

A VIEW INSIDE THE PREVENTIVE STATE

Reflections on a Decade of Anti-Terror Law

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This article examines the rise of prevention in Australia's legal response to terrorism in the decade following September 11, 2001. In particular, it explores the question of how to understand and situate preventive anti-terror laws within the Australian legal system. It will be argued that the imperative of prevention in anti-terror law can be understood as part of a broader shift in emphasis in governance, rather than as an isolated response to the threat of transnational terrorism. Adopting the conceptual model of the preventive state, and analysing law and governance therein, provides an opportunity for robust analysis from which insights may be drawn about the broader implications of this shift.

In the decade following September 11, 2001, a central preoccupation of the Australian government has been how to anticipate and thwart a terrorist attack before it occurs. This key policy objective of prevention has led to novel legislative developments that stretch the boundaries of the criminal law and evade or erode protections within the criminal justice system; notable legislative developments include the introduction of preventive detention orders and control orders, and the criminalisation of preparatory acts and associations.¹ These measures permit the state to preventively restrain an individual's liberty on the basis of an anticipated future harm. This is in stark contrast to the traditional retrospective orientation of the criminal justice system, where the state reacts and responds to harm that has occurred, such as by investigating and punishing criminal acts.

Preventive measures, however, are not unprecedented. The state has long employed strategies to control future conduct by restricting an individual's liberty. Examples include the power historically granted to a Justice of the Peace to bind over and incarcerate an individual to prevent a breach of the peace,² and the statutory power of courts to restrain an

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¹ *Criminal Code Act 1995* (Cth) Divs 101, 104, 105.

² Dershowitz traces the Office of Justice of the Peace to the time of Richard I in the twelfth Century (then called the Office of Conservator of the Peace, to become Guardian of the

individual to prevent future violence, such as by making an apprehended violence order.³ In addition, over the last decade, legislation has been introduced in many Australian jurisdictions permitting the preventive detention and continued supervision of serious sex offenders.⁴ This raises the question of how to understand and situate preventive anti-terror laws within the Australian legal system – do they, for example, constitute extraordinary measures that may be isolated as a specific response to the threat of terrorism following September 11? Or might they be emblematic of a broader shift in emphasis in governance that was perceptible prior to September 11, yet took its most visible form thereafter?

This article explores the implications of the rise of prevention in the context of anti-terror laws.⁵ It argues that preventive anti-terror laws should not be viewed in isolation. Rather, the preventive push in anti-terror law is symptomatic of a broader shift in emphasis in governance, the implications of which warrant further examination. Understood in this way, Australia's preventive anti-terror regime raises important questions about how we govern and are governed, how we view and regulate deviance, and the acceptable

Peace, Keeper of the Peace, and finally Justice of the Peace). The power of a Justice of the Peace to prevent breaches of the peace extended to incarcerating an individual who was suspected might commit a harmful or criminal act: Dershowitz (2006), pp 43, 50.

³ In New South Wales, for example, these orders are now made pursuant to the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which replaced the apprehended violence order (AVO) scheme in Part 15A of the *Crimes Act 1900* (NSW). AVOs were first introduced in New South Wales in 1982 through the *Crimes (Domestic Violence) Amendment Act 1982* (NSW). This Act empowered magistrates to make an order, for up to six months, restraining an individual where domestic violence was apprehended. AVOs are hybrid orders – that is, civil orders that attract a criminal penalty of six months' imprisonment on breach. These orders have since been extended to all situations in which violence is feared. For a history of AVOs in New South Wales, see NSW Law Reform Commission (2002), Ch 2; NSW Law Reform Commission (2003).

⁴ Queensland was the first jurisdiction to introduce post-sentence preventive detention and supervision, followed by Western Australia and New South Wales: *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld); *Dangerous Sexual Offenders Act 2006* (WA); *Crimes (Serious Sex Offenders) Act 2006* (NSW). Victoria has since followed suit: *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic).

⁵ The rationale for employing the term 'prevention' in this article is twofold. First, although used differently in different settings, prevention is employed by governments and commentators to describe state action to avert harm. At this general level, it is the most accurate descriptor of measures and modes of governance that seek to prevent harm from occurring. It is in this collective and general sense that prevention is used in discussion of the preventive state, and in reference to preventive measures and the collection of terminology used to describe those measures, the terminology of prevention. Second, when given content in the specific context of domestic anti-terror law and regulation, prevention serves as a useful descriptor through which to categorise measures that fall within the preventive state – for example, where measures may properly be categorised as preventive (targeting an identified threat before it eventuates) as opposed to pre-emptive (targeting threats before they emerge). Both measures fall within the collective and general meaning of prevention to forestall harm from occurring.

limits of state intervention to prevent harm. Further, viewing preventive anti-terror laws as part of a broader shift in emphasis in governance has the potential to prompt new questions about the rapid development of Australia's preventive anti-terror regime, and the ease with which preventive anti-terror laws have been replicated in other areas of the law.

This article begins by traversing the many ways in which prevention in anti-terror law has been explained and described since September 11, and the challenges posed to meaningful analysis by inconsistent and vague terminology. The 'preventive state' model is adopted as a way to navigate and contextualise the terminology of prevention and to conceptualise the preventive push in Australia's anti-terror law. The preventive state describes state action which seeks to anticipate and avert or minimise harm, and encompasses measures designed to prevent harm from occurring. Finally, this article addresses how to evaluate law and governance of the preventive state. It proposes that adopting a governmentality perspective presents an opportunity to step inside the preventive state and to explore the operation of different preventive measures in particular settings, such as the courtroom. This may inform the articulation of, and give content to, the limits of state action to prevent harm by exploring and subjecting to analysis the operation of preventive laws and the effects they produce.

The Terminology of Prevention

One of the striking features of recent attempts to describe and explain state action that seeks to intervene and avert a terrorist attack is the fragmented and unwieldy state of the discourse. This is manifested on several levels: ambiguous and contested terminology; inconsistent use of terms; a separation between the discourse of practice and theory, and of policy and action; and an uneasy migration of terminology from the international to the national, and between disciplines. This fractured discourse reflects, more broadly, a lack of clarity regarding the meaning of and assumptions underlying the terms engaged. Without clarification of the specific meanings of the terms in the context in which they are used, the discourse has little explanatory or analytical power, and hampers discussion of broader legal implications.

'Pre-emption' and 'prevention' were the first terms invoked to describe state responses to terrorism post-September 11, and have since pervaded policy, rhetoric and commentary on domestic and international anti-terror efforts. 'Precaution', on the other hand, has featured more prominently in commentary and analysis of anti-terror law and policy, domestically and internationally, in the latter half of the last decade.⁶ What follows is a survey of the key uses to which these terms have been put to illustrate the muddy waters of preventive terminology, and what we might take from these accounts to move the discourse forward in relation to Australia's domestic anti-terror regime.

⁶ Bronitt (2008), p 79.

Pre-emption is arguably the most reported and contested term of the so-called 'war on terror', following its incantation in the Bush administration's 2002 *National Security Strategy*. The rationale of the 'doctrine of pre-emption' or 'Bush doctrine', as it is variously known, is captured in the following excerpt:

The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.⁷

By this doctrine, the Bush administration proposed an adaptation of the international law doctrine of anticipatory self-defence on the basis that the new threat posed by 'today's adversaries', being 'rogue states and terrorists', necessitated a loosening of the imminence requirement.⁸ At customary international law, anticipatory self-defence relates to the right of states to act in self-defence where two conditions exist: necessity (an imminent threat of armed attack); and proportionality (action that is neither unreasonable nor excessive, limited by necessity).⁹ While anticipatory self-defence has hitherto been called 'pre-emption',¹⁰ many now distinguish the Bush administration's 'pre-emptive self-defence' as designating something more remote, where an attack is neither imminent nor threatened, but possible or expected.¹¹ The temporality of this distinction is significant, and it introduces a critical point that is of equal relevance to domestic legislation touted to be

⁷ President Bush (2002), p 15.

⁸ President Bush (2002), in particular, pp 6, 15.

⁹ This is also known as the '*Caroline* doctrine', following an incident in 1837 in which Britain destroyed the *Caroline*, a steamer, on US territory. The *Caroline* was being used by Canadians and US supporters to procure a rebellion against British rule; it transported supporters and ammunition to Navy Island from where an attack was to be launched on the Canadian mainland. It was in a letter, in 1942, that US Secretary of State Daniel Webster formulated what was to become known as the *Caroline* doctrine: he said it was for the British government to show 'necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada ... did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it': extracted in Jennings (1938), p 89. See also Rothwell (2005), p 339. For a summary of the debate regarding whether the customary law principle of anticipatory self-defence survives s 51 (right to self-defence) of the United Nations Charter, see Abadee and Rothwell (2007), pp 24–29.

¹⁰ Barela (2004), p 33; Powell (2007).

¹¹ For example, see Abadee and Rothwell (2007); Barela (2004); Franck (2004); Gill (2006); Shah (2007).

‘pre-emptive’, namely the nature and level of the knowledge required to found earlier intervention.

Despite expressly invoking the term ‘pre-emption’, other scholars have argued that the Bush administration was in fact advocating prevention: preventive war, not pre-emptive war.¹² Freedman, for example, writing from an international relations perspective, argues that what is proposed is prevention, being ‘a means of confronting factors that are likely to contribute to the development of a threat before it has had the chance to become imminent’.¹³ This is in contrast to pre-emption, which denotes intervention ‘at some point between the moment when an enemy decides to attack – or, more precisely, is perceived to be about to attack – and when the attack is actually launched’.¹⁴ Powell makes a further distinction, asserting that in advocating preventive war, the Bush administration challenged the traditional principle of pre-emption, meaning anticipatory self-defence.¹⁵ This accords more broadly with the position taken in the US Department of Defence (DOD) dictionary, where a pre-emptive attack is defined as initiated ‘on the basis of incontrovertible evidence that an enemy attack is imminent’.¹⁶ While absent from the current DOD dictionary, ‘preventive war’ was, in the 2004 version, defined as ‘a war initiated in the belief that military conflict, while not imminent, is inevitable, and that to delay would involve greater risk’.¹⁷ These discrepancies in the use of the terms ‘prevention’ and ‘pre-emption’ are characteristic of a common source of fragmentation in the discourse, being how the terms are employed and understood in different disciplines and settings.

