss 25(3) and 39(3) have almost uniformly been interpreted as giving rise to 'mandatory' considerations for the court to consider when determining proceedings.[874] Nonetheless, the court retains discretion to determine the weight given to each of the matters.[875]

Justice Walton has emphasised that ss 25(3) and 39(3) inform the discretionary question of whether an ESO or CDO should be made; however, this does not preclude the court from considering the same matters when determining whether the person poses an unacceptable risk.[876] So while the provisions are limited in scope – a person must already be an eligible offender who poses an unacceptable risk – these provisions ensure that the court takes into account mandatory considerations on the discretionary question of whether THRO orders should be made.[877] While the question remains discretionary, the parliament requires the court to take into account mandatory considerations which could

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[873] Ibid s 39(3).

[874] *State of New South Wales v Holt (No 8)* (n 245) [46] (N Adams J); *State of New South Wales v Dunn (a Pseudonym)* (n 190) [19]; [33] (N Adams J); *State of New South Wales v Ceissman (No 2)* [2018] NSWSC 1237 [11] (Rothman J) ('*State of New South Wales v Ceissman (No 2)*'); *State of New South Wales v White (Final)* (n 181) [151] (N Adams J); *State of New South Wales v Barez (Final)* [2020] NSWSC 555 [69] (Walton J); *State of New South Wales v Fayad (Final)* (n 480) [33]; [84] (Wright J); *State of New South Wales v Elmir (Final)* (n 312) [59] (Walton J); *State of New South Wales v Mustapha (Final)* (n 192) [27] (N Adams J); Others use the language of obligation *State of New South Wales v Barez (Preliminary)* [2019] NSWSC 1589 [15] (Fullerton J).

[875] *State of New South Wales v Lawrence* (n 334) [107] (Fullerton J).

[876] *State of New South Wales v Mustapha* (n 385) [113] (Walton J).

[877] *Terrorism (High Risk Offenders) Act 2017* (NSW) ss 39(1); 25(1).

prove persuasive in determining proceedings rather than leaving the discretionary question open for the court to determine as it sees fit.

When considering the list of mandatory considerations, and my previous analysis of the Part 5 provisions, it is clear that parliament has constructed an internally coherent and discrete (albeit complex) system for obtaining and using evidence that it considers important to THRO proceedings within the THRO Act itself as an exception to the rules that continue to apply to other legal proceedings. The Part 5 provisions allow the Attorney General to acquire evidence from third parties, sometimes compulsorily. Sections 61 and 50(2) then render the evidence admissible in the proceedings. Sections 25(3) and 39(3) then compel courts to consider the matters contained within most, if not all, of the documents acquired using Part 5 when deciding whether an ESO or CDO should be made. The process constructed by the THRO Act subverts how common law legal proceedings usually occur and the elegant synergies between information gathering powers and matters which must be considered by courts are not benign but rather use of the liminal space created by a state of exception to provide advantage to the plaintiff.

5.2.4. Rendering evidence secret

Everything discussed previously in this Chapter applies to all THRO proceedings. But there are powers which allow the plaintiff to apply to the court to keep certain evidence (called terrorism intelligence) secret from a person defending proceedings which are only used in some proceedings.[878] While the THRO Act generally creates a state of exception in relation to the law of evidence, the terrorism intelligence powers suspend part of the THRO Act in allowing evidence otherwise gathered using a state of exception to be kept secret. The terrorism intelligence powers provide a more extreme example of how the THRO Act creates a state of exception in relation to the law of evidence. The effect

[878] The use of secrecy provisions has come under increasing political and academic scrutiny. See generally Grant Donaldson, *The Operation and Effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004* (Independent National Security Legislation Monitor, Commonwealth of Australia, 30 October 2023) https://www.inslm.gov.au/system/files/2024-02/inslm-report-nsi-act-2004-30-10-2023.pdf; Jake Blight, *Secrecy Offences - Review of Part 5.6 of the Criminal Code Act 1995* (Independent National Security Legislation Monitor, Commonwealth of Australia, June 2024) https://www.inslm.gov.au/system/files/2024-06/inslm-review-of-part-5-6-of-the-criminal-code-act-1995.pdf; Anthony Gray and Pauline Collins, 'Non-Disclosure of Relevant Material and Chapter III: The Tantalising Promise of Due Process Rights Protection by the Australian Constitution in the Gageler High Court Using Separation of Powers Principles' (2024) 31(2) *Australian Journal of Administrative Law* 93.

of the terrorism intelligence powers is that a person defending proceedings which could lead to their incarceration or supervision without charge may not know all of the evidence being called against them in the proceedings.

The terrorism intelligence provisions in the THRO Act underwent significant revision, with the current iteration coming into force on 28 November 2018.[879] The Attorney General, in his Second Reading Speech, justified the amendments in the following way:

> The possibility of terrorism intelligence being provided to an offender in full can be a concern, including for other agencies or jurisdictions providing information under the [THRO] Act. Insufficient protections of terrorism intelligence under the [THRO] Act leaves open the risk that information may be withheld by other agencies or jurisdictions, meaning the Supreme Court would not be fully informed about all relevant matters.[880]

I have extracted the full definition of 'terrorism intelligence' in Chapter 2 – which includes *inter alia* information related to terrorism activity –and explained how the powers operate briefly. To summarise them again, if the Attorney General or an intelligence agency[881] proves that material received using Part 5 powers is 'terrorism intelligence', a court 'must' grant any application made under s 59A restraining access to that material.[882] The use of the word 'must' make clear that the court has no discretion to refuse to make the order, rather if the conditions are satisfied an order must be made.

The *Lawrence* proceedings which were introduced in Chapter 2, provide an extensive account of how the terrorism intelligence provisions operate, and expands upon their proper construction. I examine the *Lawrence* proceedings in detail to explore how these provisions create a state of exception.[883] The plaintiff sought an interim detention order

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879 *Community Protection Legislation Amendment Act 2018* (NSW); *State of New South Wales v Elomar* (708) [2018] NSWSC 708 dealt with the former provisions.

880 New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 November 2018, 16:27, 27, (Mark Speakman, Attorney General).

881 *Terrorism (High Risk Offenders) Act 2017* (NSW) s 4(1); *Terrorism (High Risk Offenders) Regulations 2024* (NSW) cl 6.

882 *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59A(2).

883 Two other cases mention terrorism intelligence: *State of New South Wales v Elomar (Final)* (n 221) [39] (Hamill J mentions that terrorism intelligence orders were made before the final hearing, but there are no details about the orders in the judgment) and *State of New South Wales v Fayad (Final)* (n 480) [47]ff (Wright J includes limited reasoning regarding the terrorism intelligence orders being made and does not provide any insights into the terrorism material considered).

(IDO) against Mr Lawrence, a convert to Islam, on the basis that he watched 'extremist material' while in custody, described beheadings as 'beautiful' and prepared to start, and train with, an Islamic State branch in Australia.[884] He was convicted of property and intimidation type offences, but no terrorism offences.[885] The IDO was granted.[886]

Justice Johnson, in *Lawrence,* was required to consider the definition of 'terrorism intelligence', and identified that it imports the definitions of 'terrorism activity' and 'terrorist act' in the THRO Act.[887] His Honour remarked at the 'breadth' of the definition when stating that '"intelligence" is understood as extending to direct or indirect information which falls short of being evidence'.[888] Justice Johnson further noted that 'it is not necessary that the information in question related directly to the Defendant',[889] further demonstrating the breadth of material that could be captured. His Honour, however, noted that the breadth was 'understandable' considering the THRO Act's purpose.[890]

Turning to the proper construction of 'could reasonably be expected' in the definition of 'terrorism intelligence', Johnson J determined that '[t]he words should be given their ordinary meaning'.[891] His Honour explained that the element of the definition dealing with disclosure 'involves a form of risk assessment' which 'concern[s] an assessment as to the prospect of adversely affecting the capacity of persons or bodies to carry out certain functions or to prejudice nominated forms of investigation […] or endanger a person's life or physical safety'.[892] Senior Counsel for Mr Lawrence on appeal described material that is likely to fall within the definition of terrorism intelligence as 'not likely to

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[884] *Lawrence v State of New South Wales* (n 204) [9] (Bathurst CJ); Bell P (as his Honour then was) and Leeming JA agreeing.

[885] Ibid [6]-[8] (Bathurst CJ).

[886] Ibid [1] (Bathurst CJ). The IDO made by Fullerton J was upheld on appeal.

[887] *State of New South Wales v Lawrence* (n 308) [45] (Johnson J).

[888] Ibid [49] (Johnson J). See also remarks on the construction of 'relating to' within the definition of terrorism intelligence at [49].

[889] Ibid [46] (Johnson J).

[890] Ibid [47] (Johnson J).

[891] Ibid [52] (Johnson J).

[892] Ibid [53] (Johnson J).

be innocuous', a significant understatement.[893] When the principal inquiry of any THRO proceedings is whether a person poses an unacceptable risk of committing a serious terrorism offence, any information within the definition will be highly probative.

When granting a terrorism intelligence application the court 'must' ensure the confidentiality of the terrorism intelligence until the proceedings have been determined.[894] Measures taken may include closing the court when hearing and determining a terrorism intelligence application.[895] The court is also obliged to make orders ensuring the confidentiality of terrorism intelligence after proceedings are determined. The court could ensure confidentiality by limiting the disclosure of terrorism intelligence to legal representatives, ordering redactions to the terrorism intelligence, restricting access to terrorism intelligence, and/or preventing legal representatives from disclosing terrorism intelligence to their client.[896] Senior Counsel for Mr Lawrence at first instance, and on appeal, made powerful submissions challenging the Constitutional validity of these provisions. The argument was that the operation of s. 59C can result in circumstances where legal representatives cannot seek instructions on information that they know about from their client, which impedes their ability to test the evidence.[897]

If the court grants an application in respect of terrorism intelligence when a person is unrepresented, or the court is urged by the plaintiff to make orders restricting access to the material purported to be terrorism intelligence, then the court must appoint an independent third party representative to represent the person's interests.[898] The third party representative can access the complete material and make submissions to the court

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[893] *Lawrence v State of New South Wales* (n 204) [42] (Bathurst CJ).

[894] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59C.

[895] Ibid 59C(1)(a); *State of New South Wales v Lawrence* (n 308) [31] (Johnson J).

[896] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59C.

[897] *State of New South Wales v Lawrence* (n 334) [100] (Fullerton J); *Lawrence v State of New South Wales* (n 204) [43] (Bathurst CJ); The right to know and test evidence put against a person is central to the common law system: *Kioa v West* (1985) 159 CLR 550 582 (Mason J) (as his Honour then was).

[898] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59B(1). The applicant for terrorism intelligence orders bears the costs of the independent representative: s 59B(4). For an analysis of a similar system in the UK see, John Jackson, 'The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition' (2016) 20(4) *International Journal of Evidence and Proof* 343.

on the terrorism intelligence application.[899] The THRO Regulations stipulate the qualifying requirements for an independent representative, including that they are 'a retired judicial officer, or [are] qualified to be appointed as a judicial officer'.[900]

If a court is satisfied that any information purported to be terrorism intelligence is not terrorism intelligence or declines to grant orders sought in respect of the material, then the court 'must' grant the party seeking the order the opportunity to withdraw the information.[901] This opportunity extends to affected parties that have not made the application.[902] For example, if the Attorney General made the application but the source is Corrective Services NSW, then the latter could make a withdrawal application which must be granted. If information is withdrawn, it cannot be disclosed to the defendant or their legal representatives.[903] It also cannot be considered further by the court in the substantive proceedings.[904] But interestingly, the court 'is not required to allow the information to be withdrawn from consideration by the court if the court considers that its withdrawal would be manifestly unfair' to a person defending proceedings.[905] These provisions have not yet been tested.

As terrorism intelligence applications are protected, it is hard to understand the types of material that plaintiff seeks to protect. A small glimpse is provided in the *Lawrence* proceedings. Many documents appear to be intelligence reports prepared by the Correctives Intelligence Group of Corrective Services NSW.[906] The documents are explained vaguely. Justice Johnson explained that one 'relates to suspected terrorism activity',[907] while another refers to people said to associate with Mr Lawrence who are

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[899] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59B(3).

[900] *Terrorism (High Risk Offenders) Regulations 2024* (NSW) cl 8(1)(a).

[901] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 59D(1).

[902] Ibid s 59D(2).

[903] Ibid s 59D(4)(a).

[904] Ibid s 59D(4)(b).

[905] Ibid s 59D(3).

[906] *State of New South Wales v Lawrence* (n 308) [66]; [70]; [72]; [77]; [80]; [82] (Johnson J).

[907] Ibid [68] (Johnson J).

described as holding 'violent extremist ideologies'.[908] These descriptions give little away. But Mr Lawrence's legal representatives participated in the hearing and were permitted to access the terrorism intelligence material.[909] Mr Lawrence, however, was not present when terrorism intelligence was discussed.[910] Open evidence not subject to the terrorism intelligence application indicated that Mr Lawrence corresponded with Milad Al-Ahmadzai, a person understood to have links to terrorist activity and extremist views.[911] Open evidence also suggests that Mr Lawrence distributed Corrections Intelligence Group information to Al-Ahmadzai which Lawrence received during the THRO proceedings.[912] Central to the terrorism intelligence application was the risk that if Mr Lawrence were to obtain further information, he may distribute it to people who were suspected of criminal activity.[913]

Unsurprisingly, the terrorism intelligence provisions featured heavily in Mr Lawrence's Constitutional challenge to the regime. His legal representatives argued that the terrorism intelligence provisions rendered the proceedings procedurally unfair. The terrorism intelligence provisions were central to Mr Lawrence's argument that 'many features of the Act depart to such an extent from traditional judicial methods and standards, that their combined operation […] substantially impairs the court's institutional integrity, rendering it incompatible with its role as a repository of federal jurisdiction.'[914] The emphasis on the terrorism intelligence provisions was coupled with scrutiny over ss 50 and 61, which diverge significantly from similar post-sentence

[908] Ibid [70] (Johnson J).

