

# Departmental Disclosure Statement

## Countering Terrorist Fighters Legislation Bill

The departmental disclosure statement for a government bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- The general policy intent of the Bill and other background policy material;
- Some of the key quality assurance products and processes used to develop and test the content of the Bill.
- The presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.
- This disclosure statement was prepared by the Department of the Prime Minister and Cabinet.

The Department of the Prime Minister and Cabinet certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

13 November 2014

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## Part One: General Policy Statement

The threat posed by foreign terrorist fighters (FTFs) and other violent extremists locally, regionally, and internationally is continuing to evolve rapidly. New Zealand's domestic threat level was recently increased by officials from VERY LOW to LOW (a terrorist attack is possible but not likely). Government agencies have a watch list of between 30 and 40 people of concern in the foreign fighter context. In addition to those on the watch list, there are another 30 to 40 on a list of people requiring further investigation. Internationally, the United Nations Security Council adopted a resolution relating to FTFs (Resolution 2178), which amongst other things urged states to restrict the movement of FTFs.

Cabinet considered the threat posed by FTFs shortly after the election and agreed a targeted review of capacity, capability, and legislation be undertaken, to ensure they are adequate to respond to the evolving domestic threat, and approved terms of reference for the review. The focus of the review was on interim measures that could be taken in advance of the comprehensive review of legislative settings that will occur in a broader intelligence review that is required to commence before 30 June 2015 under the Intelligence and Security Committee Act 1996. The review specifically considered what measures could add to the safety and security of New Zealand in the short term.

The terms of reference set out four matters for review and report back. They were:

- Whether the capacity and capabilities of the New Zealand Security Intelligence Service (NZSIS) and other government agencies are sufficient to undertake effective and efficient investigations of suspected and returning FTFs and other violent extremists.
- The statutory powers available to agencies to investigate and monitor suspected and returning FTFs and other violent extremists.
- The statutory powers available to restrict and disrupt the ability of suspected FTFs to travel to conflict zones.
- Whether specific criminal offences should be introduced to address the behaviour of suspected and returning FTFs and other violent extremists.

The terms of reference also required the review and any recommendations to be underpinned by:

- Respect for human rights, individual privacy, and traditions of free speech in New Zealand.
- Compliance with any international obligations and agreements.
- The need to ensure public confidence in the work of the security and intelligence agencies.

Cabinet approved targeted amendments to enhance powers to monitor and investigate, and to restrict and disrupt travel. All of the provisions in the Bill are subject to a sunset clause that expires on 1 April 2018.

The review did not recommend any changes to the criminal law in the short term. The general criminal law and terrorism offences address the most serious forms of offending in relation to FTFs. The development of new criminal offences that more explicitly capture FTFs, and provide a graduated scale of offending and penalties may be appropriate but there is no urgent and immediate gap that needs to be addressed at this time. The development of such offences which are consistent with our criminal law are more appropriately addressed by a broader review.

In relation to capacity and capability Cabinet approved a funding injection for the NZSIS of almost \$7 million across the current and next financial year to increase the number of staff it has available to work on monitoring and investigating FTFs.

### **Monitoring and investigating foreign terrorist fighters**

The proposals to enhance the powers to monitor and investigate are to authorise the NZSIS to carry out visual surveillance under warrant, and to allow the NZSIS to conduct surveillance activities without a warrant in situations of emergency or urgency subject to safeguards to recognise human rights values. Both enhanced powers are modelled on the powers provided to the New Zealand Police under the Search and Surveillance Act 2012, and the Law Commission's work that led to that Act.

The exercise of these powers will be subject to the strengthened oversight regime put in place last year, in particular the enhanced office of the Inspector-General of Intelligence and Security (the Inspector-General).

#### *Visual surveillance*

The NZSIS cannot generally undertake visual surveillance in a private setting or that would involve trespass onto private property. This means, for example, that the SIS cannot install a video camera in private premises even if it was for the purpose of observing activities of security concern, like people training with weapons.