It is precisely the murkiness of the temporal distinction between pre-emption and prevention that caused then Prime Minister Howard’s 2002 comments on pre-emptive military strikes in our region to be met with a chorus of opposition by commentators, and disquiet by regional leaders.¹⁸ These comments came in the aftermath of the 12 October 2002 Bali bombings during an interview with Laurie Oakes. Oakes put the following question to the Prime Minister:

Now, you’ve been arguing for a new approach to pre-emptive defence ... if you knew that, say, JI [Jemaah Islamiyah] people in another neighbouring country were planning an attack on Australia ... you would be prepared to act?¹⁹

¹² Barela (2004); Powell (2007).

¹³ Freedman (2003), p 113.

¹⁴ Freedman (2003).

¹⁵ Powell (2007).

¹⁶ US Department of Defence (2010), p 280.

¹⁷ Barela (2004), p 32.

¹⁸ ‘Howard Takes the Prix for Pre-emption Non-sense’, *The Age*, 8 December 2002, www.theage.com.au/articles/2002/12/07/1038950235121.html, 4 October 2011. For the response of leaders in the region, see Abadee and Rothwell (2007); Acharya (2003).

¹⁹ Oakes, 1 December 2002.

The Prime Minister responded:

Oh yes, I think any Australian Prime Minister would. I mean, it stands to reason that if you believed that somebody was going to launch an attack against your country, either of a conventional kind or of a terrorist kind, and you had a capacity to stop it and there was no alternative other than to use that capacity then of course you would have to use it ...²⁰

It is unclear from Prime Minister Howard's statement whether he was advocating unilateral action, whether he was speaking of an imminent threat ('if you believed that somebody was going to launch an attack') or something more remote, and what knowledge and evidence would be required to found the belief that an attack was to be launched and that 'there was no alternative'.²¹ Abadee and Rothwell argue that the language used by Prime Minister Howard – such as 'likely to be attacked', 'going to launch an attack' – indicates that he was in fact advocating anticipatory self-defence against an imminent terrorist attack rather than the Bush doctrine of pre-emption targeting 'emerging threats before they are fully formed'.²² Nevertheless, this demonstrates the inconsistent, ambiguous and politically convenient way in which the language of pre-emption was engaged in policy pronouncements in the war on terror, and the unease with which the term 'pre-emption' migrated between governments.

Stern and Wiener argue that what is manifest in the Bush administration's National Security Strategy is the 'precautionary principle' against the risk of terrorism.²³ The legal origin of the precautionary principle has been traced to Swedish environmental law in the late 1960s.²⁴ Since that time, the principle has taken a leading role in international environmental law, risk regulation and, increasingly, anti-terror and security studies.²⁵ There are many versions of the precautionary principle, yet it can be said that the animating idea behind all versions is that 'regulators should take steps to

²⁰ Oakes, 1 December 2002; see also Abadee and Rothwell (2007), p 46.

²¹ While such ambiguity was characteristic of Prime Minister Howard's early statements on pre-emption following September 11, it was qualified, piecemeal and over time, by Foreign Minister Downer and the prime minister himself: see Abadee and Rothwell (2007), p 62; however, this ambiguity did not extend to policy pronouncements – the 2004 White Paper referred to detecting and preventing 'any imminent threats to our security': Abadee and Rothwell (2007), p 50.

²² Abadee and Rothwell (2007), p 50.

²³ Stern and Wiener (2006).

²⁴ Sunstein (2005), p 16; cf Fisher (2001), p 316, who traces the principle to German law in the 1970s.

²⁵ The principle features prominently in environmental treaties, and has become 'an important foundation of environmental law and risk regulation' in Australia and Europe: Fisher (2001), p 315; see also Stern and Wiener (2006); Sunstein (2005), p 16.

protect against potential harms, even if causal chains are unclear and even if we do not know that those harms will come to fruition'.²⁶

The role played by the precautionary principle in anti-terror efforts, what version is being or should be advocated, and how precaution fits with pre-emption and prevention, is not settled. While commentators increasingly have attributed the logic of precaution to anti-terror policy-making and parliamentary and legislative processes,²⁷ no Western government has expressly announced the adoption of the precautionary principle against the risk of terrorism.²⁸ Even if so announced, the principle would be a difficult standard against which to describe or evaluate state action. As Powell argues:

It is somewhat misleading to refer to *the* precautionary principle, since it enjoys no canonical formulation. Instead, it amounts to a largely disconnected constellation of legal, political and academic articulations that fall within the rubric of what might be called the *precautionary approach*.²⁹

The vagueness of what the precautionary principle entails is compounded when the principle is adapted to apply to the risk of terrorism. For example, one of the more recognised formulations of the precautionary principle is Ewald's account that the principle provides a framework for decision-making where two features exist: scientific uncertainty and 'the possibility of serious and irreversible damage'.³⁰ However, when applied to the anti-terror context, the harm requirement is relaxed and state intervention permitted where there is a possibility of harms of lesser severity than 'catastrophic and irreversible' harm.³¹ In this context, the principle risks becoming so diluted as to render reference to it meaningless.

The relationship of the precautionary principle to the other terms of prevention is also unclear. De Goede, for example, argues that the politics of pre-emption in the war on terror is an appropriation and reworking of the politics of precaution as developed in the environmental context.³² De Goede identifies pre-emption in the European Union's counter-terrorism policies –

²⁶ Sunstein (2005), p 4.

²⁷ See, for example, Aradau and Munster (2008); de Goede (2008); Ericson (2007); Sunstein (2005); Zedner (2009b). In the Australian context, commentators have also identified the precautionary principle against the risk of terrorism. Goldsmith, for example, has documented a 'precautionary mindset' in Australia's anti-terror law reform processes, and Bronitt a 'subtle shift' from 'preventative to precautionary models of legal action' in amendments to the *Defence Act 1903* (Cth) that authorise the military to use lethal force to protect critical infrastructure: Goldsmith (2008); Bronitt (2008), pp 78–82.

²⁸ Bronitt (2008), p 79.

²⁹ Powell (2010), p 183.

³⁰ Ewald (2002), pp 273, 283–84.

³¹ Zedner (2009b), p 84.

³² de Goede (2008), p 165.

in particular those that make 'precautionary logic part of everyday life', such as asset freezing laws.³³ Zedner, however, finds that the rise of precaution in criminal justice is 'analogous to the concept of pre-emption which is well developed in the field of international relations'.³⁴ This illustrates the difficulties in migrating terminology between jurisdictions and across disciplines.

While pre-emption has taken a leading role in foreign policy pronouncements since September 11, prevention has been called upon in Australia and overseas as the rationale for coercive domestic legislation aimed at identifying and intervening in a terrorist attack before it occurs. Former US Attorney-General John Ashcroft, for example, coined the phrase 'paradigm of prevention' to describe domestic counter-terrorism measures in the United States that permit coercive action against individuals and groups suspected of future harm.³⁵ In Australia, former Attorney-General Phillip Ruddock championed prevention as a key cornerstone of Australia's anti-terror policy, and the hallmark of a protective and proactive government seeking to 'prevent rather than to react to terrorist offences'.³⁶ In the 2010 Counter Terrorism White Paper, *Securing Australia, Protecting our Community* (2010), prevention remains one of the identified purposes of the anti-terror regime.³⁷ The pervasion of the term 'prevention' in Australia's anti-terror policy is demonstrated by the fact that 'prevent', and its permutations, appear 68 times in the 2010 White Paper. Neither 'precaution' nor 'pre-emption' appears in the 2010 White Paper.

The use of 'prevention' in this context has been challenged. Cole, for example, argues that the US justification for coercive domestic legislation that provides for state intervention 'on the basis of speculation about future contingencies' without proof of past 'wrongdoing', or when 'the justification for punishing past acts is the speculation that they might facilitate bad acts in the future', falls foul of what may properly be called prevention.³⁸ Similarly, McCulloch and Pickering argue that what many commentators describe as prevention in Australia's domestic anti-terror legislation is in fact pre-emption.³⁹ Pre-emption in domestic legislation, they argue, has the same logic as the Bush administration's 'doctrine of pre-emption', being to target threats before they materialise. This reflects how the different perspectives of those in government and academia involve different usages of and underlying assumptions about the terminology of prevention.

The transdisciplinary nature of terrorism studies and the disciplinary heritage of the terms engaged provide another layer of fragmentation.

³³ de Goede (2008), p 175.

³⁴ Zedner (2009b), p 85.

³⁵ Cole (2008), p 235; McCulloch and Pickering (2009), p 630.

³⁶ Ruddock (2007), p 4.

³⁷ Department of Prime Minister and Cabinet (2010).

³⁸ Cole (2008), pp 235–6, 247–9.

³⁹ McCulloch and Pickering (2010).