[909] Ibid [4] (Johnson J).

[910] Ibid.

[911] For more on Mr Al-Ahmadzai, see *State of New South Wales v Fayad (Final)* (n 480) [281]-[286] (Wright J); *Fayad v R* [2017] NSWCCA 81 [14] (N Adams J).

[912] *State of New South Wales v Lawrence* (n 308) [60]-[61] (Johnson J).

[913] Ibid.

[914] *State of New South Wales v Lawrence* (n 334) [11] (Fullerton J). The argument was framed differently on appeal. Senior Counsel for Mr Lawrence argued that the THRO Act 'purports to direct the Supreme Court as to the manner of the exercise of its jurisdiction by requiring or authorising it to proceed in a manner that does not ensure equality before the law, impartiality and the appearance of impartiality, or the right of a party to meet the case made against him or her': *Lawrence v State of New South Wales* (n 204) [2] (Bathurst CJ).

regimes that have withstood Constitutional challenge.[915] Ultimately Fullerton J, who heard the Constitutional challenge, accepted that ‘contextual differences’ were present between the THRO Act and similar Acts subject to previous Constitutional challenge, but found that ‘the same fundamental features’ applied.[916] Her Honour’s reasoning centred on the court retaining control over determining the merits of an application and weighing the evidence before it.[917] Justice Fullerton also found that when protecting the community from terrorism, ‘statutory limits on the disclosure of particular information of a highly sensitive nature [… are] inevitable’ to allow the court to properly exercise its functions.[918]

Accordingly, Fullerton J found that the THRO Act neither ‘result[ed] in any practical injustice’, nor ‘den[ied] the procedural fairness’ that Mr Lawrence was entitled.[919] In this way, perhaps Mr Lawrence’s case was not the best vehicle through which to mount a Constitutional challenge, because his counsel were able to participate in all of the proceedings and could view all terrorism intelligence and make submissions about it (just not discuss it with their client).[920] Justice Fullerton identified that redactions were applied to some documents on the basis of public interest immunity, which was not a reason to Constitutionally invalidate the legislation.[921] Justice Fullerton’s decision and reasoning was unanimously upheld on appeal. Chief Justice Bathurst emphasised that ‘[t]he Court is thus not subject to any legislative direction’ in dealing with terrorism intelligence and instead exercises wide discretion which removes ‘practical injustice’.[922]

When thinking about how the terrorism intelligence provisions contribute to the creation of a state of exception, it is important to remember that they only operate in relation to material gathered using Part 5 powers. Accordingly, this material has already been

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[915] *State of New South Wales v Lawrence* (n 334) [56]-[57] (Fullerton J).

[916] Ibid [59] (Fullerton J).

[917] Ibid [59]; [107] (Fullerton J); See also *Lawrence v State of New South Wales* (n 204) [78] (Bathurst CJ).

[918] *State of New South Wales v Lawrence* (n 334) [73] (Fullerton J).

[919] Ibid [111] (Fullerton J).

[920] Ibid [104] (Fullerton J).

[921] Ibid.

[922] *Lawrence v State of New South Wales* (n 204) [93] (Bathurst CJ) (Bell P and Leeming JA agreeing).

gathered using ss 58 and 59 and rendered admissible, clearly demonstrating the state of exception. The terrorism intelligence provisions create another layer of advantage for the plaintiff during proceedings as they allow courts to restrict access to such material. The terrorism intelligence provisions, in this way, suspend the THRO Act which has already suspended the law of evidence.

Of course, the appointment of an independent legal representative ameliorates some concerns during terrorism intelligence proceedings. But if legal representatives acting for a person cannot see, or completely see, the evidence against their client, how can they properly challenge it? Ultimately, the real injustice occurs at the substantive hearing of proceedings where a person is defending an application where their liberty is at stake, and may be unable to see material connected with terrorism put against them. That the central inquiry in THRO proceedings is whether the person poses an unacceptable risk of committing a serious terrorism offence. When the terrorism intelligence provisions are engaged, a person subject to proceedings is fighting blind to defend their liberty against highly probative evidence about an unknowable purported terrorism risk. The terrorism intelligence provisions thus extend the state of exception already constructed by the other Part 5 provisions of the THRO Act.

5.2.5. Judicial concerns about the THRO Act's relationship to the law of evidence

Despite the absence of any concerns raised about the information gathering provisions in the parliamentary debates, judges have expressed concern about the evidence gathering powers in judgments. These concerns coalesce around the awkwardness of parts of the THRO Act or confusion about how powers should be exercised. Not least of all, is Bathurst CJ's characterisation of s 50(2) as 'obscure'.[923] I identify some of the expressed concerns in this section. These concerns are indicative of the court trying to grapple with the state of exception created by the THRO. It is not difficult to see the complexity that arises for the court which is trying to understand how the THRO Act and its features fit into the broader juridical order. The judicial comments demonstrate discomfort about the regime.

[923] Ibid [64] (Bathurst CJ).

Justice Wright in the *Fayad* final hearing extensively considered the Part 5 provisions, ss 50(2) and 61. On one particular piece of evidence, His Honour stated:

> [w]hile these reasons deal with all of the s 61 material to which objection was taken, I should mention specifically one document which I considered I was bound to admit under s 61 of the THRO Act but which caused me some concern for reasons which I shall explain.[924]

This is an unusual statement for a judge to make where there was no dispute about the document between the parties. The document was a case note entered into the Offender Integrated Management System,[925] which described a meeting between Mr Fayad and a staff member referred to as his 'Enforcement Officer' for an ISO that he was already subjected to. Under the conditions of Mr Fayad's ISO, he was compelled to truthfully answer questions put by his Enforcement Officer (EO) on prescribed topics.[926] After being asked questions which he was compelled to answer truthfully, Mr Fayad was asked questions about Islamic State and Jahbat Al Nusra. These questions did not fall within the scope of those which Mr Fayad was required to answer truthfully. Nonetheless, Mr Fayad answered the questions, in part, to the effect that he would not discourage people from fighting with Islamic State.[927]

Justice Wright's concerns were manifold. His Honour was concerned by a lack of clarity about whether the EO was the appropriately authorised person to administer Mr Fayad's ISO.[928] His Honour was also concerned that the information pertaining to violent extremism went beyond the scope of information that Mr Fayad was compelled to provide,[929] which in turn raised whether Mr Fayad knew that he could refuse to answer questions beyond the scope of those that he was required to answer truthfully.[930] Finally, the plaintiff did not present the EO for cross examination at the hearing, despite having

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[924] *State of New South Wales v Fayad (Final)* (n 480) [74] (Wright J).

[925] Often referred to as an OIMS note.

[926] *State of New South Wales v Fayad (Final)* (n 480) [74] (Wright J).

[927] Ibid [76(4)] (Wright J).

[928] Ibid [75] (Wright J).

[929] Ibid [77]-[78] (Wright J).

[930] Ibid [81] (Wright J).

been requested by Mr Fayad's solicitor.[931] After expressing concern about this OIMS note, his Honour admitted it into evidence, as required by s 61, but only gave it weight insofar as it recorded answers by Mr Fayad to questions that he was compelled to answer truthfully.[932] Justice Wright gave no weight to the questions and answers which extended beyond those that Mr Fayad was compelled to truthfully answer. This example clearly demonstrates the suspension of the juridical order. Justice Wright is required to admit evidence despite serious concerns. Whilst his Honour could limit the weight given to the evidence during the proceedings, the example demonstrates how the THRO Act subverts the rules of evidence that would ordinarily apply as safeguards for a defendant in legal proceedings, particularly ones which can lead to the violence and Othering explored in Chapters 3 and 4.

Section 50(2) in particular has been subjected to criticism. Justice Fullerton echoed comments made by counsel for the State that the proper construction of s 50(2) 'is somewhat arcane'.[933] Justice Davies went further:

> Section 50(2) sits somewhat uneasily with s 56 of the *Evidence Act 1995* (NSW) which makes relevance the basis for admissibility. The result may be that evidence in a document otherwise admissible under s 61 will be found to have little or no probative value if it is not relevant.[934]

Thus, judges have expressed concern, albeit in restrained ways, about the operation of the THRO Act's information gathering provisions and the consequence that certain evidence can be rendered admissible, by law. Whilst the concerns offered by judicial officers focus on the difficulty in construing the THRO Act's provisions with the *Evidence Act*, the necessary implication of the difficult construction exercise is that protections offered by the *Evidence Act* are ousted by the THRO Act.

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[931] Ibid [80]; [83] (Wright J).

[932] Ibid [83] (Wright J).

[933] *State of New South Wales v Lawrence* (n 334) [84] (Fullerton J).

[934] *State of New South Wales v Haidar* (n 848) [68] (Davies J).

The THRO Act's Part 5 provisions create a state of exception as the otherwise prevailing juridical order has been suspended. The state of exception operates on four intersecting levels. Firstly, it subverts the way that the Attorney General can gather evidence. Secondly, it renders evidence gathered using Part 5 admissible in proceedings, ousting protections offered by the law of evidence. Thirdly, such evidence which is rendered admissible by law dovetails almost identically with matters which the court 'must' consider on the discretionary question of whether to make THRO orders. Fourthly, in some cases, the evidence can be kept secret from the defendant to protect terrorism intelligence.

By creating a state of exception, it is difficult to critique these powers without turning to critical theory. The relationship between the THRO Act and law of evidence is not unlawful, but it allows things which would not otherwise be lawful. In so doing, it aids the state in achieving the violence and Othering that is enabled by the THRO Act. By turning to critical theory and analysing the THRO Act through the state of exception, its effect on relations of power can be explored more deeply than is possible under a preventive justice lens. The state of exception creates liminal space between what is lawful and unlawful, lawful and violent, and in so doing allows the state to evince close control of people who are perceived to be Others.

5.3. THE STATE OF EXCEPTION AND THE LAW OF PROCEDURE

The preliminary hearing provides another example of how the THRO Act creates a state of exception, the suspension of the otherwise prevailing juridical order. In showing how the preliminary hearing creates a state of exception, I build on my previous analysis about evidence gathering to show how crucial aspects of law of procedure are suspended. Chapter 3 and 4 of my Thesis showed how the THRO Act allows violence and Othering. Such violence and Othering would not be possible without parliament, through the THRO Act, creating a state of exception. By suspending the juridical order by law, the THRO Act is formally legal and gives a semblance of fairness. But when analysing its operation using critical theory, that picture is less clear.

The preliminary hearing is the first point where a person defending proceedings under the THRO Act can face incarceration or extended supervision but offers little opportunity for a person defending proceedings to challenge the case against them. A person at the preliminary hearing can be incarcerated or supervised when the matters alleged in supporting documents, would, if proved, justify the making of an extended supervision order (ESO) or continuing detention order (CDO) if they were not supervised or detained.[935] The preliminary hearing test falls short of orthodox criminal law adjudication of innocence or guilt which requires proof of an offence beyond reasonable doubt,[936] or even tests applied in bail proceedings where decision makers must be satisfied on the balance of probabilities that someone poses an unacceptable risk of presenting a bail concern.[937] But the outcome is the same – a person can be incarcerated or supervised after a preliminary hearing under the THRO Act.

I break down the preliminary hearing test into three parts to explore its operation as clearly as possible. I say as clearly as possible because the test itself *is* unclear as the court grapples with interpreting provisions that operate in the liminal space created by the state of exception. I close with comments on the role of the person subjected to proceedings in the preliminary hearing informed by case law analysis. In this section, I argue that the THRO Act's provisions which provide for a preliminary hearing demonstrate one way in which the Act creates a state of exception, which is crucial to allowing violence and Othering.

5.3.1. Understanding the preliminary hearing

The first step at a preliminary hearing is for the court to satisfy itself that the jurisdictional and eligibility thresholds which were explained in Chapter 2 are met. The court must then determine whether 'the matters alleged in the supporting documentation, would, if proved' justify making an ESO or CDO.[938] If it does, it must order reports from appropriately qualified experts to examine the person subjected to proceedings.[939] The court may also exercise its discretion to subject the person to an

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[935] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 27(b); 41(b).

[936] Brown et al (n 576) 252–253; See also, *Thomas v The Queen* (1960) 102 CLR 587.

[937] *Bail Act 2013* (NSW) s 32.

[938] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 38(7).

[939] Ibid ss 24(5) (for ESO); 38(5) (for CDO).

interim supervision order (ISO) or interim detention order (IDO).[940] If the test is not satisfied, the proceedings will be dismissed.[941]

Little attention was given to the preliminary hearing in the debate when the Bill was introduced to parliament. So it may be assumed that the rationale for the preliminary hearing is to contribute to the Act's primary purpose: the protection of the community.[942] The closest that the Attorney General went to explaining the preliminary hearing was in stating that interim orders were available 'if it appears that the offender's current custody or supervision will expire before the proceedings are determined'.[943] As explored in Chapter 2, the lack of parliamentary scrutiny over important aspects of this highly intrusive Bill is astounding.