The amendments will allow the NZSIS, under warrant, to undertake visual surveillance in a private setting or that would involve trespass onto private property (both with or without a visual surveillance device). Any visual surveillance activity that can currently be undertaken lawfully without a warrant would continue outside the warrant regime.

The safeguards and oversight that apply to other NZSIS warrants will apply to warrants of visual surveillance. The safeguards include having to satisfy the Minister in charge and the Commissioner of Security Warrants (CSW) that the conditions for issuing warrants apply and oversight by the Inspector General.

#### *Surveillance in situations of emergency or urgency*

The nature of intelligence investigations means that at times urgent situations arise where immediate action may be necessary. For example, information may come to light that a person not previously identified as a risk is about to travel to a conflict zone. The NZSIS has processes in place to expedite the preparation of warrant applications and place those before the Minister in charge, CSW, and the Minister of Foreign Affairs

as appropriate. However, despite those processes, a number of hours can pass before a warrant may be issued. In the intervening time vital intelligence may be lost and the person may leave New Zealand.

This issue was considered by the Law Commission in relation to law enforcement and a regime for surveillance without a warrant in situations of emergency or urgency was included in the Search and Surveillance Act 2012.

The bill allows the Director of Security (or person acting as the Director) to authorise surveillance activities to be undertaken in situations of emergency or urgency. To provide appropriate safeguards and oversight the following requirements apply:

- The Director must be satisfied that the threshold for issuing a warrant is met.
- The duration of the authorisation is limited to a period not exceeding 48 hours
- The authorisation can be issued only in circumstances where it is impracticable to obtain a warrant in the timeframe and where the delay is likely to result in a loss of intelligence.
- The Director must notify the Minister in Charge, and where the warrant would have been a domestic warrant, the CSW, as soon as practicable, and no later than 12 hours, after issuing the authorisation
- The Minister in Charge, and where appropriate, the CSW, may direct the NZSIS to discontinue activity under the authorisation and destroy any information collected.
- If no application for a warrant is made, the Director must provide a report to the Minister in charge and, where appropriate, the CSW, and they must determine whether it was appropriate for the authorisation to be given, and if not they must refer the matter to the Inspector-General.
- The Director must notify the Inspector-General as soon as practicable after issuing an authorisation.
- The NZSIS annual report must include the number of times authorisations were issued during the reporting year, and the number of authorisations were followed by an application for a warrant.

#### *Access to Customs information*

As a result of background work to review the Customs and Excise Act 1996, a doubt has been raised about whether the Act permits Customs to provide direct access to the NZSIS and the Police. Providing this access substantially improves the speed and efficiency of investigations. All authorised users have their access logged and the access can be audited to ensure compliance with all privacy and other legal requirements.

To remove all doubt, the Customs and Excise Act 1996 is amended by the bill to clarify that direct access can be provided to the NZSIS and Police but only for counter terrorism purposes. This bill is a focused and targeted measure to address the FTF phenomenon. Any wider issues about direct access to Customs information will have to be addressed by a separate process.

## **Restricting and disrupting travel**

The Passports Act 1992 currently allows the Minister of Internal Affairs to cancel or refuse to issue a passport or other travel document if the Minister believes on reasonable grounds that a person is a danger to the security of New Zealand.

The review recommended amendments to the cancellation and refusal to issue process to improve its operation and take into account UNSC R 2178 which urges states to restrict the movement of FTFs, including their onward travel if outside their home country.

### *Duration of cancellation or refusal to issue*

There are a small number of cases where the circumstances and intentions of an individual have not changed, and when the current 12 month period of cancellation ends a further application to refuse to issue a passport is made. In this small number of cases there is usually information available at the time of cancellation that shows that the person's intentions and circumstances are unlikely to change.