McCulloch and Pickering, for example, present arguments *against* the use of the term ‘prevention’ in the anti-terror context on the basis that it distorts how prevention is employed and theorised in criminology, assumes a connection to outcome and masks ulterior motivations.⁴⁰ They argue that pre-emption, which focuses on the strategy behind the legislation, is preferable to prevention, which is outcome focused.⁴¹ They challenge the use of prevention to describe anti-terror legislation as it assumes, without empirical support, that such laws will prevent or minimise the risk of a terrorist attack.⁴² Zedner makes a similar challenge to the appropriateness of prevention in the context of control orders when she argues that underlying prevention are the assumptions that it is possible to accurately assess the risk posed by an individual, and to design measures that are effective in averting that risk.⁴³

This disjointed discourse reflects divergences between individual, disciplinary and policy conceptions and usages of prevention and pre-emption. Yet there are appealing arguments *for* adopting consistent terminology to describe international and domestic responses to terrorism. McCulloch and Carlton argue that employing consistent terminology to describe domestic and international efforts accounts for the blurring of the domestic and international in relation to security, governmental policy and law that has characterised the war on terror. At the same time, employing consistent terminology has normative advantage, allowing ‘the insights of the notion of preemption in the international context, to be tested, developed and, where relevant, incorporated into critiques of domestic measures’.⁴⁴ The strength of this approach is that it provides an account of the terminology that is sensitive to the broader context of anti-terror law and governance, and allows for reflexivity between the terms employed and the measures they represent.

Some commentators have made strong inroads in applying consistent terminology and distinguishing temporally between preventive measures in the criminal law. Zedner, for example, distinguishes between the preventive turn in criminal law, ‘triggered in the main by acts “more than merely preparatory” to a specified offence’, and pre-emption, which captures encroachments on individual liberty at points earlier than preventive incursions, ‘often without the requirement of *mens rea*, still less *actus reus*’.⁴⁵ Janus makes a similar distinction invoking solely the language of prevention. He argues that what is properly called prevention entails intervention by the state only after actual or attempted harm, whereas

⁴⁰ McCulloch and Pickering (2010), pp 15–17.

⁴¹ McCulloch and Pickering (2010), p 17.

⁴² McCulloch and Pickering (2010), p 17.

⁴³ Zedner (2007b), pp 191–92, 202–3.

⁴⁴ McCulloch and Carlton (2006), p 401 and generally pp 399–402.

⁴⁵ Zedner (2007b), p 192.

'radical prevention' sanctions intervention before harm results, where there exists a propensity for harm.⁴⁶

This examination of the terminology of prevention illustrates how the proliferation of preventive measures since September 11 has been accompanied by a flourishing yet fragmented discourse. The state of the discourse is a reflection of the difficulties inherent in the blurring of the boundaries between international and national security, international and domestic law, and domestic and foreign policy that has so characterised the war on terror.⁴⁷ One such difficulty is the different conceptions and usages of the terminology that each perspective adopts. The horizontal and vertical migration of terminology between jurisdictions and disciplines gives rise to inaccuracies, inconsistencies and anomalies in translation.

To move the discourse in relation to Australia's preventive anti-terror regime forward, we can draw from this analysis the need for an account of the terminology that provides clear definitions and temporal distinctions, that explains the underlying assumptions and epistemological premises of terms, and that contextualises the terms in anti-terror law and governance. Of itself, the terminology cannot capture the full picture; prevention, pre-emption and precaution, however defined, can describe what the laws are, yet they do not of themselves have explanatory or analytical force. They do not generate an account from which implications may be drawn, more broadly, about the rise of prevention, pre-emption and precaution in anti-terror law. What is needed is a framework that can place the terminology of prevention within the broader context of law and governance. In this way, prevention, pre-emption and precaution can be harnessed to explain and analyse Australia's preventive anti-terror regime.

One way to achieve this is to conceptualise the preventive push in Australia's anti-terror regime through the rubric of the preventive state. Steiker first coined 'the preventive state' in 1998 to describe the array of measures employed in the United States to 'prevent or prophylactically deter (as opposed to investigate) crime and to incapacitate or treat (as opposed to punish) wrongdoers'.⁴⁸ These measures included the expanded functions given to criminal justice institutions, such as the extension of police powers to conduct suspicionless searches, and the coopting of analogous institutions – for instance, the civil commitment process in relation to the mentally ill.⁴⁹ Steiker presented a prescriptive model, arguing that the limits of the preventive state ought to be articulated and policed, as are those of the

⁴⁶ Janus (2004), p 577.

⁴⁷ See, for example, Zedner (2009b). On the migration of law in the war on terror and the influence of the United Nations Security Council and Britain, see Michaelson (2010); Roach (2006, 2007).

⁴⁸ Steiker (1998), pp 776–80. As did Steiker in reference to the preventive state in the United States, I employ 'state' to refer to 'any sovereign governmental power' as opposed to state governments in Australia's federal system: Steiker (1998), p 773, n 19.

⁴⁹ Steiker (1998), pp 774.

punitive state.⁵⁰ There are a number of guises through which the limits of state action to prevent harm may be articulated – for example, the principles of criminalisation, constitutional law or human rights law.⁵¹ Steiker focused on the constitutional and due process limits of the preventive state. She identified that the question of the limits of preventive action had been sidelined because, among other reasons, the courts were preoccupied with whether a measure amounted to punishment, and therefore whether the enhanced protections of the criminal justice system applied.⁵² This leaves what Steiker argues is the ‘mistaken impression that if the state is not punishing, it is not doing anything objectionable at all, constitutionally speaking or otherwise’.⁵³

For Steiker and Janus, the preventive state reflects the movement in governmental practices to averting criminal harm by targeting individuals deemed ‘dangerous’ and restraining their liberty before they cause harm.⁵⁴ Ashworth and Zedner have similarly examined the preventive state in the United Kingdom. They argue that the preventive state is one manifestation of the modern state that has altered how the state governs and the nature of criminal justice in the United Kingdom.⁵⁵ In advocating the preventive state model, and in building upon its scholarship, this article adopts a broad view of the preventive state. Rather than maintaining a connection to wrongdoing or aversion to criminal behaviour, this article includes within the preventive state those measures that seek to avert future harm (whether criminal or otherwise) by restricting an individual’s liberty in the present.

The preventive state model is deliberately pitched at a high ‘level of conceptual generalization’.⁵⁶ This enables it to serve as a prism through which to collate and view the diverse set of preventive measures in Australia, and to investigate how the state governs through preventive measures. We can begin, then, to contextualise the preventive push in anti-terror law, to examine how it relates to preventive measures in other areas of the law, and to critically analyse whether it is an isolated response to transnational terrorism or forms part of a shift in emphasis in governance. It will be argued that through the preventive state we can understand preventive anti-terror laws as part of, and in the context of, a broader transformation of governance and society.

⁵⁰ Steiker (1998), pp 773–74.

⁵¹ For example, see Ashworth and Zedner (2010, 2011); Steiker (1998); Ashworth (2009).

⁵² Steiker (1998), pp 783–84.

⁵³ Steiker (1998), p 784.

⁵⁴ Steiker (1998); Janus (2004, 2006).

⁵⁵ Ashworth and Zedner (2008), p 38; see generally pp 37–42.

⁵⁶ Steiker (1998), pp 779–80.

The Rise of the Preventive State and Australia's Domestic Legislative Response to Terrorism

We can understand the rise of prevention (loosely defined as state interventions that target an identified threat before it eventuates) and pre-emption (broadly describing state interventions to 'target threats before they emerge')⁵⁷ in Australia's anti-terror law as part of a broader transformation of governance and society in the twenty-first century. In his influential account of this process, entitled *Risk Society*, Beck argues that risk has replaced wealth as the central organising principle of late modernity, and the key dilemma facing the 'risk society' is the prevention or management of risk.⁵⁸ One of the ways in which governance is transforming is the movement from the 'reactive' or 'punitive' state, where the state intervenes after harm occurs, to the preventive state, in which the state seeks to intervene before harm occurs.⁵⁹ In his more recent work, Beck extends his thesis to the world stage,⁶⁰ contending that we are now part of a 'world risk society' in which risks such as climate change and transnational terrorism may have global reach and catastrophic potential.⁶¹

Beck's thesis explains, at the level of grand theory, how risk has become the central organising principle, transforming governance and society in the twenty-first century. The rise of risk in popular consciousness, political discourse and scholarly inquiry has been well documented.⁶² Furedi, for example, calculated an almost ninefold increase in the mentions of 'at risk' in UK newspapers from 1994 to 2000, demonstrating 'the language we use reflects our unprecedented preoccupation with risk'.⁶³ In Australia, risk continues to feature prominently in anti-terror policy and rhetoric.⁶⁴

⁵⁷ McCulloch and Pickering (2010), pp 15–17.

⁵⁸ Beck (1992).

⁵⁹ Dershowitz (2009); Steiker (1998); Zender (2007a) has also described this as the movement from a post-crime to a pre-crime society.

⁶⁰ Beck (1999, 2002, 2006, 2009).

⁶¹ Beck distinguishes between climate change and terrorism in terms of intentionality: climate change is an unintended side-effects catastrophe, whereas terrorism is intentional catastrophe, the 'intentional triggering of unintentional side effects': Beck (2009), pp 41, 203.

⁶² Mythen and Walklate assert that the momentum of risk, coupled with the visibility of hazards and uncertainties, has led it to be one of the 'defining themes of investigation in the social sciences in the last two decades': Mythen and Walklate (2006), p 2. For the rise of risk in current perception, see Furedi (2002), p 488; Sunstein (2005), Chs 2–4; Massumi (1993); Slovic (2000).

⁶³ Furedi calculated the usage of the term 'at risk' in UK newspapers over a six-year period with usage increasing almost ninefold from 2037 mentions in 1994 to 18003 mentions in 2000: Furedi (2002), p xii.

⁶⁴ For example, the 2010 White Paper stresses a 'risk informed and layered approach' and public protection: Department of Prime Minister and Cabinet (2010), para 3.2.3. This is mirrored in the language of former Attorney-General Robert McClelland – see, for example, McClelland, 10 March 2011.