The court has identified that the preliminary hearing serves a protective purpose. Not only for the community, but also because it protects the person defending proceedings from having to meet a case that ought not to have been brought. Justice Johnson explained '[t]his statutory interlocutory process exists in legislation intended to protect the community. A lower standard applies […] to determine whether the application should proceed',[944] he continued, 'this approach does not overlook the potential adverse consequences for the Defendant if orders are made [...] Rather it reflects the statutory two-stage process where a lower hurdle applies at the interlocutory stage.'[945] Elsewhere,

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[940] Ibid s 41.

[941] Ibid.

[942] Ibid s 3(1).

[943] New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 November 2017, 16:29 (Mark Speakman, Attorney General).

[944] *State of New South Wales v Cheema (Preliminary)* (n 206) [98] (Johnson J); cited with approval in *State of New South Wales v Osman* (n 385) [213] (Wilson J); *State of New South Wales v Reginald Collingwood (a Pseudonym)* (n 222) [14] (Hamill J); *State of New South Wales v Elomar (Preliminary)* (1850) [2020] NSWSC 1850 [6] (Beech-Jones J) (as his Honour then was).

[945] *State of New South Wales v Cheema (Preliminary)* (n 206) [99] (Johnson J); cited with approval in *State of New South Wales v Osman* (n 263) [213] (Wilson J).

Johnson J identified that the preliminary hearing 'filter[ed] out unmeritorious applications at an early stage', the corollary being that it protects liberty.[946]

On Johnson J's view, the preliminary hearing checks the executive's power to seek oppressive orders which can cause incarceration and supervision of people without charge. As explored in Chapter 4, people subjected to THRO proceedings are already subjected to Othering. From a preventive justice perspective, the preliminary hearing could be seen as useful to check the proportionality of proceedings to the purported risk, which contributes to the normative justifiability of such a regime.[947] But the preliminary hearing must be viewed within the broader context of the THRO Act and the effect that it has on people subjected to it, discussed in Chapters 3 and 4. The preliminary hearing, by suspending legal procedure, enables the conditions which allow violence and Othering to occur because of the THRO Act.

5.3.2. "Matters alleged in supporting documentation"

I first consider what "matters alleged in supporting documentation" means. While the case law on this aspect of the test is clear, its effect remains illusory. The task of the court at the preliminary hearing is dictated by the factual matters alleged by the plaintiff, for which there must be a proper basis within the supporting documentation filed with the plaintiff's THRO application. But not every fact contained within the supporting documentation corresponds with a matter alleged by the plaintiff in the THRO proceedings. At the preliminary hearing, the court must grapple with which matters in the supporting documentation are matters alleged by the plaintiff to be satisfied of the test. I draw from case law to demonstrate the uncertainty in this aspect of the preliminary hearing test.

The term 'supporting documentation' is defined by s 4 of the THRO Act which, by operation of s 23(3) – a list of documents that must be filed when proceedings are commenced – refers to documentation addressing matters identified in s 25(3).

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[946] *State of NSW v KAS (Preliminary)* [2019] NSWSC 924 [26] (Johnson J) ('*State of NSW v KAS (Preliminary)*'); cited with approval in *State of New South Wales v Osman* (n 263) [213] (Wilson J); *State of New South Wales v Cheema (Preliminary)* (n 206) [96] (Johnson J); *State of New South Wales v Dickson (Preliminary)* (n 186) [44] (Johnson J).

[947] Ashworth and Zedner (n 172) 169.

Section 25(3), set out in full in section 5.2.3, provides an extensive list of matters which must be considered by the court, and information addressing those matters must be contained in the documents filed at commencement. The chapeau to s 25(3) allows the court to consider 'any other matter it considers relevant'.[948] Section 25(3)(m) confirms this, as the court can consider 'any other information that is available as to the likelihood that the offender will commit a serious terrorism offence'[949] which, in effect, is identical to the final hearing test.

But the test refers to *matters alleged* in supporting documentation. Unlike many civil proceedings, THRO applications are commenced by Summons not Statement of Claim.[950] So, the plaintiff is not required to plead in full the facts relied upon in their claim. The phrasing of the test is peculiar; not all of the documents tendered in proceedings emanate from, or bear any relationship to, the THRO proceedings which requires the plaintiff to make allegations of fact which are not fully pleaded. Justice Rothman identified that the matters alleged must be 'matters of fact that, if proved, would be open to lead to a particular conclusion', rather than matters asserting legal conclusions.[951] Justice Walton explained that at the preliminary hearing '[t]he plaintiff is not required to prove the allegations it makes'.[952]

In an attempt to explain the relationship between "matters alleged" and "supporting documentation", Wilson J stated:

> the fact that any particular document is "supporting documentation" does not necessarily mean that its contents will contain "matters" alleged by the State. As a matter of common

[948] *State of New South Wales v Alam* (n 229) [156] (Wilson J).

[949] Ibid.

[950] *Uniform Civil Procedure Rules 2005* (NSW) r 6.4(1)(h).

[951] *State of New South Wales v Elomar (No 2)* [2018] NSWSC 1034 [7] (Rothman J); cited with approval in *State of New South Wales v Fayad (Preliminary)* (n 210) [51] (Johnson J); *State of New South Wales v Kiskonen (Preliminary)* [2021] NSWSC 915 [14] (Lonergan J) ('*State of New South Wales v Kiskonen (Preliminary)*'); *State of New South Wales v Church (Preliminary)* [2021] NSWSC 246 [7] (Campbell J); *State of New South Wales v Azar (Preliminary)* (n 219) [82] (Hoeben CJ at CL); *State of New South Wales v Osman* (n 385) [213] (Wilson J); *State of New South Wales v Cheema (Preliminary)* (n 206) [102] (Johnson J).

[952] *State of New South Wales v Mustapha* (n 385) [83] (Walton J).

> sense, a matter alleged would have to have some proper foundation, and could not include matters of rumour, possibilities unfounded in fact, or wholly unsupported speculation.[953]

Justice Wilson's remarks provide useful guidance to understanding this element of the test. However, it remains unclear how the court can discern *which* matters alleged in the supporting documentation tendered by the plaintiff in proceedings can be attributed to the plaintiff as matters alleged *in* the proceedings.

It should also be evident that the preliminary hearing test is dictated by what the plaintiff says in its own case. This feature is central to how the preliminary hearing contributes to the THRO Act constructing a state of exception. While the person subjected to proceedings appears, they play a limited role in a hearing which would ordinarily be adversarial. This is particularly dangerous when considering that a consequence of the preliminary hearing could be incarcerated or supervised without conviction. These consequences are only permissible because the THRO Act, through aspects like the preliminary hearing, suspends the juridical order to allow such consequences to be available.

5.3.3. "WOULD, IF PROVED, JUSTIFY…"

The next part of the test concerns whether the "matters alleged in the supporting documentation, would, if proved justify" making THRO orders. Here, I focus on the phrase "would, if proved, justify" because the lack of clarity around how this aspect of the test operates is problematic and shows how the THRO Act creates a state of exception. There is no uniform approach in the case law to the proper construction of this aspect of the test. Different cases refer to different formulations. What is, however, clear is that the preliminary hearing test is 'lower' than that at a final hearing, where proof to a high degree of probability of an unacceptable risk is required.[954] At the final hearing, the court

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[953] Ibid [159] (Walton J); cited with approval in *State of New South Wales v Cheema (Preliminary)* (n 206) [103] (Johnson J); *State of New South Wales v Fayad (Preliminary)* (n 210) [52] (Johnson J); *State of New South Wales v Kiskonen (Preliminary)* (n 951) [14] (Lonergan J).

[954] *State of New South Wales v Naaman (No 2)* (n 204) [17] (Basten, Macfarlan, Leeming JJA); *State of New South Wales v Osman* (n 385) [214] (Wilson J); See also *State of New South Wales v Fayad (Preliminary)* (n 210) [48 (Johnson J).

is also required to 'assess and weigh the reliability of the evidence adduced by the State',[955] which is not something that the court does at the preliminary hearing.

The statutory test for a preliminary hearing under the THRO Act is almost identical to that in *Crimes (High Risk Offenders) Act 2006* (NSW) (CHRO Act). Accordingly, the jurisprudence on the proper construction of the preliminary hearing test under both regimes overlaps. In CHRO jurisprudence, now cited in THRO jurisprudence, the preliminary hearing test has been described as:

> [I]t has been said that it is not for the court to weigh up the documentation or to predict the ultimate result or to consider what evidence the Defendant might call at the final hearing. Rather, the Court undertakes a task that has been described as being akin to applying a *prima facie* case test in committal proceedings (as they were before 30 April 2018), taking the Plaintiff's case at its highest. The use of the term '*prima facie* case' seems especially apt given that the [then] Minister used this term in the 2006 second reading speech [citations omitted].[956]

In *Mustapha,* after acknowledging the analogy between the preliminary hearing test and a *prima facie* case test,[957] Walton J stated '[a] preferable formulation is for the Court to proceed on the assumption that the asserted facts are proved and then to consider whether, on that assumed basis, it is satisfied as to unacceptable risk.'[958] Elsewhere, Campbell J has described the test as:

> [I]t is necessary to look at the allegations and the documentation put before the Court through the lens of the plaintiff's case and to take them at their highest when deciding whether the test articulated in section 27(b) has been made good.[959]

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[955] *State of New South Wales v Osman* (n 385) [212] (Wilson J); See also *State of New South Wales v Naaman (No 2)* (n 204) [37] (Campbell J); *State of New South Wales v Cheema (Preliminary)* (n 206) [91]-[103] (Johnson J).

[956] *State of NSW v KAS (Preliminary)* (n 946) [25] (Johnson J); cited with approval in *State of New South Wales v Cheema (Preliminary)* (n 206) [96] (Johnson J); *State of New South Wales v Osman* (n 385) [213] (Wilson J).

[957] *State of New South Wales v Mustapha* (n 385) [84] (Walton J).

[958] Ibid [85] (Walton J); cited with approval in *State of New South Wales v Newton* [2022] NSWSC 224 [28] (Walton J).

[959] *State of New South Wales v Naaman (No 2)* (n 204) [48] (Basten, Macfarlan, Leeming JJA); cited with approval in *State of New South Wales v Elzamtur* [2019] NSWSC 186 [4] (Campbell J); *State of New South Wales v Fayad (Preliminary)* (n 210) [49] (Johnson J).

The messiness of the case law concerning the application of the preliminary hearing test is symptomatic of the THRO Act operating within legal liminal space. The court is left to determine anew how it should navigate the liminal space, despite the outcome available being identical to punishment under the criminal law. Despite the alignment of outcomes, the THRO proceedings themselves leading to the outcomes are vastly different to criminal proceedings because they suspend the otherwise prevailing juridical order.

In *Naaman,* the Court of Appeal observed that determination of preliminary proceedings 'will ordinarily be made in advance of the reports from the psychologists and psychiatrists' being made available.[960] Similarly, Johnson J stated:

> [The preliminary hearing] exists in legislation intended to protect the community. A lower standard applies at a preliminary hearing to determine whether the application should proceed further where the Court will be assisted by expert psychiatric and psychological reports prepared after examination of the Defendant.[961]

Walton J has also stated 'risk avoidance is the focus of the enquiry at the preliminary stage. The court will be best placed to assess the defendant's risk upon receipt of the expert opinions.'[962]

The court clearly has the THRO Act's primary purpose, protection of the community, at the forefront of preliminary hearing decision-making processes. These comments demonstrate the importance that the court places on expert evidence to assist in resolving THRO proceedings.[963] Nonetheless, Justice Walton has also stated '[t]he Court is, however, not absolved of consideration of the evidence put before it in support of the application. Some analysis is required, particularly where there is conflict in the evidence.'[964]

In recognising the assistance that additional expert evidence offers – which is only sought after preliminary THRO orders are made – it can appear pre-determined that such orders

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[960] *State of New South Wales v Naaman (No 2)* (n 204) [17] (Basten, Macfarlan, Leeming JJA); cited with approval in *State of New South Wales v Fayad (Preliminary)* (n 210) [46] (Johnson J).

[961] *State of New South Wales v Fayad (Preliminary)* (n 210) [46] (Johnson J).

[962] *State of New South Wales v Mustapha* (n 385) [91] (Walton J).

[963] Which I addressed in Chapter 4.

[964] *State of New South Wales v Mustapha* (n 385) [87] (Walton J).

are warranted. Recalling that once the preliminary hearing test is appropriately satisfied, the court then has the discretion to make an IDO or ISO, Hamill J has noted 'it is difficult to contemplate circumstances in which any such discretion would be exercised against making an interim order'.[965] While I do not suggest that the court attends to the preliminary hearing without exercising appropriate care and attention, the messiness of the case law concerning the preliminary hearing test is perhaps more explicable in a context where the court is preoccupied with 1) maintaining public safety; and. 2) concerns about complex evidence of prospective risk which they know will be synthesised by experts later on.