In those situations, the bill allows the Minister of Internal Affairs to set a cancellation period of up to three years if the Minister is satisfied that the person would continue to pose a danger to New Zealand or any other country.

The safeguards include the person being able to make submissions to the Minister on the duration of the cancellation, periodic reviews once every 12 months by the Minister, and the requirement to invite the person to make written submissions as to whether the cancellation should remain in place.

The person would have the ability to appeal or seek a judicial review of the Minister's decision to extend the duration of the cancellation.

### *Temporary suspension*

There are cases where information comes to light indicating that a person may be seeking to travel shortly to engage in or facilitate a terrorist act, and the NZSIS would seek to recommend to the Minister of Internal Affairs that the person's passport or other travel document be cancel. However, in the time it takes to compile the full package of information and present it to the Minister, a person may leave New Zealand.

To address this situation, the bill allows the Minister to suspend a person's passport or other travel document for no more than 10 working days if the Minister is satisfied that a briefing recommending cancellation is being prepared and the person is likely to travel within the period of temporary suspension. If during the preparation of the briefing it becomes apparent that the grounds for cancellation cannot be established the Minister must be notified immediately, and the suspension will lapse.

### *Giving notice*

Notice must be given to a person that his or her passport or travel document has been cancelled. In some cases involving national security, providing notice to a person may raise operational risks. For example, giving notice could reveal the existence of an intelligence investigation and potentially jeopardise an ongoing investigation, put the safety of the intelligence operators involved at risk, and in some cases give rise to a threat to public safety.

To allow time for steps to be taken to mitigate any risks the bill allows the Minister of Internal Affairs to defer notification for up to 30 days if the Minister is satisfied that providing notice immediately would put an investigation at risk or endanger the safety of any person.

Finally, in some cases it is not possible to locate the person and provide him or her with notice despite the best efforts of the Department of Internal Affairs. To address that situation, the Bill amends the Passports Act 1992 to require the Department to take all practicable steps to provide notice.

#### *Court processes*

The Passports Act currently has special provisions that apply to proceedings where national security is involved. The provisions provide a regime to manage and protect classified security information that may be required to be presented in appeals and applications relating to national security under the Passports Act.

In addition to appeal against the Minister's decision, judicial reviews and other legal challenges of the same decisions under the Passports Act can be sought. To ensure a consistent approach regardless of what form the legal challenge to the Minister's decision takes, the bill amends the Passports Act so that the special provisions also apply to judicial reviews and any other litigation to challenge the Minister's decisions that involve national security.

The bill also allows classified information introduced into evidence under closed court proceedings to be withdrawn at any time in the interests of national security or in order to maintain confidentiality obligations of information provided by other countries. Where that occurs the information will not be able to be relied on during the proceedings. This amendment is similar to section 37 of the Immigration Act 2009.

Finally, the bill exempts the Crown from liability for loss and damages caused through the cancellation of travel except where those actions are grossly negligent or shown to be in bad faith. This amendment is modelled on section 280E of the Customs and Excise Act.

#### *Clarifications*

In order to better respond to UNSC R 2178 the bill makes two amendments to clarify or make matters explicit. First, the bill makes explicit that cancellation or refusal to issue a travel document can be on the grounds that a person is a danger to any other country, in addition to New Zealand, because the person intends to engage in or facilitate a terrorist act or the proliferation of weapons of mass destruction. Secondly, the bill

clarifies and makes explicit that a person's travel document may be cancelled when they are outside New Zealand.



## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>NO</b>

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
However, the bill does take into account the recent United Nations Security Council (UNSC) Resolution 2178.	

### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
A Regulatory Impact Statement entitled 'Foreign Terrorist Fighters – Targeted review of relevant legislation' was prepared. A copy of the RIS can be accessed on the Treasury website at <a href="http://www.treasury.govt.nz/publications/informationreleases/ris">http://www.treasury.govt.nz/publications/informationreleases/ris</a>	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>NO</b>
The RIS did not meet the threshold for RIA Team assessment. An independent opinion was provided from within DPMC on the quality of the RIS.	