Interestingly, its reference is on the rise: there are 37 mentions of ‘risk’ in the Howard government’s 2006 Counter-Terrorism White Paper, *Protecting Australia Against Terrorism*,⁶⁵ whereas four years on, in the Rudd government’s 2010 White Paper, there are 58 references to ‘risk’.

Beck’s account also highlights how the emphasis on risk involves a shift in perspective to the future and a precautionary approach to risk management. As will be developed below, this shift in perspective is borne out in the characteristics of the law and governance of the preventive state. It is worth recounting Beck in detail:

The centre of risk consciousness lies not in the present, but in the future. In the risk society, the past loses the power to determine the present. Its place is taken by the future, thus, something non-existent, invented, fictive as the ‘cause’ of current experience and action. We become active today in order to prevent, alleviate or take precautions against the problems and crises of tomorrow and the day after tomorrow – or not to do so ... In the discussion of the future we are dealing with a ‘projected variable’, a ‘projected cause’ of present (personal and political) action.⁶⁶

Risk Society contextualises the ascendancy of risk and its role in transforming governance. It provides, as Dean explains, a ‘general understanding of the processes of the transformation of contemporary governmental practices’.⁶⁷ We can observe Australian governmental practices transforming through the rise of the preventive state, not only in relation to preventive anti-terror laws, but also, for instance, in relation to preventive detention and extended supervision of serious sex offenders at the state government level.⁶⁸

This is not to argue that preventive measures are new, or that the preventive state is displacing the punitive state. We find further examples of the power to detain an individual to prevent harm to that individual and/or others in relation to the involuntary detention of the mentally ill,⁶⁹ and the preventive detention of persons suffering from infectious disease,⁷⁰ who habitually use alcohol or other drugs,⁷¹ or suffer from severe substance dependence.⁷² Rather, preventive measures are rising in prominence and, arguably, being used to extend as opposed to supplant the criminal justice system.⁷³ This raises important questions for further research, such as

⁶⁵ Department of Prime Minister and Cabinet (2006).

⁶⁶ Beck (1992), p 34.

⁶⁷ Dean (2010a), p 207.

⁶⁸ See n 4.

⁶⁹ For example, in NSW pursuant to the *Mental Health Act 2007* (NSW).

⁷⁰ For example, in NSW pursuant to the *Public Health Act 1991* (NSW).

⁷¹ For example, in NSW pursuant to the *Inebriates Act 1912* (NSW).

⁷² For example, in NSW pursuant to the *Drug and Alcohol Treatment Act 2007* (NSW).

⁷³ Ashworth (2009), pp 87–88.

whether continuities exist between current preventive practices and historical antecedents, as exist in mental health and inebriates legislation, and how this might inform our understanding of the shift in emphasis in governance and the limits that do and ought attach to state action to prevent harm.

As noted, the preventive state exists at a high level of conceptual generalisation, serving as an umbrella concept to describe and encompass state action that seeks to anticipate and avert or minimise harm. In this way, the preventive state may be understood in a similar fashion as the punitive state, being representative of state action in furtherance of a particular objective, such as punishment. We can distil key features of law and governance of the preventive state that mark its boundaries – laws that are preventive in substance, and have a future orientation. This future orientation may be seen in attempts to govern the future by intervening to preventively restrain an individual's liberty in the present.⁷⁴ One example is Australia's preventative detention order, the stated object of which is:

to allow a person to be taken into custody and detained for a short period of time in order to:

- a. prevent an imminent terrorist attack occurring; or
- b. preserve evidence of, or relating to, a recent terrorist act.⁷⁵

A preventive purpose is a feature of many of Australia's anti-terror laws. Indeed, the objective of preventing a terrorist attack permeates a broad spectrum of Australia's anti-terror initiatives. These range from border management⁷⁶ to surveillance⁷⁷ and intelligence analysis,⁷⁸ the criminalisation of preparatory acts and associations,⁷⁹ the introduction of preventive detention and control orders,⁸⁰ and the extension of police powers.⁸¹ In Australia, terrorism-related legal action has been concentrated on these preventive laws. Over the course of the past decade, 37 people have been charged with terrorism-related offences, resulting in 25 convictions under the *Criminal Code Act 1995* (Cth) (Criminal Code).⁸² However, no one

⁷⁴ Ashworth and Zedner (2008), p 21.

⁷⁵ *Criminal Code Act 1995* (Cth), s 105.1.

⁷⁶ See, for example, provisions contained in *Aviation Transport Security Act 2004* (Cth); *Border Security Legislation Amendment Act 2002* (Cth); *Maritime Transport and Offshore Facilities Security Act 2003* (Cth).

⁷⁷ See, for example, *The Surveillance Devices Act 2004* (Cth); *Telecommunications (Interception and Access) Amendment Act 2010* (Cth); *Telecommunications Interception Legislation Amendment Act 2002* (Cth).

⁷⁸ Department of Prime Minister and Cabinet (2010).

⁷⁹ *Criminal Code Act 1995* (Cth), Divs 101, 102.

⁸⁰ *Criminal Code Act 1995* (Cth), Divs 104, 105.

⁸¹ Such as ASIO's questioning and detention warrants: *Australian Security Intelligence Organisation Act 1979* (Cth), ss 34F-34H.

⁸² I note that former Attorney-General Robert McClelland referred to 38 persons prosecuted with terrorism-related offences. He includes in his count David Hicks, who was not

has been charged with the offence of engaging in a terrorist act.⁸³ Two persons, Jack Thomas and David Hicks, have been made subject to control orders.⁸⁴ In a notable case, Dr Mohamed Haneef was detained for twelve days without charge under the provisions of Part 1C of the *Crimes Act 1914* (Cth) before being charged with a terrorism-related offence – a charge that subsequently was withdrawn.⁸⁵

A preventive label or objective does not insulate a law from being ‘stigmatic, burdensome or punitive’⁸⁶ in substance or effect, or from incurring a punitive sanction. Rather, the relationship is far more complex, featuring overlap and intersection. A preventive law may share a punitive purpose, and vice versa. The task of sentencing is one example, imbued as it is with a mixture of punitive and non-punitive purposes, such as retribution, deterrence and protection of the community.⁸⁷ The following extract from Whealy J’s sentencing remarks in *R v Elomar*, which relate to the offence of conspiracy to do acts in preparation for a terrorist act or acts, encapsulates this point:

The broad purpose of the creation of offences of the kind involved in the present sentencing exercises is to prevent the emergence of circumstances which may render more likely the carrying out of a serious terrorist act. Obviously enough, it is also to punish those who contemplate action of the prohibited kind. Importantly, it is to denounce their activities and to incapacitate them so that the community will be protected from the horrific consequences contemplated by their mindset and their actions.⁸⁸

The contours of the punitive/preventive distinction have implications for the limits of state action to prevent harm – for example, in relation to what procedural protections are prerequisites for the exercise of state power to prevent harm by seeking a civil preventive order and, in Australia, the constitutional limits of executive detention.⁸⁹ In jurisdictions with human

charged or prosecuted in Australia, but subjected to a control order: Williams (2011). For an excellent overview of Australia’s terrorism prosecutions, see McGarrity (2010).

⁸³ McGarrity (2010), p 113.

⁸⁴ In respect of David Hicks (*Jabbour v Hicks* (2007) FCMA 2139; *Jabbour v Hicks* [2008] FMCA 178) and Jack Thomas (*Jabbour v Thomas* [2006] FMCA 1286).

⁸⁵ Dr Haneef was charged under s 102.7(2) of the *Criminal Code Act 1995* (Cth). For further discussion, see Davis (2010); Rix (2010).

⁸⁶ Ashworth and Zedner (2008), p 41.

⁸⁷ *Veen v The Queen (No 2)* (1988) 164 CLR 465 at 476; *Al-Kateb v Godwin* (2004) 219 CLR 562, per Gummow J at [136].

⁸⁸ *R v Elomar* [2010] NSWSC 10 at [79].

⁸⁹ In Australia, punitive detention is the exclusive purview of the judiciary as an incident to the adjudication of criminal guilt: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per Brennan, Deane and Dawson JJ at 27. To determine whether detention is non-punitive, and therefore a legitimate exercise of executive power, the relevant test is ‘whether the detention can reasonably be regarded as

rights instruments, the punitive/preventive distinction has obvious implications for the rights accorded to an individual under those instruments, and the concomitant restrictions on state action. For example, the European Court of Human Rights held in *Welch v United Kingdom* that although the purpose of the asset confiscation provisions in the *Drug Trafficking Offences Act 1986* (UK) was preventive as well as punitive, the combination of punitive elements in the regime meant it was, in substance, a penalty. Therefore, the prohibition on retrospectivity in Article 7(1) of the European Convention of Human Rights applied, and had been breached.⁹⁰

A future orientation is another characteristic of laws of the preventive state. ‘Future law’⁹¹ and ‘future governance’⁹² are in-vogue descriptions of laws with a future orientation, that attempt to govern the future by imposing restrictions on the liberty of a person in the present. In contrast to the punitive state, where the state reacts to criminal harm, ‘future governance’ permits the state to intervene and restrict a person’s liberty to avert an anticipated future harm. Intervention occurs at points in time well before – and indeed well after – that which is traditionally accepted in the criminal justice system. For example, preventative detention and control orders, as well as preparatory offences such as doing an act in preparation or planning for a terrorist act,⁹³ permit the state to intervene at a point in time before acts ‘more than merely preparatory’ to an offence. Acts ‘more than merely preparatory’ is the temporal point at which the criminal law traditionally marks criminal liability in relation to the inchoate offence of attempt. Preparatory offences, however, criminalise those actions taken before the inchoate offences are enlivened – namely acts that are ‘merely preparatory’ to a completed offence. Preparatory offences thus create pre-inchoate liability, with the substantive offence enlivened prior to the risk of harm developing.⁹⁴ Inchoate liability also attaches to the preparatory offences, further extending the point at which the state may intervene. At the other end of the spectrum, post-sentence preventive detention and supervision of serious sex offenders extend the temporal point at which the state may intervene to after the expiration of a custodial sentence.