The way that the THRO Act constructs a multifaceted suspension of the juridical order which otherwise remains in operation is clear when considering the preliminary hearing. The outcomes available under the regime already creates a state of exception, by allowing for the ongoing incarceration and supervision of persons without criminal conviction on the basis of proof which falls short of the criminal standard. But the preliminary hearing test goes further in suspending the THRO Act *itself*. The plaintiff can more easily seek incarceration and supervision for people who are purported to be Others who are required to be subjected to the THRO Act's violence. By creating a state of exception, the parliament has 'co-opt[ed] the judicial arm of government' to do their bidding in a way which would otherwise be anathema.[966] In so doing, the court, as an arm of the state, legitimises the Othering and violence that people subjected to THRO proceedings can be subjected to within the liminal space created by the THRO Act.

5.3.4. The making of an ESO or CDO, if left unsupervised

The final part of the preliminary hearing test imports a limb from the final hearing test which has been explored in Chapter 2, but it can be shortly expressed as: the court must be 'satisfied to a high degree of probability that the [eligible] offender poses an

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[965] *State of New South Wales v Reginald Collingwood (a Pseudonym)* (n 222) [14] (Hamill J); See also *State of New South Wales v Fayad (Preliminary)* (n 210) [48] (Johnson J).

[966] *State of New South Wales v Baldwin* [2019] NSWSC 1882 [92]. In a case concerning the CHRO Act, Beech-Jones J (as his Honour then was) stated of that Act '[i]t puts that scheme into effect by co-opting the judicial arm of government into the process of prospective risk assessment but, nevertheless, leaves the administration of the [C]HRO Act, including post-parole supervision of the offenders to Corrective Services'. The point that I am making is broader than this, but his Honour's comments are also apposite.

unacceptable risk of committing a serious terrorism offence' if not supervised[967] or detained.[968] The Court of Appeal in *Naaman* has described the hybrid test which applies at the preliminary hearing which requires, partial satisfaction of the final hearing test, as 'complicated' and identified its unusual nature insofar as it 'requires an inquiry to be made of the inherently uncertain future as to whether something will occur.'[969] But as explored in the previous sections of this Chapter, the final hearing test is partially abrogated at the preliminary hearing, showing how the THRO Act not only gives rise to a state of exception when compared with the general law but that the preliminary hearing is a state of exception within the THRO Act regime itself.

5.3.5. The defendant's role at the preliminary hearing

Moving away from the preliminary hearing test, I consider the role that a person subjected to proceedings plays at the preliminary hearing. At the preliminary hearing, as explored throughout this Chapter, the court is principally required to consider the allegations made by the plaintiff and proceed on the basis that they will be proven to determine whether interim orders should be made. But the role of the person defending proceedings in the preliminary hearing, in light of that test, has not been extensively considered in the jurisprudence. While s 50(1) of the THRO Act provides that the proceedings ought to be conducted as civil proceedings in accordance with ordinary law of procedure, it is hard to appreciate how this can occur when the preliminary hearing test is considered. Whilst the question of the role of the defendant at the preliminary hearing has not been resolved by an appellate court, there has been some commentary from first instance courts which largely follows CHRO jurisprudence that evidence called by a defendant has no bearing on whether the preliminary hearing test is satisfied.[970]

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[967] *Terrorism (High Risk Offenders) Act 2017* (NSW) s 20(d).

[968] Ibid s 34(d).

[969] *State of New South Wales v Naaman (No 2)* (n 204) [29] (Basten, Macfarlan, Leeming JJA).

[970] *Attorney General for New South Wales v Tillman* [2007] NSWCA 119 [98] (Mason P, Santow and Tobias JJA agreeing) ('*Attorney General for New South Wales v Tillman*'); cited with approval in *State of New South Wales v Sturgeon* [2019] NSWSC 559 [6] (Garling J) ('*State of New South Wales v Sturgeon*'); *State of New South Wales v Haidar* (n 848) [14] (Davies J); *State of New South Wales v Fayad (Preliminary)* (n 210) [50] (Johnson J); *State of New South Wales v Kiskonen (Preliminary)* (n 951) [14] (Lonergan J).

That said, the adoption of CHRO jurisprudence is beginning to be qualified.[971] In *Mustapha*, the defendant sought to call evidence which was directly relevant to the evidence contained in the plaintiff's supporting documentation. Justice Walton distinguished the case from CHRO jurisprudence, stating:

> Once a document or report is received under s 61 of the [THRO] Act (see also s 58), other evidence can be received and acted upon which can affect the relevance and probative value of that material. Thus, evidence which, *prima facie*, would justify the making of an order can be found to be of insufficient weight to justify the making of an order.[972]

In so doing, his Honour drew support from the *Haidar* preliminary hearing decision. In *Haidar*, Justice Davies rejected part of the plaintiff's evidence because evidence tendered by Mr Haidar demonstrated that facts asserted by the plaintiff were incorrect.[973] Ultimately, Davies J found that Mr Haidar was not a convicted NSW terrorism activity offender, but noted that if he was, the court could not be satisfied that he posed an unacceptable risk.[974] In using the defendant's evidence to read down the plaintiff's evidence, his Honour drew support from the appellate CHRO decision, *Tillman,* which said '[t]here is no reason why, for instance, an offender could not seek to establish that the matters alleged in the supporting documentation were incapable of proof'.[975]

Returning to *Mustapha*, Walton J characterised *Haidar* and *Tillman* as examples of cases where 'the material was simply incapable of sustaining the proposition advanced by the applicant on an evidentiary basis'.[976] I find this characterisation of *Haidar* difficult to understand. The reading down of evidence in that case was directly because of assertions made in the defendant's evidence which were accepted by the court. Not merely because of a deficiency in the plaintiff's evidence. As expressed elsewhere in this section, THRO preliminary hearing jurisprudence is unclear and inconsistent. As the THRO Act creates

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[971] I cannot say that a new rule has been formed on the basis of two decisions of a first instance court, particularly when reliance is still placed on the CHRO decision of *Tillman* to explain what the court is doing in both *Mustapha* and *Haidar*.

[972] *State of New South Wales v Mustapha* (n 385) [50] (Walton J).

[973] *State of New South Wales v Haidar* (n 848) [31]; [37]; [57]-[59] (Davies J).

[974] Ibid [98].

[975] *Attorney General for New South Wales v Tillman* (n 970) [37] (Mason P, Santown and Tobias JJA agreeing); cited with approval in *State of New South Wales v Haidar* (n 848) [95] (Davies J).

[976] *State of New South Wales v Mustapha* (n 385) [81] (Walton J).

a state of exception and operates in liminal space, the court's difficulty in navigating the tests and requirements without aid from bodies of established doctrine and common law principles is unsurprising. Nonetheless, it appears tolerably clear that evidence called by a person subjected to THRO proceedings can be considered at a preliminary hearing on the question of whether the court's discretion to make an ISO or IDO is enlivened, if the evidence is directly relevant to matters alleged in the plaintiff's evidence.

To be clear, this is not to say that evidence called by a person defending proceedings is irrelevant to the discretionary question of whether an ISO or IDO should be made[977] or that a defendant's cross examination of the plaintiff's witnesses will have no bearing on proceedings.[978] A person subject to proceedings can call evidence on the question of whether the court should exercise its discretion to make an IDO or ISO. But nonetheless, the preliminary hearing test which enlivens the court's discretion requires a mostly one-sided inquiry, showing how the preliminary hearing creates a state of exception. In so doing, it makes proceedings difficult to defend despite the significant consequences that can flow from orders being made at the preliminary hearing.

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[977] *State of New South Wales v Sturgeon* (n 970) [7] (Garling J); cited with approval in *State of New South Wales v Devaney (Preliminary)* [2021] NSWSC 1432 [19] (Dhanji J).

[978] *Attorney General for New South Wales v Tillman* (n 970) [95] (Mason P, Santown and Tobias JJA agreeing); cited with approval in *State of New South Wales v Haidar* (n 848) [95] (Davies J); and *State of New South Wales v Devaney (Preliminary)* (n 977) [17] (Dhanji J).

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Section 5.3 has shown how the preliminary hearing is one of the ways in which the THRO Act creates a state of exception which suspends the otherwise prevailing juridical order. In so doing, it allows for a person's liberty to be constrained by the plaintiff through incarceration or ongoing supervision after the expiry of a criminal sentence. By deploying the state of exception, the THRO Act creates liminal space which must be navigated by the court, often uncomfortably, when determining whether people should be subjected to the violence and Othering of the THRO Act.

By examining how the preliminary hearing operates in practice through the case law, it can be seen that there is little certainty around how the test applies. It can also be seen that people defending proceedings have little ability to resist the plaintiff's application. By using critical theory to analyse how the preliminary hearing positions the THRO Act *vis-à-vis* the law generally, the relationship between the suspension of the otherwise prevailing juridical order and the violence and Othering of the THRO Act becomes clear when it may otherwise be obscured.

6. Conclusion

To briefly conclude, my Thesis analysed the THRO Act, a *sui generis* post-sentence supervision and detention regime, which needs deeper scholarly attention. I analysed how the THRO Act works in practice and considered the political substrata of the THRO Act which reshapes people's relationship with the state. My Thesis ran in parallel to preventive justice scholarship using tools from critical theory. Throughout, I have considered the relationship between the THRO Act – as an exercise of state power – and its effects on people subjected to its control. I have argued that instead of its purported purpose to prevent harm, the THRO Act causes harm instead.

In Chapter 2, I analysed the THRO Act's passage through parliament and provisions as interpreted through case law. I applied insights from preventive justice scholarship which has sought to constrain preventive measures to ensure that they are as least human rights infringing as possible. I argued that the THRO Act is neither appropriately justified nor subjected to appropriate safeguards to prevent human rights infringements. I observed that despite the powerful preventive justice critiques that can be made against the THRO Act, it has withstood legal and normative challenges and expanded over time.

I turned to critical theory from Chapter 3 onwards. In Chapter 3, I argued that the THRO Act enables violence in looking at its effects on the people subjected to its control. I split the types of violence into two categories: the physical violence of incarceration and the violence of supervision which causes harm. In Chapter 4, I argued that the THRO Act enables Othering which constructs people as not properly belonging within the state. Othering is a violent process of dehumanisation which also enable further violence against the Other. The THRO Act enables Othering through legal proceedings and also calls in aid otherwise existing logics of oppression.

In Chapter 5, I examined how the THRO Act has been able to create its violent effect that was examined in Chapters 3 and 4. Using the concept of the state of exception, I argued that the THRO Act uses law to suspend the otherwise prevailing juridical order which can neuter normative critiques of the THRO Act and also enable violence as the THRO Act is clothed in legality. I drew on examples showing the suspension of both law of evidence and procedure.

In a Thesis where liminality is ever present, it is fitting that at the end, I identify beginning points for future research about the THRO Act. There is clear scope for doctrinal research to try and draw disparate threads of jurisprudence to principled consistency. For example, clarification about how the preliminary hearing test analysed in section 5.3 might best be applied for consistency. Or forensic analysis of what types of objections to evidence might be allowed in light of the proper construction of ss 61 and 50(2) of the THRO Act developing from my analysis in section 5.2.

There is also scope for comparative doctrinal work to observe how different regimes operate across jurisdictions. Given that the THRO Act is *sui generis* there is scope for comparative work which shows that less human rights infringing regimes can successfully achieve preventive aims. Have differences developed in the jurisprudence under the CHRO Act and THRO Act? Are differences developing between THRO jurisprudence and jurisprudence under Division 105A of the Criminal Code? The differences between these regimes were drawn out in section 1.2.1 and it would be interesting to see how courts are dealing with these similar but very different regimes and could lead to generative conclusions being formed about best practice.

Another area of doctrinal law research could be to explore how recent Constitutional law decisions of the High Court like *Benbrika*[979] and *Garlett*[980] may present avenues through which the THRO Act could be further challenged.[981] In section 2.7, I considered how most legal challenges to the THRO Act have failed. But with the dissents increasing in decisions considering similar legislation and the *sui generis* nature of the THRO Act, the time is ripe to consider how recent decisions about other regimes may apply to the Constitutionality of the THRO Act.

There is also ample room for empirical research along the lines of Stimpson's content analysis.[982] Research which answers the questions of who are the high risk offenders?

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[979] *Minister for Home Affairs v Benbrika* (n 37).

[980] *Garlett v Western Australia* (n 37).

[981] Writing in the context of analysing secrecy positions in the context of a visa cancellation case, Gray and Collins observe that a shift in Chapter III jurisprudence may be underway, especially because of the many recent changes to the High Court's bench Gray and Collins (n 878) 96; 122.

[982] Stimpson (n 94).

What are their areas of commonality and difference? This research could feed into a richer account of the types of Others – some of which I have identified in section 4.2 – constructed by the state using the THRO Act. Richer accounts of who is subjected to THRO proceedings could also feed into other legal research which looks at how patterns of Othering and violence occur across areas of law by drawing comparisons with policing practices or migration policy.

A further space for empirical research could be to deepen knowledge about ESO conditions and how they are administered, a gap that I identified in section 3.3. This could be through trying to access statistical information from the state about ESO breach reports and prosecutorial practices. Another avenue could be through accessing transcripts of Local Court prosecutions for failure to comply with an ESO.

Finally, there is wide scope for theoretical research both within and outside of the preventive justice field. As I introduced in Chapter 2, preventive justice scholars can bring to bear incisive and powerful critiques against any part of the THRO Act. If so minded, they could couple their critiques with principle-based calls for law reform. Critical race theorists and critical disability studies scholars could find ripe terrain for analyses of race and disability through close studies of the THRO judgments, extending from the type of analysis that I conducted in Chapter 4. Abolitionist theorists could grapple with the analysis of risk and harm presented by the state, which I considered in Chapter 2, to explore how purported risks addressed by the THRO Act can be mitigated without carceral responses.