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>NO</b>

### Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>

<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>NO</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>
The specific benefits, costs and other indicators of impact in relation to countering foreign terrorist fighters and other violent extremists are inherently difficult to estimate, and rely in part on classified information. The situation is evolving rapidly. The urgent nature of the review limited the amount of time to collect the necessary data and conduct the analysis. The provisions are however time limited and a further review is required by law.	

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>NO</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>NO</b>
The bill does not create new obligations or standards. The bill provides for greater powers to monitor and investigate foreign terrorist fighters and other violent extremists and restrict and disrupt their travel. In addition to the changes in this bill Cabinet also approved additional funding for the NZSIS over this and the next financial year to increase its capacity to carry out investigations.	

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

<b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b>
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MFAT and Crown Law were consulted on the development of the policy proposals in order to determine compliance with relevant international obligations.
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### Consistency with the government's Treaty of Waitangi obligations

<b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b>
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No specific steps were taken as it was considered that the provisions do not affect the general principle that New Zealand legislation is to be interpreted consistently with the principles of the Treaty of Waitangi.
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### Consistency with the New Zealand Bill of Rights Act 1990

<b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b>	<b>YES</b>
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The advice provided to the Attorney General by the Ministry of Justice, or a section 7 report by the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website.
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### Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
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<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>YES</b>
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<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>NO</b>
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Offences for failing to destroy records after expiry of visual surveillance warrants and authorisations have been created. They are identical to the existing offences in the NZSIS Act that relate to destruction of records after the expiry intelligence warrants. The maximum penalty is a fine not exceeding \$1000.
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<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
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The Ministry of Justice was consulted on the development of Bill, which included commenting on versions of the bill and discussion with MOJ officials.
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## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>YES</b>
<p>The amendment to the Customs and Excise Act 1996 authorising direct access to Customs information by the NZSIS and Police for counter terrorism purposes.</p> <p>The amendments to the NZSIS Act that authorise visual surveillance under warrant and surveillance under situations of emergency and urgency.</p>	

<b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>	<b>YES</b>
<p>The Privacy Commissioner was consulted on the draft bill, but not during the review phase. The time available for consultation was very limited due to the tight timeframes for the review and development of legislation.</p>	

## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>NO</b>
<p>Consultation occurred within Government. External consultation was not undertaken given the nature of the subject matter addressed by the bill and the limited time available to conduct the review and develop legislation.</p>	

## Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>YES</b>
<p>The operational agencies were consulted during the development of the policy and the legislation to ensure that the changes can be successfully operationalised.</p>	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO

### Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO

### Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO

### Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO

### Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	YES
The bill amends the Passports Act 1992 to exempt the Crown from liability for loss and damages caused through the cancellation of travel except where those actions are grossly negligent or shown to be in bad faith. This amendment is modelled on section 280E of the Customs and Excise Act.	

## Significant decision-making powers

<b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>	<b>YES</b>
<p>The amendments to the NZSIS Act that authorise visual surveillance under warrant and surveillance under situations of emergency and urgency. Safeguards are included in the Bill, and the powers are subject to external oversight by the Inspector-General of Intelligence and Security and annual reporting requirements to Parliament.</p> <p>The amendments to the Passports Act extend the period of cancellation or refusal to issue a travel document to up to 3 years. Safeguards include the right to make written submissions, periodic reviews by the Minister during the extended period and rights of appeal and judicial review of the Ministers decision.</p> <p>The amendments to the Passports Act to temporarily suspend a travel document. Safeguards include the Minister having to be satisfied of the grounds for suspension and that the period can be for no longer than 10 working days. The person can seek a judicial review of the Ministers decision.</p>	

## Powers to make delegated legislation

<b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b>	<b>NO</b>

<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>NO</b>

## Any other unusual provisions or features

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>