Future governance also alters the knowledge required to found intervention. Pre-crime and post-sentence interventions occur on the basis of a lower threshold of knowledge, such as suspicion. An example is the power of police to preventively detain a person police suspect, on reasonable

necessary to achieving the non-punitive ends’: Zines (2008), p 288, citing application of this principle by Gummow J in *Kruger v Commonwealth* (1997) 190 CLR 1 at 162, Gleeson CJ and Callinan J in *Re Woolley* (2004) 225 CLR 1 at [21], [260], and Heydon J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [215].

⁹⁰ *Welch v United Kingdom* (1995) 20 EHRR 247 at [27]–[36]; see also Ashworth and Zender (2010, 2011).

⁹¹ Ashworth and Zedner (2008), p 42.

⁹² Crawford (2009), p 819.

⁹³ *Criminal Code Act 1995* (Cth), s 101.6.

⁹⁴ See Ashworth and Zedner (2011), pp 285–86.

grounds, will engage in a terrorist act, prior to a terrorist act occurring.⁹⁵ Indeed, many of Australia's anti-terror laws may be described as 'future-focused', justifying the regulation of behaviour in the present on the basis of forestalling a future terrorist attack – for instance, the suppression of terrorism-financing laws,⁹⁶ and the criminalisation of associations with members of proscribed terrorist organisations.⁹⁷

The future orientation of the preventive state also gives rise to new modes of governance, such as 'the bid to control future behaviour through strategies of self-governance'.⁹⁸ Crawford has identified one such mode as 'contractual governance', being a 'mix of regulatory forms which mimic and reproduce elements of contract'.⁹⁹ 'Contractual governance' may be explained as a way the state can control the future behaviour of an individual through a 'contractual arrangement' made in the present. Contract, for Crawford, is a 'metaphor for a technique of "regulated self-regulation"', and is wider than, but also includes, what is understood as a legal contract.¹⁰⁰ For example, 'contractual governance' describes the United Kingdom's anti-social behaviour order, which is a civil preventive order imposed by a court to protect the public from future anti-social behaviour. Crawford acknowledges that consent or agreement to the terms of a civil preventive order 'may be little more than a sham' as it occurs on pain of breach of the order which may attract criminal sanction.¹⁰¹ Whilst Crawford's contract metaphor is somewhat inexact, it usefully captures the broad collection of measures that form part of the 'shift in regulatory style'¹⁰² that is borne out of the precautionary efforts by governments to regulate the future and alter the behaviour of individuals through strategies of self-regulation.

Turning to the Australian context, an anti-terrorism control order is a civil order that imposes obligations, prohibitions and restrictions on an individual, such as reporting to police and abiding by a curfew. A control order is issued by a court¹⁰³ where the court is satisfied, on the balance of probabilities, that making the order 'would substantially assist in preventing a terrorist act' or the person provided or received training from a listed terrorist organisation, and the terms of the order are 'reasonably necessary and reasonably appropriate and adapted to protecting the public from a

⁹⁵ *Criminal Code Act 1995* (Cth), s 105.4.

⁹⁶ The package of laws were introduced in the *Suppression of Financing of Terrorism Act 2002* (Cth) and include criminal offences contained in Div 104 of the *Criminal Code Act 1995* (Cth); see also McCulloch and Carlton (2006).

⁹⁷ *Criminal Code Act 1995* (Cth), s 102.8.

⁹⁸ Ashworth and Zedner (2008), p 41.

⁹⁹ Crawford (2003), p 488.

¹⁰⁰ Crawford (2003), p 488.

¹⁰¹ Crawford (2009), p 816.

¹⁰² Crawford (2003), p 487.

¹⁰³ An issuing court means the Federal Court of Australia, the Family Court of Australia or the Federal Magistrates Court: *Criminal Code Act 1995* (Cth), s 100.1.

terrorist act'.¹⁰⁴ The penalty for contravention of a control order is five years' imprisonment.¹⁰⁵ As with anti-terrorism control orders, many Australian examples of contractual governance are hybrid orders – that is, orders that are civil in nature, yet attract criminal penalty on breach. This is true of serious organised crime control orders¹⁰⁶ and extended supervision orders in respect of serious sex offenders.¹⁰⁷ These orders are said to be self-regulating based on the assumption that an individual subject to an order will, acting rationally in his or her self-interest, voluntarily comply with the order – that is, self-police – so as not to incur the consequences of breach.

The preventive state provides a useful conceptual rubric to view and map the diverse set of preventive measures in Australia, providing an opportunity to draw attention to, and critically engage with, Australia's collection of preventive measures. Despite the various and growing armoury of measures that can be said to fall within the preventive state, it has, as a whole, attracted minimal attention. Over a decade ago, Steiker identified that despite being insulated from the legal limitations of the punitive state, attention was not being paid to the proper limits of the preventive state.¹⁰⁸ This remains true of Australia. For example, unlike its UK counterpart, the procedural limits of state action to prevent harm by imposing a control order have not been determined. In the United Kingdom, the House of Lords, with the benefit of domestic and European jurisprudence on preventive orders, held that although control order proceedings are properly civil, as opposed to criminal, the severity of the obligations imposed by a control order may require enhanced procedural protections so as to comply with the right to a fair trial contained in Article 6 of the European Convention.¹⁰⁹ This has led to

¹⁰⁴ *Criminal Code Act 1995* (Cth), s 104.4.

¹⁰⁵ *Criminal Code Act 1995* (Cth), s 104.27.

¹⁰⁶ Serious organised crime control orders have been introduced in many Australian jurisdictions: *Criminal Organisation Act 2009* (Qld); *Serious Crime Control Act 2009* (NT); *Serious and Organised Crime (Control) Act 2008* (SA) – in 2010, the control order provisions of this Act, contained in s14(1), were held to be constitutionally invalid by the High Court in *State of South Australia v Totani* (2010) 242 CLR 1. The South Australian Parliament is currently considering an amended control order scheme contained in the Serious and Organised Crime (Control) (Miscellaneous) Amendment Bill 2012 (SA). In a recent decision, the High Court found the *Crimes (Criminal Organisations Control) Act 2009* (NSW), which provided for the declaration of criminal organisations and control of the members of declared organisations, to be invalid: *Wainohu v New South Wales* [2011] HCA 24. Following *Wainohu*, the O'Farrell government introduced into parliament the Crimes (Criminal Organisations Control) Bill 2012 (NSW), which received Royal Assent on 21 March 2012. The Western Australian Parliament is also considering control order legislation in respect to organised crime, the Criminal Organisations Control Bill 2011 (WA).

¹⁰⁷ See n 4.

¹⁰⁸ Steiker (1998), pp 776–80; post-September 11, Zedner has championed the 'largely ignored' issue of the legal and moral limits of the preventive state: Zedner (2007b), p 188.

¹⁰⁹ *Secretary of State for the Home Department v MB and Others* [2007] UKHL 46.

the juridical development of minimum disclosure requirements where closed or secret material is relied upon in order to satisfy this standard of fairness.¹¹⁰

Focusing attention on the preventive state may also facilitate the development of a more cohesive jurisprudence around Australia's preventive measures, through which connections may be drawn.¹¹¹ This highlights the normative potential of the preventive state: identifying similarities between the diverse set of preventive measures may avoid dangers discovered in one measure being blindly reproduced in another.¹¹² Further, as Zedner identifies, recognising similarities between various preventive measures:

might allow a broader and better informed discussion about the appropriate limits to be placed upon the preventive state. It might also permit the articulation of larger principles and values by which the preventive justice might legitimately be pursued without the need for reference back to the entrenched and often inappropriate provisions of civil and criminal procedure.¹¹³

The preventive state model also presents a way to view preventive measures within a broader context of law, governance and society. It is a useful conceptual tool to understand and situate preventive anti-terror laws in the context of a wider societal and governmental trend that may be explained through the *Risk Society* thesis. Through the preventive state, we can view, track and collate measures that form part of this shift in emphasis in governance from reacting and responding to harm, to anticipating and intervening to avoid harm occurring. In this way, the preventive state has meta-level explanatory potential, and may prompt new questions about the rise of Australia's preventive anti-terror regime, and the implications that may be drawn from it.

However, there are limitations to what we may glean from the preventive state model. While it serves as a vehicle through which to contextualise and evaluate Australia's preventive anti-terror laws as part of a broader shift in emphasis in governance, it does not provide a means to analyse or critique preventive governance, or examine its consequences. The preventive state model lacks a method to analyse its operation: it offers no guidance on how to step inside the preventive state and critically evaluate

¹¹⁰ The House of Lords recently held that where secret material is relied upon, the controlee 'must be given sufficient information to enable' the special advocate (security cleared counsel representing the interests of the controlee in closed hearings) to effectively challenge the state's case: *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28 at [85], per Lord Hoffman.

¹¹¹ Steiker identified that 'few connections have been made between the main categories of preventive restraints, such as pre-trial detention, civil commitment of the dangerous mentally ill ... Rather, each individual preventive practice has been treated as *sui generis* rather than as a facet of a larger question in need of a more general conceptual framework': Steiker (1998), p 778.

¹¹² Zedner (2007b), p 189.