As I end my Thesis journey, it would be remiss of me not to mention that the most recent decision delivered at the time that I am finalising this conclusion, was *State of New South Wales v Holt (No 8)* [2023] NSWSC 1363 which was delivered on 10 November 2023. As I have drawn towards the end of my journey, I have been surprised to see no proceedings determined in over a year. It is unlikely that this reflects an end to the use of the THRO Act to violently control people that the state does not think ought to belong. But it is an interesting development nonetheless with the reasons behind it being completely unclear.

In seeking to explore how the THRO Act operates in practice, I have sought to deconstruct how the state constructs people as high risk offenders. I have taken an abject and Othered subject and sought to problematise the state's constructions of them and show that the story that the state has told is constructed using an exceptional process for political ends which does not adequately reflect the messy, difficult and complete picture about the person involved in the proceedings. I do not suggest that some of the people subjected to THRO proceedings are not dangerous or could have the potential to cause harm. But rather I have shown that the state's construction of them provides singular, simplistic and unnuanced accounts which often obscure the complexity of both the person and their political context.

Ensuring public safety from harm is important and difficult work. If nothing else, I hope to have shown that care needs to be taken to ensure that harm is not caused in the name of prevention particularly when nets are cast wide, as they are in the THRO Act. The lack of recent judgments gives me hope that we are entering a more reflective time where the THRO Act's capacity to cause harm is giving pause for thought about when it is used.

7. Bibliography

7.1. Articles/Books/Reports

Abdel-Fattah, Randa, *Islamophobia and Everyday Multiculturalism in Australia* (Routledge, 2017)

Agamben, Giorgio, 'Homo Sacer: Sovereign Power and Bare Life' in Daniel Heller-Roazen (tran), *The Omnibus Homo Sacer* (Stanford University Press, 2017) 1

Agamben, Giorgio, 'State of Exception' in Kevin Attell (tran), *The Omnibus Homo Sacer* (Stanford University Press, 2017) 161

Ahmed, Sara, *The Cultural Politics of Emotions* (Routledge, 2nd ed, 2015)

Ajnakina, Olesya et al, 'Hospitalisation and Length of Hospital Stay Following First-Episode Psychosis: Systematic Review and Meta-Analysis of Longitudinal Studies' (2020) 50(6) *Psychological Medicine* 991

Althusser, Louis, 'Ideology and Ideological State Apparatuses (Notes towards an Investigation)' in Ben Brewster (tran), *Lenin and Philosophy and Other Essays* (Monthly Review Press, 1971) https://www.marxists.org/reference/archive/althusser/1970/ideology.htm

Ananian-Welsh, Rebecca, 'If at First You Don't Succeed...: Effectiveness and the Evolution of Preventive Organised Crime Measures' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 177

Appleby, Gabrielle and Joanna Howe, 'Scrutinising Parliament's Scrutiny of Delegated Legislative Power' (2015) 15(1) *Oxford University Commonwealth Law Journal* 3

Appleby, Gabrielle and John Williams, 'The Anti-Terror Creep: Law and Order, the States and the High Court of Australia' in Gabrielle Appleby et al (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11* (Routledge, 2010) 162

Ashworth, Andrew, 'Criminal Law, Human Rights and Preventative Justice' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The*

Redirection of Criminalisation and the Futures of the Criminal Law (Bloomsbury Publishing Plc, 2008) 87

Ashworth, Andrew and Lucia Zedner, *Preventive Justice* (Oxford University Press, 2014)

Ashworth, Andrew, Lucia Zedner and Patrick Tomlin, 'Introduction' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013) 1

Askarzai, Benafsha, 'The Burqa Ban, Islamophobia, and the Effects of Racial "Othering" in Australian Political Discourses' (2022) 68(2) *Australian Journal of Politics & History* 218

Auld, Lachlan and Julia Quilter, 'Changing the Rules on Bail: An Analysis of Recent Legislative Reforms in Three Australian Jurisdictions' (2020) 43(2) *University of New South Wales Law Journal* 642

Baldry, Eileen, Bree Carlton and Chris Cunneen, 'Abolitionism and the Paradox of Penal Reform in Australia: Indigenous Women, Colonial Patriarchy, and Co-Option - ProQuest' (2015) 31(3) *Social Justice* 168

Ball, Matthew, 'Queer Criminology, Critique, and the "Art of Not Being Governed"' (2014) 22(1) *Critical Criminology* 21

Basten, John et al (eds), *The Criminal Injustice System* (Australian Legal Workers Group, 1982)

Battersby, John, 'Terrorism Where Terror Is Not: Australian and New Zealand Terrorism Compared' (2018) 41(1) *Studies in Conflict & Terrorism* 59

Baudrillard, Jean, *The Spirit of Terrorism and Other Essays*, tr Chris Turner (Verso, 2012)

Beck, Ulrich, *Risk Society: Towards a New Modernity* (Sage Publications, 1992)

Benhabib, Seyla and Drucilla Cornell, *Feminism as Critique: On the Politics of Gender* (University of Minnesota Press, 1987)

Bergey, Meredith R, 'The Changing Drivers of Medicalisation' in Bruce Cohen (ed), *Routledge International Handbook of Critical Mental Health* (Routledge, 2017) 153

Blackbourn, Jessie, 'Counterterrorism Legislation and Far-Right Terrorism in Australia and the United Kingdom' (2021) 50(1) *Common Law World Review* 76

Blight, Jake, *Secrecy Offences - Review of Part 5.6 of the Criminal Code Act 1995* (Independent National Security Legislation Monitor, Commonwealth of Australia, June 2024) https://www.inslm.gov.au/system/files/2024-06/inslm-review-of-part-5-6-of-the-criminal-code-act-1995.pdf

Boon-Kuo, Louise, Erica R Meiners and Paul Simpson, 'Queer Interruptions: Policing Belong in the Carceral State' in Peter Aggleton et al (eds), *Youth, Sexuality and Sexual Citizenship* (Routledge, 1st ed, 2018) 34

Boughey, Janina, 'Executive Power in Emergencies: Where Is the Accountability?' (2020) 45(3) *Alternative Law Journal* 168

Boukalas, Christos, 'No Exceptions: Authoritarian Statism. Agamben, Poulantzas and Homeland Security' (2014) 7(1) *Critical Studies on Terrorism* 112

Briskman, Linda, 'The Creeping Blight of Islamophobia in Australia' (2015) 4(3) *International Journal for Crime, Justice and Social Democracy* 112

Brophy, Lisa et al, 'Community Treatment Orders and Supported Decision-Making' (2019) 10 *Frontiers in Psychiatry* 414

Brown, David et al, *Criminal Laws* (Federation Press, 7th ed, 2020)

Brown, David, 'The NSW Prisoners Action Group Submission to the Nagle Royal Commission' in Michael J Coyle and David Scott (eds), *The Routledge International Handbook of Penal Abolition* (Routledge, 2021) 280

Browne, Christie C et al, 'Continuity of Mental Health Care during the Transition from Prison to the Community Following Brief Periods of Imprisonment' (2022) 13 *Frontiers in Psychiatry*

Butler, Judith, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, 1990)

Carlton, Bree and Emma K Russell, *Resisting Carceral Violence: Women's Imprisonment and the Politics of Abolition* (Springer International Publishing, 2018)

Carroll, Andrew et al, ‘No Involuntary Treatment of Mental Illness in Australian and New Zealand Prisons’ (2021) 32(1) *The Journal of Forensic Psychiatry & Psychology* 1

Carvalho, Henrique, *The Preventive Turn in Criminal Law* (Oxford University Press, 2017)

Cherney, Adrian, Michele Grossman and Lydia Khalil, ‘Guest Editorial: Special Issue on Violent Extremist Risk Assessment’ (2022) 17(3) *Journal of Policing, Intelligence and Counter Terrorism* 235

Cherney, Adrian and Kristina Murphy, ‘Being a “suspect Community” in a Post 9 / 11 World: The Impact of the War on Terror on Muslim Communities in Australia’ (2016) 49(4) *Australian & New Zealand Journal of Criminology* 480

Cho, Sumi, Kimberlé Williams Crenshaw and Leslie McCall, ‘Toward a Field of Intersectionality Studies: Theory, Applications, and Praxis’ (2013) 38(4) *Signs: Journal of Women in Culture and Society* 785

Connell, RW, *Masculinities* (Allen & Unwin, 1995)

Corner, Emily and Helen Taylor, *Testing the Reliability, Validity, and Equity of Terrorism Risk Assessment Instruments* (Centre for Social Research and Methods, 2023) https://www.homeaffairs.gov.au/foi/files/2023/fa-230400097-document-released-part-1.PDF

Cover, Robert M, ‘Violence and the Word’ (1986) 95(8) *The Yale Law Journal* 1601

Crenshaw, Kimberlé, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ (1989) 1989(1) *University of Chicago Legal Forum* 139

Crenshaw, Kimberlé, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color’ (1990) 43(6) *Stanford Law Review* 1241

Cunneen, Chris et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Routledge, 2016)

Dana, Shahram and Ben White, ‘Terrorising Innocence: Australia’s Counter-Terrorism Laws Trump Freedom of Liberty’ (2021) 27(2) *Australian Journal of Human Rights* 352

Davies, Margaret Jane, *Asking the Law Question* (Law Book Company, 2008)

Davis, Angela Y and Cassandra Shaylor, ‘Race, Gender, and the Prison Industrial Complex’ (2020) 19(S1) *Meridians* 87

Debeljak, Julie, ‘The Fragile Foundations of Human Rights Protections: Why Australia Needs a Human Rights Instrument’ in Melissa Castan and Paula Gelber (eds), *Critical Perspectives on Human Rights Law in Australia Vol 1* (Thomson Reuters (Professional) Australia Pty Limited, 2021) 39

Debnath, Biplab, ‘Did “History” and “Geography” Collide?: Examining Australia’s Allegiance toward the USA-Led “War on Terror” and Its Implications for Regional Engagement under the Liberal–National Coalition of John Howard’ (2024) 19(2) *The International Journal of Interdisciplinary Global Studies* 1

Dempsey, Michelle Madden, ‘The Voice of the Criminal Law’ (2024) 18 *Criminal Law and Philosophy* 599

Derrida, Jacques, ‘Force de Loi: Le "Fondement Mystique de L’Autorite’ (1990) 11(5–6) *Cardozo Law Review* 920

Derrida, Jacques, *Of Grammatology*, tr Gayatri Chakravorty Spivak (John Hopkins University Press, 1998)

Dhamoon, Rita Kaur, ‘Relational Othering: Critiquing Dominance, Critiquing the Margins’ (2021) 9(5) *Politics, Groups, and Identities* 873

Dííez, Carlos Gómez-Jara, ‘Enemy Combatants Versus Enemy Criminal Law: An Introduction to the European Debate Regarding Enemy Criminal Law and Its Relevance to the Anglo-American Discussion on the Legal Status of Unlawful Enemy Combatants’ (2008) 11(4) *New Criminal Law Review* 529

Donaldson, Grant, *Review into Division 105A (and Related Provisions of the Criminal Code Act 1995 (Cth)* (Independent National Security Legislation Monitor, Commonwealth of Australia, March 2022) https://www.inslm.gov.au/system/files/2024-02/inslm-report-division-105a-3-march-2023.pdf

Donaldson, Grant, *The Operation and Effectiveness of the National Security Information (Criminal and Civil Proceedings) Act 2004* (Independent National Security Legislation Monitor, Commonwealth of Australia, 30 October 2023) https://www.inslm.gov.au/system/files/2024-02/inslm-report-nsi-act-2004-30-10-2023.pdf

Dowsett, Gary W, 'Abjection. Objection. Subjection: Rethinking the History of AIDS in Australian Gay Men's Futures' (2017) 19(9) *Culture, Health & Sexuality* 935

Doyle, Dominic J and James RP Ogloff, 'Calling the Tune Without the Music: A Psycho-Legal Analysis of Australia's Post-Sentence Legislation' (2009) 42(2) *Australian & New Zealand Journal of Criminology* 179

Doyle, Dominic J, James RP Ogloff and Stuart DM Thomas, 'An Analysis of Dangerous Sexual Offender Assessment Reports: Recommendations for Best Practice' (2011) 18(4) *Psychiatry, Psychology and Law* 537

Dudgeon, Pat, 'Decolonising Psychology: Self-Determination and Social and Emotional Well-Being' in Brendan Hokowhitu et al (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge, 2020) 100

Duff, RA, *The Realm of Criminal Law* (Oxford University Press, 2018)

Duncan, Peter, 'Achieving Law Reform' in John Basten et al (eds), *The Criminal Injustice System* (Australian Legal Workers Group, 1982) 288

Dyer, Andrew, 'Irreducible Life Sentences, Craig Minogue and the Capacity of Human Rights Charters to Make a Difference' (2020) 43(2) *University of New South Wales Law Journal* 484

Dyer, Andrew, 'Minister for Home Affairs v Benbrika and the Capacity of Chapter III of the Commonwealth Constitution to Protect Prisoners' Rights' (2022) 45(1) *University of New South Wales Law Journal* 209