¹¹³ Zedner (2007b), p 190.

the operation of law and governance therein. This hampers attempts to establish the limits of the preventive state; examining the operation of preventive measures may uncover different problems, and expose how legal limits may be manipulated in practice. There are many forms of analysis, such as a public law or human rights framework, that could provide an angle through which to step inside the preventive state. However, it is here that engagement with the governmentality perspective has much to offer. This is not to suggest that the governmentality perspective is without limitations,¹¹⁴ or that questions of reconcilability with the *Risk Society* thesis do not arise.¹¹⁵ Rather, engaging with governmentality scholarship offers insights that may be drawn upon to assist in the difficult task of evaluating law and governance of the preventive state. Such engagement with this scholarship also presents an opportunity to generate new perspectives on the rise of prevention in anti-terror law, on preventive governance and, by emphasising what is happening in practice, on the legal limits that ought to inhere in this shift in emphasis in governance.

Inside the Preventive State

The term ‘governmentality’ derives from Foucault’s lectures at the Collège de France in 1978.¹¹⁶ The relevant meaning of governmentality for present purposes is its general meaning, being an inquiry into the art of government. In other words, it means an inquiry into the craft of governing: the complex practices, institutions, procedures and programs through which we govern and are governed.¹¹⁷ The governmentality approach engaged with in this section stems predominantly from Anglophonic governmentality scholarship.¹¹⁸ This scholarship traverses many social and political science

¹¹⁴ For discussion of limitations, see Garland (1997); McKee (2009); Bröckling, Krasmann and Lemke (2011), p 15.

¹¹⁵ O’Malley, for example, argues that these two positions are irreconcilable and that there is ‘the almost polar opposition of Beck’s work to the kinds of analysis of risk generated by the governmentality literature’. Sites of critique include the meta narration of the risk society, and its somewhat monolithic view of power and risk: O’Malley (2009), p 11; others have sought to integrate both approaches and employ the risk society thesis in a flexible manner – notable examples include Ericson and Haggerty (1997); Ericson (2007); Steele (2004).

¹¹⁶ Foucault (2007).

¹¹⁷ Dean (2010a), pp 24–28; Foucault (2007), p 108. Dean identifies two meanings of the term ‘governmentality’ in the literature: the first is its general meaning, an inquiry into the art of government; the second a historically specific version of the first: Dean (2010a), p 24.

¹¹⁸ This scholarship is sometimes referred to as the ‘Anglo-Foucauldian effect’, having taken off after publication of Burchell, Gordon and Miller (1991), *The Foucault Effect*. While governmentality scholarship commenced in the 1980s, it flourished following this publication, which shifted the focus of governmentality research from the French-speaking world to the English-speaking world. This collection of scholarship has largely stepped away from the genealogical-historical orientation of the Francophone studies and focused instead on the use of ‘Foucault’s instruments to analyse processes of

disciplines in which researchers with divergent theoretical perspectives variously employ concepts,¹¹⁹ applying insights of governmentality in new areas.¹²⁰ What is common to the Anglophonic approaches is the analytical perspective – what has been referred to as a ‘research perspective in the literal sense: an angle of view, a manner of looking, a specific orientation’ into the art of government, rather than a prescribed and distinct methodological ‘inventory’.¹²¹

There are many features of governmentality scholarship that can assist in understanding and evaluating the preventive state. This perspective provides a broad lens that is attuned to the practice of governing, to the political and to power – to understanding ‘the discourses, imaginaries, techniques and technologies through which power operates and is manifest’.¹²² By focusing on the *how* of governance, this perspective eschews approaches to analysing government that seek to determine the source and legitimacy of state power.¹²³ Rather, it promotes analysis of the effects and consequences of power. It explores the force of power in relation to preventive measures as they operate, directs attention to how we govern and are governed, and to how the threat of transnational terrorism is ‘problematized and controlled’.¹²⁴ This type of inquiry prompts investigation of how, and with what effects, governing authorities act, think and use knowledge and expertise, and how, through this governing process, identity is formed and transformed.¹²⁵ It is through these lines of inquiry that we might begin to analyse the operation of preventive laws in a particular context, such as the courtroom. As such, a governmentality analysis may feed into the development of principled limits to state action to prevent harm by unveiling how preventive laws operate. How, for example, does a preventive and future-focused nature of a law impact upon the legal criteria a decision-maker is to apply, and the knowledge and expertise used to satisfy that criteria?

We can, then, begin to understand the preventive state as a mechanism for viewing the institutions, practices and personnel of government, and organising them in relation to a specific ideal of government: prevention of future harm.¹²⁶ This opens up critical analysis of the preventive state by

contemporary social transformation’: Bröckling, Krasmann and Lemke (2011), p 9; Jessop (2011). See also Rose, O’Malley and Valverde (2006).

¹¹⁹ Bröckling, Krasmann and Lemke (2011), p 9.

¹²⁰ Jessop (2011), pp 57–58.

¹²¹ Bröckling, Krasmann and Lemke (2011), p 15.

¹²² Dean (2010b), p 460.

¹²³ Dean (2010a), pp 16, 31; McKee (2009), p 465.

¹²⁴ Garland (1997), p 174.

¹²⁵ Dean (2010a), p 40.

¹²⁶ Dean, for instance, refers to the welfare state in this way: Dean (2010a), p 43. This is not to equate the preventive state with the welfare state, or to argue that it represents a new form of state. Rather, it describes a shift in emphasis in governance.

questioning and problematising the objective of prevention, how it operates and is translated into particular ways of thinking and particular programs, and how it is made operable in laws. It also directs attention to how thought operates in the preventive state, prompting investigation of how practices and processes are informed and shaped by knowledge and expertise, such as national security intelligence. Importantly, by focusing on the ‘how’ questions of governance, this perspective asks not whether a law or practice of government is effective, but rather how governmental activities and their effects unfold.¹²⁷ In doing so, it probes and problematises accepted practices of government and ‘shows that things might be different to the way they are’.¹²⁸ As preventive practices increasingly are employed by the state, this form of inquiry may facilitate exposition of dissonance between how preventive laws are conceived and how they operate, of how preventive practices are problematic in practice, and where the power of the state to prevent harm produces adverse effects.

Analysis of the preventive state may be enhanced by unpacking the modes of thinking and intervention of the state and exploring the *operation* of these rationalities and technologies.¹²⁹ For example, we can understand practices that are concerned with directing the conduct of others to prevent harm as a specific regime of practice – that is, the ‘more or less organised ways, at any given time and place, we think about, reform and practice’ preventing harm.¹³⁰ This presents an opportunity to situate prevention, pre-emption and precaution in the context of anti-terror law and governance. Of interest is the particular activity of the Australian government in attempting to intervene to prevent harm occurring, such as a terrorist attack. The state intervenes by controlling the behaviour of an individual in the present either by deprivation or restriction of liberty – for example, by the issuance of a control order. The rationality guiding this governmental action is precaution – it is the particular logic, style of thought or way of reasoning that governs or influences the operation of future governance inside the preventive state. The practices that direct conduct as part of this rationality

¹²⁷ Bröckling, Krasmann and Lemke (2011), p 13.

¹²⁸ Dean (2010a), p 50.

¹²⁹ Rose and Miller are authoritative on the distinction between rationalities and technologies: ‘Problematics of government may be analyzed, first of all, in terms of their political rationalities, the changing discursive fields ... the moral justifications for particular ways of exercising power by diverse authorities, notions of the appropriate forms, objects and limits of politics, and conceptions of the proper distribution of such tasks among secular, spiritual, military and familial sectors. But, we suggest, problematics of government should also be analyzed in terms of their governmental technologies, the complex of mundane programmes, calculations, techniques, apparatuses, documents.’ Extracted in Valverde (2011), p 9. Garland identifies that a limitation of governmentality literature has been an over-emphasis on rationalities and technologies without looking at how these ‘knowledges and techniques are put to use, and the meanings they acquire in context’: Garland (1997), pp 173, 199.

¹³⁰ Dean (2010a), p 268.

include, for example, the anti-terror legislative framework, and are seen through the techniques of prevention and pre-emption.

In this way, we may begin to contextualise the precautionary approach in Australia's preventive anti-terror regime, and the preventive state more generally. Many commentators have observed a new precautionary logic governing how we think and act, individually and collectively through governments, in the twenty-first century.¹³¹ Furedi, for example, maps the shift from probabilistic to possibilistic risk management, from probabilistic to possibilistic thinking; the latter, he argues, is the 'distinctive feature of 21st-century lifestyle'.¹³² When applied to security policies, this mode of thinking is identified as an application of the precautionary principle to terrorism.¹³³ The rise of precaution is also contextualised:

What is new is not so much the advent of a risk society as the emergence of a 'precautionary' element that has given birth to new configurations of risk that require that the catastrophic prospects of the future be avoided at all costs.¹³⁴

This facilitates investigation of what the rationality of precaution means in the Australian anti-terror context and, more generally, the preventive state. By exploring the rise of precaution in terms of how it is manifest in the particular practices of government, questions arise as to how this mode of thinking is embedded in governmental rhetoric and policy pronouncements and made operable in anti-terror laws,¹³⁵ and whether precaution in domestic anti-terror law produces unexpected effects, be they risks or benefits. One of the main criticisms of precaution, and the precautionary principle specifically, is that it is error prone – it generates false positives and false negatives.¹³⁶ Whether the precautionary approach is producing such errors has implications for an individual subject to a preventive measure, for confidence in the legal system and also for governmental resources, as such errors divert attention from threats to security. Similarly, it raises and supplements avenues of inquiry on what may be unexpected effects of precaution, such as how a precautionary approach to threat-assessment levels impacts on the performance of the judiciary or judicial proceedings more generally.¹³⁷

The practices that direct conduct as part of this rationality are seen through the techniques of prevention and pre-emption. By identifying and examining these two techniques, we can start viewing, contextualising and

¹³¹ See, for example, Aradau and van Munster (2007); Ericson (2007); Furedi (2009); Sunstein (2005); Zedner (2007b, 2009b).

¹³² Furedi (2009), p 211.

¹³³ Furedi (2009), p 209.

¹³⁴ Aradau and van Munster (2007), p 91.

¹³⁵ To adopt the approach taken by Rose and Miller (2010).

¹³⁶ Stern and Wiener (2006), p 396; Sunstein (2005).

¹³⁷ See, for example, Santow and Williams (2012).

comparing how the law operates inside the preventive state. While sharing a precautionary logic, prevention and pre-emption are conceptually distinct and can be distinguished based on the point at which they permit intervention by the state, and the level of knowledge or belief required to found the intervention. This distinction derives from the work of Massumi in international relations scholarship, and provides key insights for distinguishing pre-emption and prevention in domestic legislation.¹³⁸

Massumi argues that what links prevention and pre-emption is a shared goal of neutralising threats, yet they differ – crucially for present purposes – in terms of epistemology or knowledge premise. Prevention achieves neutralisation of a threat by developing the capability to prevent it. This assumes the ability to empirically assess a threat, identify its causes and adopt a method to neutralise it.¹³⁹ The epistemological premise of prevention is that the world is objectively knowable; uncertainty ‘is a function of lack of information’ and the trajectory of an event is predictable and linear ‘from cause to effect’.¹⁴⁰ For Massumi, pre-emption also ‘operates in the present on a future threat’,¹⁴¹ but it does so with a vastly different knowledge. It does so in circumstances of uncertainty. Here, uncertainty does not result from a lack of information, but rather because the threat has not emerged. The threat is indeterminate – neither the threat nor the enemy can be specified.¹⁴² Uncertainty about the nature of the threat is insurmountable, and the potential nature of threats gives rise to potential politics and the subjunctive; ‘could have’ if ‘would have’.¹⁴³ For Massumi, following the war on terror and its asymmetrical nature, the world has changed from one of ‘known unknowns’ (where uncertainty can be analysed and identified) to ‘unknown unknowns’ (that is, objective uncertainty).¹⁴⁴

Significantly, what can be drawn from Massumi’s work and applied to an analysis of the preventive state is the distinction between prevention and pre-emption in terms of the timing of intervention and the level of knowledge upon which intervention is based. Both pre-emption and prevention are composites of prediction and intervention. Prediction draws attention to the status of knowledge, and intervention to how the strategies of prevention and pre-emption are conceived.¹⁴⁵ Pre-emption rests on the knowledge premise that the future is incalculable, and is organised around uncertainty. Intervention occurs when a threat of harm is emergent but not determinate. Because pre-emption permits interventions that are so far removed from the anticipated harm, the mental state or the level of

¹³⁸ Massumi (2007).

¹³⁹ Massumi (2007), para 5.

¹⁴⁰ Massumi (2007), para 5.

¹⁴¹ Massumi (2007), para 13.

¹⁴² Massumi (2007), para 13.

¹⁴³ Massumi (2007), para 17.

¹⁴⁴ Massumi (2007), para 13 referring to the infamous statement by Donald Rumsfeld.

¹⁴⁵ Freeman (1992).

knowledge upon which intervention is based can only be suspicion.¹⁴⁶ Importantly, pre-emption licenses action on the basis of intelligence and threat assessments. This, in turn, has consequences for court proceedings where judicial reliance is placed upon ‘secret evidence’ – that is, evidence that is not disclosed to the affected party, and for the performance and role of participants in these proceedings.¹⁴⁷

Prevention, on the other hand, provides a framework for a decision-maker to assess the likelihood and degree of a threat before taking action.¹⁴⁸ Prediction is the basis upon which the action is taken, and it relates to the possibility of assessing with accuracy and objectivity the risk an individual poses. In this way, it presumes that the future is calculable, a premise underlying risk assessments.¹⁴⁹ Risk also serves as the logic or justification for intervention.¹⁵⁰ State intervention here is based on a higher threshold of knowledge – belief as opposed to suspicion.

This is not a typology amenable to clear lines or neat distinctions. Rather, it is preferable to view pre-emption and prevention as two ends of a spectrum that share a precautionary logic. It may be that some measures fall clearly at the prevention end and others at the pre-emption end of the spectrum. Others may contain elements of both. This does not detract from the analytical insights that may be drawn employing this typology, or comparing laws according to it. The contours of the spectrum are borne out in the following examples. The offence of engaging in a terrorist act under section 101.1 of the Criminal Code, for instance, falls outside of the spectrum. It is an example of the punitive state and the traditional, retrospective orientation of criminal justice system where the state intervenes *after* the act occurs, and therefore *after* criminal intention is formed.

The inchoate offence of attempting to engage in a terrorist attack under sections 11.1 and 101.1 of the Criminal Code is an example of *prevention*. The requisite fault element for attempt is whether there is an intention to commit the completed offence.¹⁵¹ The prosecution must prove intention to ‘bring about each element of the crime alleged’¹⁵² – that is, the prosecution must prove intention to commit a terrorist attack, as defined in the Criminal

¹⁴⁶ Ericson (2007).

¹⁴⁷ For example, where national security intelligence is led as evidence and not disclosed to the affected person on the basis that disclosure is likely to prejudice national security. The significance of secrecy is to protect intelligence-gathering methods, sources and current intelligence missions, as well as intelligence shared by another agency: Roach (2010, 2011).

¹⁴⁸ Zedner (2009a), p 46.

¹⁴⁹ Zedner (2007b, 2009a).

¹⁵⁰ Zedner (2009a).

¹⁵¹ *Criminal Code Act 1995* (Cth), s 11.1. See, for example, in New South Wales, *R v Mai* (1992) 26 NSWLR 371; *Britten v Alpoput* (1986) 79 ALR 457.

¹⁵² *Britten v Alpoput* (1986) 23 A Crim R 254 at 258, per Murphy J (Fullagar and Gobbo JJ concurring), cited in NSW Sentencing Council (2004), p 16. This decision was followed in *R v Mai* (1992) 26 NSWLR 371.

Code, and that the accused ‘began to put that intention into execution by doing an act more than merely preparatory to the commission of the offence, and did not fulfil his intention to the extent of committing the offence’.¹⁵³ The state intervenes before the crime occurs but after there have been ‘acts more than merely preparatory’ to the offence.¹⁵⁴ This is the threshold at which the risk or likelihood of the offence justifies intervention, and criminal intention arises, and as such may be understood as *prevention*.

The preparatory or ancillary offence of doing an act in preparation or planning for a terrorist attack under section 101.6 of the Criminal Code is an example of *pre-emption*. The state intervenes before the crime occurs, and before the commission of ‘acts more than merely preparatory’ to the offence, where the threat of harm is emergent but not determinate. Here, the criminal offence occurs before the risk of harm is permitted to arise. Whealy J’s account in *R v Lodhi* is instructive:¹⁵⁵

In my opinion, an offence will have been committed by a person acting in a preliminary way in preparation for a terrorist act even where no decision has been made finally as to the ultimate target...it seems clear to me that an offence will have been committed provided there is an act done in preparation for an action that has (‘falls within’) or contemplates having the characteristics set out in subs (2) [of 100.1 of the Criminal Code which lists which action falls within the definition of a terrorist act]. The requisite intention to satisfy the existence of the mental ingredient of the offence must be an intention that the act is done in preparation for an action or threat of action possessing those characteristics.

This was reinforced by the passage of the *Anti-Terrorism Act [No 1] 2005* (Cth), which amended the preparatory offence provisions ‘to clarify that, in a prosecution for a terrorist offence, it is not necessary to identify a particular terrorist act’.¹⁵⁶ Pre-emption would similarly describe the offence of attempting to do an act in preparation, or planning, for a terrorist attack under sections 11.1 and 101.6 of the Criminal Code.

The benefit of this analysis is that it contextualises prevention, pre-emption and precaution in relation to anti-terror law and the preventive state. It provides a detailed account of the terminology of prevention that is context sensitive, clarifies the specific meaning of the terms, epistemological premises and underlying assumptions. It is a basis from which to investigate the timing and knowledge used to found interventions, and the associated implications – such as the increased reliance upon secret evidence in judicial proceedings. This provides a schema through which we may begin to

¹⁵³ *Milenkovski v Western Australia* [2004] WASCA 85, per Miller J at [23].

¹⁵⁴ *Criminal Code Act 1995* (Cth), s11.1 (2).

¹⁵⁵ *R v Lodhi* (2005) 199 FLR 236 at 246.

¹⁵⁶ Press release of Prime Minister Howard extracted in Lynch (2006), p 751. See Lynch generally for a comprehensive overview of the ‘the’ to ‘a’ change.

explore similarities and differences between preventive laws and their operation, and through exploring what is happening in practice to inform and give content to the limits of the preventive state.

What this analysis also highlights is the predominance of pre-emptive measures in Australia's domestic anti-terror regime. The Criminal Code contains one complete offence of engaging in a terrorist attack pursuant to section 101.1. It provides for inchoate offences, such as attempt, conspiracy and incitement, which constitute preventive measures criminalising acts 'prior to but not merely preparatory' to the completed offence. In addition, there are a host of pre-emptive measures, including the four ancillary or preparatory offences in sections 101.2 and 101.4–101.6 of the Criminal Code. These preparatory offences are also subject to the inchoate offences of attempt, conspiracy and incitement. This extension of criminal liability through pre-emptive laws raises serious questions about the elasticity of the boundaries of the criminal justice system, and whether so stretching the boundaries of the criminal law is desirable – or indeed possible – without fundamentally corroding the criminal justice system.