Dyer, Andrew and Josh Pallas, 'Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights (and What to Do about It)' (2022) 33(1) *Public Law Review* 61

Eagle, Kerri, Todd Davis and Andrew Ellis, 'Unfit Offenders in NSW: Paying the Price for Gaps in Service Provision' (2020) 27(5) *Psychiatry, Psychology and Law* 853

Fanon, Frantz, *The Wretched of the Earth*, tr Constance Farrington (Penguin, 2001)

Feeley, Malcolm M and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications' (1992) 30(4) *Criminology (Beverly Hills)* 449

Fisher, Matthew et al, 'Stakeholder Perceptions of Policy Implementation for Indigenous Health and Cultural Safety: A Study of Australia's "Closing the Gap" Policies' (2021) 80(2) *Australian Journal of Public Administration* 239

Ericson, Richard V, *Crime in an Insecure World* (Polity, 2007)

Foucault, Michel, *The History of Sexuality: Volume 1: An Introduction*, tr Robert Hurley (Vintage Books, 1990)

Frazer, Elizabeth and Kimberly Hutchings, *Violence and Political Theory* (Polity, 2020)

Fullagar, Simone, 'Foucauldian Theory' in Bruce Cohen (ed), *Routledge International Handbook of Critical Mental Health* (Routledge, 2017) 39

Garland, David, *The Culture of Control: Crime and Social Order in Contemporary Society* (University Press, 2001)

Gleeson, Kathleen, *Australia's 'war on Terror' Discourse* (Routledge, 1st ed., 2014)

Gogarty, Brendan, Benedict Bartl and Patrick Keyzer, 'The Rehabilitation of Preventive Detention' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013) 1

Gray, Anthony and Pauline Collins, 'Non-Disclosure of Relevant Material and Chapter III: The Tantalising Promise of Due Process Rights Protection by the Australian Constitution in the Gageler High Court Using Separation of Powers Principles' (2024) 31(2) *Australian Journal of Administrative Law* 93

Griffin, Michael, *Islamic State: Rewriting History* (Pluto Press, 1st ed, 2015)

Groves, Matthew, Janina Boughey and Dan Meagher, 'Rights, Rhetoric and Reality: An Overview of Rights Protection in Austrlaia' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Bloomsbury Publishing Plc, 2019) 1

Günther, Klaus, 'Criminal Law, Crime and Punishment as Communication' in AP Simester, Antje du Bois-Pedain and Ulfrid Neumann (eds), *Liberal Criminal Theory: Essays for Andreas Von Hirsch* (Bloomsbury Publishing Plc, 2016) 123

Hage, Ghassan, *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Routledge, 2000)

Hallam, Richard, *Abolishing the Concept of Mental Illness* (Routledge, 2018)

Hamza, Agon, *Althusser and Pasolini* (Palgrave Macmillan New York, 2016)

Hardt, Michael and Antonio Negri, *Empire* (Harvard University Press, 2000)

Hardy, Keiran and George Williams, 'Two Decades of Australian Counterterrorism Laws' (2022) 46(1) *Melbourne University Law Review* 34

Harris, Anita, 'Making Whiteness and the Racialisation of Australian Youth Citizenship' (2024) 45(4) *Journal of Intercultural Studies* 589

Harris-Hogan, Shandon, 'Is Far-Right Violence Actually Increasing in Australia?: Tracking Far-Right Terrorism and Violence in Australia Between 1990–2020' (2023) 17(2) *Perspectives on Terrorism* 1

Harris-Hogan, Shandon, Lorne L Dawson and Amarnath Amarasingam, 'A Comparative Analysis of the Nature and Evolution of the Domestic Jihadist Threat to Australia and Canada (2000–2020)' (2020) 14(5) *Perspectives on Terrorism* 77

Hart, Amber, 'Risks, Radicalisation and Rehabilitation: Imprisonment of Incarcerated Terrorists' (2020) 15(3) *Journal of Policing, Intelligence and Counter Terrorism* 189

Hawkins, Tom, 'Agamben, "Bare Life" and Archaic Greek Poetry' (2018) 15(1) *Mouseion: Journal of the Classical Association of Canada* 49

Held, David, *Introduction to Critical Theory: Horkheimer to Habermas* (University of California Press, 1980)

Henningsen, Troels Burchall, *Western Intervention and Informal Politics: Simulated Statebuilding and Failed Reforms* (Routledge, 2021)

Hobbs, Harry and Andrew Trotter, 'Lessons from History in Dealing with Our Most Dangerous' (2018) 41(2) *University of New South Wales Law Journal* 319

Holland, Jack, 'The Language of Counterterrorism' in Richard Jackson (ed), *Routledge Handbook of Critical Terrorism Studies* (Routledge, 2016) 203

Honneth, Axel, 'Three. Reconstructive Social Criticism with a Genealogical Proviso: On the Idea of "Critique" in the Frankfurt School' in *Three. Reconstructive Social Criticism with a Genealogical Proviso: On the Idea of "Critique" in the Frankfurt School* (Columbia University Press, 2009) 43

Humphreys, Stephen, 'Legalizing Lawlessness: On Giorgio Agamben's State of Exception' (2006) 17(3) *European Journal of International Law* 677

Ingram, Haroro J, Craig Whiteside and Charlie Winter, *The ISIS Reader: Milestone Texts of the Islamic State Movement* (University Press, 1st ed, 2020)

Jackson, John, 'The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition' (2016) 20(4) *International Journal of Evidence and Proof* 343

Jagose, Annamarie, *Queer Theory* (Melbourne University Press, 1996)

Jamali, Abbas, 'Why Agamben Cannot Save Us: A Political Critique of Giorgio Agamben's "Coming Politics"' (2024) 36(1) *Rethinking Marxism* 82

Jenkins, Fiona, 'Bare Life: Asylum-Seekers, Australian Politics and Agamben's Critique of Violence' (2004) 10(1) *Australian Journal of Human Rights* 79

Jennings, Ronald C, 'Sovereignty and Political Modernity: A Genealogy of Agamben's Critique of Sovereignty' (2011) 11(1) *Anthropological Theory* 23

Julayanont, Parunyou and Uma Suryadevara, 'Psychosis' (2021) 27(6) *Continuum: Behavioural Neurology and Psychiatry* 1682

Keyzer, Patrick, 'Preventive Detention: Asking the Fundamental Questions' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013) 1

Kilroy, Debbie and Tabitha Lean, 'The Not So Easy, Simple Solution' (2022) 30(2) *Journal of Prisoners on Prisons* 91

Lean, Tabitha, 'Why I Am an Abolitionist' (8 June 2021) *Overland Literary Journal* https://overland.org.au/2021/06/why-i-am-an-abolitionist/

Lennox, Charlotte, Beth Angell and Kimberlie Dean, 'Editorial: Mind the Gap! Criminal Justice and Health Transitions for Those with Severe Mental Illness' (2023) 14 *Frontiers in Psychiatry*

Lentin, Alana, 'No Room for Neutrality' (2022) 45(3) *Ethnic and Racial Studies* 485

Levinas, Emmanuel, *Otherwise than Being or Beyond Essence* (Springer Netherlands, 1991)

Levinas, Emmanuel, *Totality and Infinity: An Essay on Exteriority* (Springer Netherlands, 1980)

Loughnan, Arlie, 'Consorting, Then and Now: Changing Relations of Responsibility Special Issue: Criminal Law' (2019) 45(2) *University of Western Australia Law Review* 8

Loughnan, Arlie, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge University Press, 2019)

Loughnan, Arlie and Sabine Selchow, 'Preventive Detention Beyond the Law: The Need to Ask Socio-Political Questions' in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013) 261

Lucashenko, Melissa and Debbie Kilroy, *A Black Woman and a Prison Cell: Working with Murri Women in Queensland Prisons* (Sisters Inside Inc, 2005) https://drive.google.com/file/d/16RYEPrT8gJopYiZekkaKEvbq0UF33gjI/view?usp=sharing&usp=embed_facebook

Macken, Julie, 'The Melancholic Torturer: How Australia Became a Nation That Tortures Refugees' (2020) 56(1) *Journal of Sociology* 9

Mangabeira Unger, Roberto, *The Critical Legal Studies Movement: Another Time, A Greater Task* (Verso, 2015)

Marsic, Natalie, 'Criminal Law: An "Unacceptable Risk" - Post Sentence Detention under the New Terrorism ('High Risk Offenders') Act' [2018] (44) *Law Society Journal* 86

Mbembe, Achille, 'Necropolitics' (2003) 15(1) *Public Culture* 11

Mbembe, Achille, *Necropolitics*, tr Stephen Corcoran (Duke University Press, 2019)

McCausland, Ruth and Eileen Baldry, 'Who Does Australia Lock Up? The Social Determinants of Justice' (2023) 12(3) *International Journal for Crime, Justice and Social Democracy* 37

McClellan, Peter, *Report - Special Commission of Inquiry into Offending by Former Corrections Officer Wayne Astill at Dillwynia Correctional Centre* (State of New South Wales, 2024) https://www.nsw.gov.au/sites/default/files/noindex/2024-03/Wayne%20Astill%20Special%20Commission%20of%20Inquiry%20-%20Final%20Report.pdf

McElhone, Megan, 'Gangland and Task Force Gain: An Alternative Account of Middle Eastern Crime in Sydney, Australia' (2023) 31(3) *Critical Criminology* 793

McKay, Carolyn, 'Predicting Risk in Criminal Procedure: Actuarial Tools, Algorithms, AI and Judicial Decision-Making' (2020) 32(1) *Current Issues in Criminal Justice* 22

McKinnon, Crystal, 'Striking Back: The 1980s Aboriginal Art Movement and the Performativity of Sovereignty' in Brendan Hokowhitu et al (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge, 2020) 324

McLinden, Cassie and Elaine M Barclay, 'Australian Media Portrayals of Domestic Terrorism: The Sydney Siege and Parramatta Shooting' (2018) 29(3) *Current Issues in Criminal Justice* 209

McLoughlin, Daniel, 'The Fiction of Sovereignty and the Real State of Exception: Giorgio Agamben's Critique of Carl Schmitt' (2016) 12(3) *Law, Culture and the Humanities* 509

McNamara, Luke et al, 'Theorising Criminalisation: The Value of a Modalities Approach' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91

McNamara, Luke et al, 'Understanding *Processes* of Criminalisation: Insights from an Australian Study of Criminal Law-Making' (2021) 21(3) *Criminology & Criminal Justice* 387

McSherry, B, 'Throwing Away the Key: The Ethics of Risk Assessment for Preventive Detention Schemes' (2014) 21(5) *Psychiatry, Psychology and Law* 779

McSherry, Bernadette, 'Preventive Justice, Risk of Harm and Mental Health Laws' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2018) 62

McSherry, Bernadette, 'Risk Assessment, Predictive Algorithms and Preventive Justice' in John Pratt and Jordan Anderson (eds), *Criminal Justice, Risk and the Revolt against Uncertainty* (Springer International Publishing, 2020) 17

McSherry, Bernadette, Alan Norrie and Simon Bronitt, 'Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Bloomsbury Publishing Plc, 2008) 3

Mohanty, Chandra Talpade, *Feminism Without Borders: Decolonizing Theory, Practising Solidarity* (Duke University Press, 2003)

Moreton-Robinson, Aileen, 'Writing off Indigenous Sovereignty: The Discourse of Security and Patriarchal White Sovereignty' in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2007) 86

Naffine, Ngaire, 'Moral Uncertainties of Rape and Murder: Problems at the Core of Criminal Law Theory' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Bloomsbury Publishing Plc, 2008) 213

Nagle, JF, *Report of the Royal Commissioner into New South Wales Prisons* (No G46890D-1, Parliament of New South Wales, 31 March 1978)

Neudorf, Lorne, 'Time to Take Lawmaking Seriously: The Problem of Delegated Legislation in South Australia' (2021) 43(8) *Bulletin (Law Society of South Australia)* 10

Ngo, Helen, *The Habits of Racism: A Phenomenology of Racism and Racialized Embodiment* (Lexington Books, 2017)

Oliver, Dawn, 'Regulation, Democracy and Democratic Oversight in the UK' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State* (Oxford University Press, 2010) 243

Pallas, Josh, 'Heed the Call: The Implied Freedom of Political Communication and the Terrorism High-Risk Offenders Regime' (2021) 34(1) *Current Issues in Criminal Justice* 1

Parashar, Swati and Michael Schulz, 'Colonial Legacies, Postcolonial "Selfhood" and the (Un)Doing of Africa' (2021) 42(5) *Third World Quarterly* 867

Parliamentary Joint Committee on Human Rights, *Inquiry into Australia's Human Rights Framework* (Commonwealth of Australia, May 2024) https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000210/toc_pdf/InquiryintoAustralia'sHumanRightsFramework.pdf

Patil, Tejaswini Vishwanath and Helen Jacqueline McLaren, 'Australian Media and Islamophobia: Representations of Asylum Seeker Children' (2019) 10(9) *Religions* 501

Plater, David, 'The Development of the Prosecutor's Role in England and Australia with Respect to Its Duty of Disclosure: Partisan Advocate or Minister of Justice?' (2022) 25(2) *University of Tasmania Law Review* 111

Pressman, D Elaine and Natalie Davis, 'Violent Extremism Risk Assessment and Screening Analysis: Applicability, Challenges, and New Developments' (2022) 17(3) *Journal of Policing, Intelligence and Counter Terrorism* 301