It is possible to then build on this schema and examine how these different techniques, prevention and pre-emption, shape and are shaped by different forms of knowledge and expertise.¹⁵⁷ This can add to our understandings of the preventive state by making preventive practices more visible, and by focusing inquiry on the impact of knowledge and expertise on power relations between governmental actors, the governing authority and the governed. To take one example, it may focus attention on how the increased use of national security intelligence in court proceedings has impacted upon the relationship between intelligence agencies and police services, and how executive and judicial reliance upon secret evidence alters the power relations between the state and the individual.¹⁵⁸ How the increased reliance upon secret evidence in terrorism-related proceedings, and the redaction of information on the basis of national security,¹⁵⁹ challenges the principles of fairness and open justice, and impacts upon the performance and identity of actors in the courtroom is important to understanding where the limits of preventive state action lie. This type of analysis may, for instance, reveal how accepted practices of procedural fairness are abrogated in practice, and how this creates material hardship for participants to court proceedings, such as for an individual to meet the case against them.

In addition, how these forms of knowledge 'define the objects of such practices' may open up channels of inquiry.¹⁶⁰ The Australian control order regime, for example, provides for a three-tiered process for a senior member of the Australian Federal Police to obtain a control order against an

¹⁵⁷ Dean (2010a), p 32.

¹⁵⁸ For secret evidence, see Roach (2010, 2011).

¹⁵⁹ Such as pursuant to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

¹⁶⁰ Dean (2010a), p 32.

individual: consent of the Attorney-General; an *ex parte* application for an interim control order from an issuing court; and proceedings to confirm the control order.¹⁶¹ At each stage, information may be withheld on the basis that it is 'likely to prejudice national security'.¹⁶² This draws attention to how the cumulative restriction of information feeds into the construction of the identity of the individual who is the subject of these proceedings. Inquiring into the role of knowledge and expertise may also assist in uncovering the effects – oppressive or otherwise – of communication and information in particular settings.¹⁶³ Again, how preventive laws operate in practice may give content to and illuminate the limits of state action to prevent harm, as well as expose new areas in which the preventive state produces adverse effects. It is not simply a question of what substantive and principled limits attach, but how these limits operate in practice. As such, this form of analysis may reveal, for instance, whether an individual subject to the proceedings is able or entitled to challenge the evidence led against them, and whether they can, in practice, do so.

A related feature of the governmentality approach is attention to subjectivity – to how, for instance, the terror suspect is conceived. It looks to 'forms of identity through which governing operates' and also 'what forms of identity are presupposed by different practices of government and what sorts of transformations do these practices seek'.¹⁶⁴ In doing so, as McKee points out, this perspective 'illuminates how the governable subject is discursively constituted and produced through particular strategies, programmes and techniques'.¹⁶⁵ This opens up lines of inquiry regarding the attributes of the governed and the governor, including what rights and duties the governed have and how these rights and duties are enforced.¹⁶⁶ Questions of identity are relevant to both the governable subject and governing authority, and the exercise of power within the preventive state. How does the conception of the 'non-deterrable' terrorist suspect, for example, infuse trial or sentencing proceedings, and considerations such as rehabilitation? Similarly, how the governing authorities have understood their role in relation to the problem of transnational terrorism,¹⁶⁷ and how this is reflected in the practices of governance, may provide relevant insights.

¹⁶¹ Where an urgent control order is sought, the first two steps are reversed: an AFP officer may apply directly to the issuing court but must seek approval from the Attorney-General within four hours of the interim control order being issued: *Criminal Code Act 1995* (Cth), s 104.10.

¹⁶² 'Likely to prejudice national security' is defined as 'a real not merely remote possibility that disclosure will prejudice national security': *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), s 17. 'National security' is broadly defined as Australia's defence, security, international relations or law-enforcement interests: s 8.

¹⁶³ McNay (1994), p 125.

¹⁶⁴ Dean (2010a), p 43.

¹⁶⁵ McKee (2009), p 468.

¹⁶⁶ Dean (2010a), p 43.

¹⁶⁷ Garland (1997), p 185.

This inquiry may also feed into questions of the broader legal and social implications of this shift in emphasis in governance. Janus, for instance, argues that ‘risk’ has now replaced ‘race, gender, sexual orientation and disability’ as the ‘marker of otherness’ and the ‘foundation of outsider jurisprudence’.¹⁶⁸ Janus argues that the sexual predator legislation in the United States, as well as what he terms the ‘radically preventive’ measures in the *USA Patriot Act of 2001*, provide a road map for the expansion of preventive incursions on liberty more generally and ‘reintroduce and relegitimise the concept of the degraded other’ establishing an alternative system of justice.¹⁶⁹ These concerns resonate in the Australian context in which preventive measures predominantly affect marginalised and excluded members of society, such as the mentally ill, serious sex offenders and terrorist suspects. Of the 37 persons charged with terrorism-related offences in Australia, the overwhelming majority have been Muslim men, and all but one of the ‘proscribed’ terrorist organisations under Division 104 of the Criminal Code have been Muslim groups.¹⁷⁰ Moreover, the civil liberties concerns raised by international commentators on the dangers of blindness to the limits of the preventive state are amplified in the Australian context, where reliance cannot be placed on a federal bill of rights.¹⁷¹

Conclusion

Australia’s domestic legal response to the threat of transnational terrorism in the decade following September 11 has been marked by the objective of prevention. In furtherance of this objective, the Australian government has enacted a host of laws that enlarge the boundaries of the criminal law and undermine protections within the criminal justice system. To date, meaningful analysis of prevention in Australian anti-terror law has been hindered by the fragmented and unwieldy state of the discourse. Prevention, pre-emption and precaution are routinely invoked to describe legislative efforts to thwart terrorism, yet their imprecise usage exposes a deeper lack of clarity regarding the meaning of the terms. This lack of clarity manifests in a variety of ways, including ambiguous and contested terminology, inconsistent use of terms and an uneasy migration of terminology between disciplines, governments and the domestic and international spheres. This article has suggested that the fractured state of the discourse reflects, more broadly, the difficulties inherent in the blurring of the boundaries between the national and international that has so characterised the war on terror.

A precondition to advancing the discourse in relation to Australia’s preventive anti-terror regime is an account of the terminology that provides

¹⁶⁸ Janus (2006), pp 103–4.

¹⁶⁹ Janus (2006), p 94.

¹⁷⁰ McClelland, 7 June 2011; McGarrity (2010), p 117. For the experience of Muslims in Australia post September 11, see Poynting and Perry (2007).

¹⁷¹ Ashworth and Zedner (2008); Dershowitz (2009); Zedner (2007b, 2007c, 2009a); Lynch and Williams (2006); Williams (2012).

clarity of definition, of epistemological premises and underlying assumptions. The adoption of consistent terminology to describe both domestic and international responses to terrorism has the potential to account for the blurring of the national and international, while facilitating insights drawn in one sphere being harnessed to improve the other. However, it is clear that the terminology of prevention, in and of itself, cannot adequately capture the complexity of prevention in anti-terror law.

The preventive state model provides a useful conceptual rubric through which to contextualise and examine the rise of prevention in anti-terror law and governance. This article has argued that the imperative of prevention in Australian anti-terror law can be viewed as part of a broader shift in emphasis in governance, rather than as an isolated response to the exceptional threat of terrorism. This shift is evident in governmental interventions that seek to anticipate and prevent harm from occurring, such as by the issuance of a preventative detention order or the criminalisation of preparatory acts, as opposed to reacting and responding to harm that has occurred. The preventive state model is pitched at a high level of conceptual generalisation and, as such, enables the collation and comparison of preventive measures that may be seen as forming part of this shift in emphasis in governance. It is a vehicle through which attention may be focused on the diverse set of Australian preventive measures, along with the principles that should guide, and the limits that should attach to, preventive interventions. In this way, the preventive state model may foster a broader preventive jurisprudence.

There are, however, limits to what may be drawn from the preventive state model. It has been argued that the governmentality approach has much to offer scholarship on the preventive state, presenting an opportunity to step inside the preventive state and to explore the operation of different preventive measures in particular settings, such as the courtroom. The governmentality perspective provides an analytical lens to facilitate scrutiny of the operation of preventive governance, through which the terminology of prevention may be harnessed and meaningfully engaged in the broader context of law and governance. This may inform the articulation of, and give content to, the limits of state action to prevent harm by exploring and subjecting to analysis the operation of preventive laws and what effects they produce. Engaging with an analytics of government approach may also focus critical inquiry on the preventive state itself; whether, for example, it is separate to or forms part of the criminal justice system.

Identifying the strengths of the governmentality perspective to the preventive state model in the Australian context is only a first step in unpacking and investigating the rise of prevention in anti-terror law. The imperative to understand and evaluate the preventive push in Australia's response to terrorism is underscored by the fact that anti-terror laws endure more than a decade after September 11. This is despite many of these laws originally being justified as temporary and extraordinary measures. Of further importance is the use to which anti-terror laws have been put as legislative models. For instance, state and territory governments have

adopted features of the anti-terror regime in their legislative responses to organised crime, including introducing control orders and criminalising associations and membership.¹⁷²

The implications of this shift in emphasis in governance warrant further research. This shift presents real challenges to traditional conceptions of the criminal justice system, and the extent to which the state may engage the objective of prevention to encroach upon an individual's liberty on the basis of an anticipated future harm. Viewing preventive anti-terror laws as part of a broader shift in emphasis in governance has the potential to raise new questions and research agendas about preventive governance, and the principles and limits that should attend preventive interventions. Indeed, appreciating preventive anti-terror laws as emblematic of this broader shift that preceded September 11, and in the context of a pre-existing and fertile environment of preventive governance, has the potential to promote fresh insights on the speed with which the preventive anti-terror regime developed, and the ease with which these laws have been used as legislative templates in relation to state government responses to organised crime.

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¹⁷² See n 106.

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