Puar, Jasbir K, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, Tenth anniversary expanded edition., 2017)

Puar, Jasbir K, '"The Turban Is Not a Hat": Queer Diaspora and Practices of Profiling' (2008) 4(1) *Sikh Formations* 47

Pugliese, Joseph, *State Violence and the Execution of Law* (Routledge, 2013)

Punter, Helen, 'Policing Persons with Mental Illness: Preventive Justice or Preventing Injustice?' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2018) 75

Pye, Christopher, 'Agamben at the Gates: Timon of Athens and the Political-Aesthetic Foundations of the Polis' (2022) 22(1) *Journal for Early Modern Cultural Studies* 177

Pyszora, N et al, 'Violent Extremism Risk Assessment in the Australian Courts; Professional and Ethical Challenges for the Expert Witness in Post Sentence Preventative Detention Cases' (2022) 17(3) *Journal of Policing, Intelligence and Counter Terrorism* 314

Ramsay, Peter, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (Oxford University Press, 2012)

Ramsay, Peter, 'The Theory of Vulnerable Autonomy and the Legitimacy of Civil Preventative Orders' in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Bloomsbury Publishing Plc, 2008) 109

Ricketts, Aidan, 'Freedom of Association or Guilt by Association: Australia's New Anti-Terrorism Laws and the Retreat of Political Liberty' (2002) 6(6) *Southern Cross University Law Review* 133

Ripperger, Bernhard, 'The Use of Terrorism Risk Assessment Tools in Australia to Manage Residual Risk' in Raymond Corrado, Gunda Wössner and Ariel Merari (eds), *NATO Science for Peace and Security Series – E: Human and Societal Dynamics* (IOS Press, 2021) 165

Roach, Kent, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge University Press, 2011)

Ross, Alison, *The Agamben Effect* (Duke University Press, 2008)

Roux, Theunis, 'Judging the Quality of Legal Research: A Qualified Response to the Demand for Greater Methodological Rigour' (2014) 24(2014) *Legal Education Review* 177

Russell, Emma K, ‘Queer Penalities: The Criminal Justice Paradigm in Lesbian and Gay Anti-Violence Politics’ (2017) 25(1) *Critical Criminology* 21

Said, Edward W, *Orientalism* (Penguin, 2003)

Sarat, Austin and Thomas R Kearns, ‘Introduction’ in Austin Sarat and Thomas R Kearns (eds), *Law’s Violence* (The University of Michigan Press, 1992) 1

Saul, Ben, *Defining Terrorism in International Law* (Oxford University Press, 2010)

Scarry, Elaine, *The Body in Pain: The Making and Unmaking of the World* (Oxford University Press, 1985)

Scott, Russ and Rodger Shanahan, ‘Man Haron Monis and the Sydney Lindt Café Siege - Not a Terrorist Attack’ (2018) 25(6) *Psychiatry, Psychology, and Law* 839

Sengul, Kurt Adam, ‘Performing Islamophobia in the Australian Parliament: The Role of Populism and Performance in Pauline Hanson’s “Burqa Stunt”’ (2022) 184(1) *Media International Australia* 49

Sentas, Vicki, ‘Beyond Media Discourse: Locating Race and Racism in Criminal Justice Systems’ in Monish Bhatia, Scott Poynting and Waqas Tufail (eds), *Media, Crime and Racism* (Springer International Publishing, 2018) 359

Sentas, Vicki and Michael Grewcock, ‘Criminal Law as Police Power: Serious Crime, Unsafe Protest and Risks to Public Safety’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 75

Seuffert, Nan, ‘Occupy, Financial Fraternity and Gender Ventriloquism’ (2014) 10(3) *Law, Culture and the Humanities* 380

Shepherd, Stephane, ‘Violence Risk Assessment and Indigenous Australians: A Primer’ (2018) 43(1) *Alternative Law Journal* 45

Simester, AP and Andreas von Hirsch, *Crimes, Harms, and Wrongs* (Hart Publishing, 1st ed, 2011)

Singh, Teresa, ‘A Sovereign Citizen by Any Other Name? Risks in the Terrorism High-Risk Offender Context’ (2024) 49(3) *Alternative Law Journal* 212

Slobogin, Christopher, ‘Preventive Detention in Europe, the United States and Australia’ in Patrick Keyzer (ed), *Preventive Detention: Asking the Fundamental Questions* (Intersentia, 2013) 31

Smith, Charisse and Mark Nolan, ‘Post-Sentence Continued Detention of High-Risk Terrorist Offenders in Australia’ (2016) 40(3) *Criminal Law Journal* 163

Snow, Deborah, *Inside the Lindt Café Siege: The Powerful and Uncompromising Story of What Happened and Why the Police Response Went so Tragically Wrong* (Allen & Unwin, 2018)

Sorial, Sarah, ‘Guilt by Association: The “anti-Terrorism” Case of Regina v Lodhi’ (2007) 32(3) *Alternative Law Journal* 160

Spade, Dean, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (South End Press, 2011)

Spencer, Sarah-Jane, ‘Forensic Community Treatment Orders: Waste of Time or Exciting New Provision?’ (2015) 49(11) *Australian & New Zealand Journal of Psychiatry* 965

Spivak, Gayatri Chakravorty, ‘Can the Subaltern Speak?’ in Lawrence Grossberg and Cary Nelson (eds), *Marxism and the Interpretation of Culture* (University of Illinois Press, 1988)

Stahl, William, ‘The Exception and the Paradigm: Giorgio Agamben on Law and Life’ (2020) 19(2) *Contemporary Political Theory* 233

Steiker, Carol, ‘The Limits of the Preventive State’ (1998) 88(3) *Journal of Criminal Law and Criminology* 771

Stimpson, Claire, ‘Unfortunate, Unforgivable and Unacceptable? A Comprehensive Review of Applications under *Terrorism (High Risk Offenders) Act 2017 NSW*’ (2020) (forthcoming) *Current Issues in Criminal Justice* 1

Stormont, Nathan, ‘Not Child-Related: Unnecessary Working with Children Checks as Irrelevant Criminal Records Discrimination’ (2022) 48(2) *Monash University Law Review* 160

Tedmanson, Deirdre, 'Isle of Exception: Sovereign Power and Palm Island' (2008) 4(2/3) *Critical Perspectives on International Business* 142

Thomas, Archie et al, 'First Nations Media in the Closing the Gap Era: Navigating the New Self-Determination' (2023) 0(0 (online first)) *Media International Australia*

Toole, Kellie, 'The Decision to Prosecute - The Accountability of Australian Prosecutors' in Victoria Colvin and Philip Stenning (eds), *The Evolving Role of the Public Prosecutor: Challenges and Innovations* (Routledge, 1st ed, 2018) 232

Tulich, Tamara, 'A View Inside the Preventive State: Reflections on a Decade of Anti-Terror Law' (2012) 21(1) *Griffith Law Review* 209

Tulich, Tamara, 'Critical Reflections on Preventive Justice' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) 3

Tulich, Tamara, '"Perverts", "Terrorists", and Business as Usual: Pether and Preventive Justice Scholarship' (2021) 30(1) *Social & Legal Studies* 123

Tulich, Tamara, 'Post-Sentence Preventative Detention and Extended Supervision of High Risk Offenders in New South Wales' (2015) 38(2) *University of New South Wales Law Journal* 823

Tulich, Tamara, Sarah Murray and Natalie Skead, 'Antipodean Perspectives on Preventive Justice: The High Court and Serious Crime Prevention Orders' (2021) 30(2) *Griffith Law Review* 211

Tyulkina, Svetlana and George Williams, 'Combating Terrorism in Australia through Preventative Detention Orders' in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2019) 136

Venkatesan, Sathyaraj and Arya Suresh, 'Critique of DSM, Medicalisation and Graphic Medicine' (2022) 14(2) *Journal of Graphic Novels and Comics* 233

Wald, Patricia M, 'Violence under the Law: A Judge's Perspective' in Austin Sarat and Thomas R Kearns (eds), *Law's Violence* (The University of Michigan Press, 1992) 77

Watego, Chelsea, *Another Day in the Colony* (University of Queensland Press, 2021)

Watson, Irene, ‘Settled and Unsettled Spaces: Are We Free to Roam?’ in Aileen Moreton-Robinson (ed), *Sovereign Subjects: Indigenous Sovereignty Matters* (Routledge, 2007) 15

Weheliye, Alexander G, *Habeas Viscus: Racializing Assemblages, Biopolitics, and Black Feminist Theories of the Human* (Duke University Press, 2014)

Whyte, Jessica, *Catastrophe and Redemption: The Political Thought of Giorgio Agamben* (SUNY Press, 2013)

Wiegman, Robyn and Elizabeth A Wilson, ‘Introduction: Antinormativity’s Queer Conventions’ (2015) 26(1) *differences* 1

Williams, George, ‘A Decade of Australian Anti-Terror Laws’ (2011) 35(3) *Melbourne University Law Review* 1136

Wong, Joanna, ‘Sharing Terrorism Intelligence: Insights from UK Law Enforcement Agencies’ (2022) 17(2) *Journal of Policing, Intelligence and Counter Terrorism* 218

Xypolia, Ilia, ‘From the White Man’s Burden to the Responsible Saviour: Justifying Humanitarian Intervention in Libya’ (2022) 31(1) *Middle East Critique* 1

Zdenkowski, George and David Brown, *The Prison Struggle: Changing Australia’s Penal System* (Penguin Books, 1982)

Zedner, Lucia, ‘Fixing the Future? The Pre-Emptive Turn in Criminal Justice’ in Bernadette McSherry, Alan Norrie and Simon Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Bloomsbury Publishing Plc, 2008) 35

Zedner, Lucia, *Security* (Routledge, 2009)

Zedner, Lucia, ‘Taking the Preventive Justice Project Forward’ in Tamara Tulich et al (eds), *Regulating Preventive Justice: Principle, Policy and Paradox* (Routledge, 2017) xiii

Zedner, Lucia and Andrew Ashworth, ‘The Rise and Restraint of the Preventive State’ (2019) 2(1) *Annual Review of Criminology* 429

7.2. Cases

Attorney General for New South Wales v Tillman [2007] NSWCA 119

Attorney-General (NT) v Emmerson (2014) 254 CLR 393

Cheema v State of New South Wales (2020) 102 NSWLR 714

Cornwall v Attorney General for New South Wales [2007] NSWCA 374

Edwards v R ((2021) 273 CLR 585)

Fardon v Attorney-General (Qld) (2004) 223 CLR 575

Fayad v R [2017] NSWCCA 81

Garlett v Western Australia (2022) 277 CLR 1

Grey v R (2001) 184 ALR 593

Hardy v State of New South Wales (2021) 294 A Crim R 424

Human Rights Committee, *Views: Communication No 1629/2007*, 98th sess, UN Doc CCPR/C/98/D/1629/2007, (10 May 2010)

Human Rights Committee, *Views: Communication No 1935/2007,* 98th sess, UN Doc CCPR/C/98/D/1635/2007, (10 May 2010)

IMM v The Queen (2016) 257 CLR 300

Jones v State of New South Wales [2020] NSWCA 202

Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51

Kioa v West (1985) 159 CLR 550

Lawrence v State of New South Wales (2020) 103 NSWLR 401

Lodhi v R (2006) 199 FLR 303

Lodhi v R (2007) 179 A Crim R 470

Lynn v State of New South Wales (2016) 91 NSWLR 636

Mallard v R (125) (2005) 224 CLR 125

Minister for Home Affairs v Benbrika (2021) 272 CLR 68

Monis v The Queen; Droudis v the Queen (2013) 249 CLR 92

R v Alqudsi [2016] NSWSC 1227

R v Biber [2008] NSWSC 535

R v Glynatsis [2013] NSWCCA 131

R v Hraichie (No 3) [2019] NSWSC 973

R v Lawrence [2023] NSWSC 1428

R v Musleh (No 5) [2018] NSWSC 1927

R v Sulayman Khalid; R v Jibryl Almaouie; R v IM; R v Mohamed Rashad Al Maouie; R v Farhad Said [2017] NSWSC 1365

R v Warwick (No 30) [2018] NSWSC 1051

State of New South Wales v Alam [2020] NSWSC 295

State of New South Wales v Azar (Final) [2021] NSWSC 216

State of New South Wales v Azar (Preliminary) [2020] NSWSC 1807

State of New South Wales v Baldwin [2019] NSWSC 1882

State of New South Wales v Barez (Final) [2020] NSWSC 555

State of New South Wales v Barez (Preliminary) [2019] NSWSC 1589

State of New South Wales v BG (Final) [2019] NSWSC 200

State of New South Wales v BP (No 2) [2019] NSWSC 806

State of New South Wales v BP (Preliminary) [2019] NSWSC 699

State of New South Wales v Burchell (No 2) [2017] NSWSC 1191

State of New South Wales v Carr [2020] NSWSC 643

State of New South Wales v Ceissman (No 2) [2018] NSWSC 1237

State of New South Wales v Ceissman [2018] NSWSC 508

State of New South Wales v Ceissman [2021] NSWSC 390

State of New South Wales v Cheema (Final) [2022] NSWSC 463

State of New South Wales v Cheema (Preliminary) [2020] NSWSC 876

State of New South Wales v Church (Preliminary) [2021] NSWSC 246

State of New South Wales v Devaney (Preliminary) [2021] NSWSC 1432

State of New South Wales v Dickson (Final) [2020] NSWSC 100

State of New South Wales v Dickson (Preliminary) [2019] NSWSC 1534

State of New South Wales v Dunn (a pseudonym) (2018) 273 A Crim R 238

State of New South Wales v Dunn [2019] NSWSC 426

State of New South Wales v Elmir (Final) [2019] NSWSC 1867

State of New South Wales v Elomar (Final) [2021] NSWSC 411

State of New South Wales v Elomar (No 2) [2018] NSWSC 1034

State of New South Wales v Elomar (Preliminary) [2020] NSWSC 1850

State of New South Wales v Elomar [2018] NSWSC 708

State of New South Wales v Elzamtur [2019] NSWSC 186

State of New South Wales v Fayad (Final) [2021] NSWSC 294

State of New South Wales v Fayad (Preliminary) [2020] NSWSC 1681

State of New South Wales v Fayad (Preliminary) [2023] NSWSC 115

State of New South Wales v Fayad (Variation of Conditions) [2021] NSWSC 600

State of New South Wales v Gavin [2022] NSWSC 84

State of New South Wales v GB by his Tutor [2020] NSWSC 913

State of New South Wales v Grooms (Final) [2019] NSWSC 353

State of New South Wales v Haidar [2020] NSWSC 38

State of New South Wales v Hardy (Final) [2021] NSWSC 900

State of New South Wales v Hardy [2021] NSWSC 323

State of New South Wales v Hardy [2022] NSWSC 1724

State of New South Wales v Hickey (Preliminary) [2022] NSWSC 1498

State of New South Wales v Holt (No 8) [2023] NSWSC 1363

State of New South Wales v Ibrahim (Final) [2021] NSWSC 793

State of New South Wales v Kiskonen (Preliminary) [2021] NSWSC 915

State of New South Wales v Lawrence (2019) 349 FLR 142

State of New South Wales v Lawrence [2019] NSWSC 946

State of New South Wales v McQuilton (Final) [2019] NSWSC 265

State of New South Wales v Mustapha (2022) 295 A Crim R 296

State of New South Wales v Mustapha (Final) [2022] NSWSC 116

State of New South Wales v Naaman (Final) [2018] NSWSC 1635

State of New South Wales v Naaman (No 2) (2018) 276 A Crim R 30

State of New South Wales v Newton [2022] NSWSC 224

State of New South Wales v Osman [2020] NSWSC 1646

State of New South Wales v Osman [2021] NSWSC 124

State of New South Wales v Pacey (Final) [2015] NSWSC 1983

State of New South Wales v RC (No2) [2019] NSWSC 845

State of New South Wales v Reginald Collingwood (a pseudonym) [2021] NSWSC 1365

State of New South Wales v Richardson (Final) [2023] NSWSC 1048

State of New South Wales v Richardson (Preliminary) (No 2) [2023] NSWSC 794

State of New South Wales v Simcock (Final) [2016] NSWSC 1805

State of New South Wales v Sturgeon [2019] NSWSC 559

State of New South Wales v Taleb (Final) [2022] NSWSC 1748

State of New South Wales v White (Final) [2018] NSWSC 1943

State of New South Wales v White (No 1) [2018] NSWSC 1064

State of New South Wales v White [2020] NSWSC 1568

State of New South Wales v Williamson (No 1) [2019] NSWSC 812

State of New South Wales v Wynne (Preliminary) [2020] NSWSC 1650

State of New South Wales v XX [2022] NSWSC 1583

State of NSW v Biber (No 2) (Final) [2021] NSWSC 104

State of NSW v Holschier (No 2) [2018] NSWSC 1921

State of NSW v KAS (Preliminary) [2019] NSWSC 924

State of NSW v TL (Preliminary) [2022] NSWSC 946

State of NSW v XX (Final) [2023] NSWSC 59

Thomas v The Queen (1960) 102 CLR 587

White v Director of Public Prosecutions [2021] NSWSC 1629

Wilde v State of New South Wales (2015) 249 A Crim R 65

7.3. Legislation

Bail Act 2013 (NSW)

Community Protection Legislation Amendment Act 2018 (NSW)

Crimes Act 1900 (NSW)

Crimes (Administration of Sentences) Amendment Act 2022 (NSW)

Crimes (Administration of Sentences) Regulation 2014 (NSW)

Crimes (Appeal and Review) Act 2001 (NSW)

Crimes (High Risk Offenders) Act 2006 (NSW)

Crimes Legislation Amendment Act 2021 (NSW)

Criminal Code 1995 (Cth)

Criminal Law (High Risk Offenders) Act 2015 (SA)

Criminal Procedure Act 1986 (NSW)

Evidence Act 1995 (NSW)

High Risk Offenders Legislation Amendment Act 2024 (NSW)

Independent Commission Against Corruption Act 1988 (NSW)

Justice Legislation Amendment Act (No 2) 2018 (NSW)

Justice Legislation Amendment (Miscellaneous) Act 2023 (NSW)

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

Marine Safety Act 1998 (NSW)

Mental Health Act 2007 (NSW)

Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)

Terrorism (High Risk Offenders) Act 2017 (NSW)

Terrorism (High Risk Offenders) Regulations 2024 (NSW)

Uniform Civil Procedure Rules 2005 (NSW)

Water Management Act 2000 (NSW)

7.2. Other

'Closing the Gap' (2024) https://www.closingthegap.gov.au/

'National Agreement on Closing the Gap', *Closing the Gap* (July 2020) https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap

'Uluru Statement from the Heart' (2017) https://ulurustatement.org/the-statement/view-the-statement/

Anthony, Thalia, 'FactCheck: Are First Australians the Most Imprisoned People on Earth?', *The Conversation* (online, 6 June 2017) http://theconversation.com/factcheck-are-first-australians-the-most-imprisoned-people-on-earth-78528

Bavas, Josh, 'Man Jailed for 28 Years over Curtis Cheng Shooting Has Conviction Quashed', *ABC News* (online, 27 August 2021) https://www.abc.net.au/news/2021-08-27/mustafa-dirani-wins-appeal-over-curtis-cheng-death-conviction/100413692

Benny-Morrison, Ava, 'Man Returns from Turkey-Syria Border to Face Questioning over Michael Ibrahim Shooting', *Sydney Morning Herald* (online, 25 November 2015) https://www.smh.com.au/national/nsw/man-returns-from-turkeysyria-border-to-face-questioning-over-michael-ibrahim-shooting-20151125-gl7p71.html

Bucci, Nino and Christopher Knaus, 'Coalition Warned of Problems with Tool to Predict Future Terrorist Crime but Continued to Use It on Offenders', *The Guardian* (online, 7 April 2023) https://www.theguardian.com/australia-news/2023/apr/08/coalition-warned-of-problems-with-tool-to-predict-future-terrorist-but-continued-to-use-it-on-offenders

Bucci, Nino and Christopher Knaus, 'Lawyers Outraged by Government Failure to Disclose Terrorism-Prediction Tool's Serious Problems', *The Guardian* (online, 27 April 2023) https://www.theguardian.com/australia-news/2023/apr/28/lawyers-outraged-by-government-failure-to-disclose-terrorism-prediction-tools-serious-problems

Buchanan, Ian, *A Dictionary of Critical Theory* (1st ed, 2010) 'Critical theory' 100

Coë, Charlie, 'Alleged Terrorist Could Be PARALYSED after a Violent Stand-off with Prison Officers "over Prayer Time" at Goulburn's Notorious Supermax Jail' *The Daily Mail* (online, 3 December 2021) https://www.dailymail.co.uk/news/article-10269965/Alleged-terrorist-PARALYSED-stand-prison-officers-Goulburn-supermax-prison.html

Council of Australian Governments, 'Council of Australia Governments Communiqué: Countering Violent Extremism' (11 December 2015)

Dyer, Andrew and Josh Pallas, *NSWCCL and SIC Submission to the Independent National Security Legislation Monitor Review into Division 105A of the Criminal Code (Cth)* (New South Wales Council for Civil Liberties and Sydney Institute of Criminology, 1 September 2021) https://www.inslm.gov.au/sites/default/files/2022-10/1-NSW-Council-for-Civil-Liberties-and-Sydney-Institute-of-Criminology.pdf

Explanatory Note, Terrorism (High Risk Offenders) Bill 2017 (NSW)

Ferri, Lauren, 'Paralysed Alleged Terror Offender Tukiterangi Larwrence's Big for Freedom from Supermax', *News.com.au* (online, 7 April 2022) https://www.news.com.au/national/nsw-act/courts-law/paralysed-alleged-terror-offender-tukiterangi-lawrences-bid-for-freedom-from-supermax/news-story/c47eff3d8cfe084fc8a07a4594ed11e0

Foden, Blake, 'Former Brothers 4 Life Chapter Leaders Damien Featherstone Pleads Guilty over Alexander Maconochie Centre Hostage Situation', *Canberra Times* (online, 17 August 2022) https://www.canberratimes.com.au/story/7864154/former-gang-leader-pleads-guilty-over-jails-first-hostage-situation/

Ford, Mazoe, 'NSW Inmate Allegedly Said Sydney's City 2 Surf Would Be a "good Place" to Blow Up', *ABC News* (online, 5 June 2018) https://www.abc.net.au/news/2018-06-05/nsw-inmates-alleged-desire-to-bomb-sydney-city-to-surf/9836644

Galouzis, Jennifer, 'Research Bulletin: Profile of Violent Behaviour by Inmates in NSW Correctional Centres' (NSW Department of Corrective Services Corporate Research, Evaluation and Statistics, March 2008) https://correctiveservices.dcj.nsw.gov.au/documents/research-and-statistics/rb25-profile-violent-behaviour-inmates-nsw-correctional-centres.pdf

Krasmann, Susanne, Oxford University Press, *Oxford Research Encyclopedia of Criminology and Criminal Justice* (at 24 January 2018) 'Enemy Penology'

Legislation Review Committee, *Legislation Review Digest* (No No. 65/56, New South Wales Parliament, 21 November 2017)

Mautner, Thomas, *The Penguin Dictionary of Philosophy* (2nd ed, 2005) 'Critical theory' 130

McKinnell, Jamie, 'NSW Closes "terror" Loophole for Inmates', *AAP Bulletin Wire* (online, 27 May 2018)
https://www.proquest.com/docview/2044520519/abstract/B1DF074285584953PQ/1

Mental Health Review Tribunal 'Forensic Community Treatment Orders' (March 2021)
https://www.mhrt.nsw.gov.au/files/mhrt/MHCIFP/FCTOInformationKit-March2021.pdf

National Institute of Mental Health (USA), 'Understanding Psychosis' (2023)
https://www.nimh.nih.gov/health/publications/understanding-psychosis

New South Wales, *Parliamentary Debates*, Legislative Assembly, 13 November 2018,

New South Wales, *Parliamentary Debates*, Legislative Assembly, 15 November 2017

New South Wales, *Parliamentary Debates,* Legislative Assembly, 21 November 2017

New South Wales, *Parliamentary Debates*, Legislative Assembly, 10 October 2023.

New South Wales, *Parliamentary Debates*, Legislative Council, 22 November 2017

New South Wales, *Parliamentary Debates*, Legislative Council, 22 November 2017

Ripperger, Bernhard, 'Preventive Justice, Autonomy and Rehabilitation: A Contribution Toward a Critical Theory of Law' (thesis, Macquarie University, 2023)
https://figshare.mq.edu.au/articles/thesis/Preventive_Justice_Autonomy_and_Rehabilitation_A_Contribution_Toward_a_Critical_Theory_of_Law/22280974/1

Scheikowski, Margaret, ‘Bans Re-Imposed on Sydney Terror-Plotter’, *AAP General News Wire* (online, 1 December 2021) https://www.proquest.com/docview/2604947940/citation/9FCF38430E1747D5PQ/1

Taylor, Gordon, ‘Former Brothers for Life Chapter Leader Damien Featherstone Jailed over Canberra Crime Spree’, *ABC News* (online, 16 August 2019) https://www.abc.net.au/news/2019-08-16/man-jailed-over-violent-crime-spree-in-canberra/11422942

Tulich, Tamara and Sarah Murray, ‘Confronting Race, Chapter III and Preventive (In)Justice: Garlett v Western Australia’, *Australian Public Law* (4 November 2022) https://www.auspublaw.org/blog/2022/11/confronting-race-chapter-iii-and-preventive-injustice-garlett-v-western-australia

Wakatama, Giselle, ‘Jail Attack Data Lays Bare Violent Reality of Prison Life’, *ABC News* (online, 7 November 2022) https://www.abc.net.au/news/2022-11-08/nsw-prisoner-assault-statistics-concern-advocates/101624424

Wellauer, Kirstie and Stephanie Boltje, ‘Latest Closing the Gap Data Shows Only Five out of 19 Targets Are “on Track”. Will the next Generation Get a Fair Go?’, *ABC News* (online, 6 March 2024) https://www.abc.net.au/news/2024-03-06/closing-the-gap-targets-progress-report-2024/103546578

Wolf, Natalie, ‘Alleged City2Surf Terror Plot Revealed in Court’, *News.com.au* (online, 6 June 2018) https://www.news.com.au/lifestyle/real-life/news-life/alleged-city2surf-terror-plot-revealed-in-court/news-story/f191426016b2db6c559c8d220a9268b8