

Departmental Disclosure Statement

Terrorism Suppression (Control Orders) 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 Ministry of Justice.

The Ministry of Justice certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

September 2019.

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Part One: General Policy Statement

Purpose and overview

- This Bill introduces a civil regime of control orders to manage and monitor a small number of people who are returning to, or who have arrived in New Zealand after having engaged in terrorism-related activities overseas.
- The control order regime targets individuals who pose a risk of engaging in further terrorism-related activities and for whom a criminal prosecution for their past terrorism-related activities overseas is not viable because of the significant difficulties associated with securing evidence from overseas jurisdictions (particularly in the context of an ongoing armed conflict).
- Control orders would impose requirements on returnees to protect the public from terrorism, to prevent engagement in terrorism-related activities in a country (carrying out terrorism, or facilitating or supporting the carrying out of terrorism), and to support the returnee's reintegration into New Zealand and rehabilitation. For example, an order could enable the electronic monitoring of a person's movements, restrict their access to the Internet and other communication devices except on devices known to and monitored by the Police, prohibit associations with specific people or places, or require the person to report regularly to the Police.
- Returnees' reintegration into New Zealand and disengagement from radicalising influences are key to minimising future risks of terrorism. The implementation of the order would also be designed to help mobilise the necessary services for returnees' reintegration (for example, needs assessments, alcohol and drug treatment services, or support into employment). Returnees would be encouraged to participate in programmes that lessen their risk, and this, in turn, could lead to an easing of requirements or discharge of their order.
- Orders would be made by the High Court on application by the Commissioner of Police. In making the order, the court must be satisfied that the person is a relevant person (a person who is 18 years old or older, is or may be coming to New Zealand or has arrived in New Zealand, and has engaged in terrorism-related activities in a foreign country or meets other stated criteria). The court must also be satisfied that the person poses a risk of engaging in further terrorism-related activities and that the requirements the order imposes are necessary and appropriate for stated main and incidental purposes. Before imposing a requirement, the court must also consider how the condition would affect the returnee's financial, health, or other personal, circumstances, must consider any other matter the court thinks relevant (for example, whether requirements are justified limits on rights and freedoms in the New Zealand Bill of Rights Act 1990), and must comply with relevant limits specified in the Bill.
- An interim order operates until a final order is made and served or it is clear that no final order has been applied for or made. A final order can have a maximum duration of up to 2 years, and can be renewed by the court twice if there is evidence that the person still meets the criteria for the final order. No extension of the order would be available past 6 years. Breaches, without a reasonable excuse, of requirements of an order would be a criminal offence. The offence would be punishable, on conviction, by imprisonment for a term not exceeding 1 year or a fine not exceeding \$2,000.
- It is expected that orders would be applied for in respect of only a very small number of returnees, with estimates of no more than 2 orders made per year.

Part Two: Background Material and Policy Information

Published reviews or evaluations

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?	YES
<p>In designing the proposed regime the Ministry has taken account of international experience on the use of control orders or similar regimes in comparable jurisdictions (in particular, Canada, United Kingdom and Australia). The Ministry considered the findings and recommendations of independent evaluations and reviews of overseas regimes, which have informed design of the New Zealand regime, including</p> <ul style="list-style-type: none">• UK Independent Reviewer of Terrorism Legislation, Max Hill QC, The Terrorism Acts in 2017, October 2018, [https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/10/The_Terrorism_Acts_in_2017.pdf]• Australia, Independent National Security Legislation Monitor (INSLM), Dr James Renwick CSC SC, <i>Review of Divisions 104 and 105 of the Criminal Code (including the interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders, September 2017</i>, [http://www.inslm.gov.au/sites/default/files/files/control-preventative-detention-orders.pdf]• Australia, Parliamentary Joint Committee on Intelligence and Security, Review of police stop, search and seizure powers, the control order regime and the preventative detention order regime, March 2018 [https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/AFPpowersreview/Report]• Australian Attorney-General's Department [https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Control-orders-and-preventative-annual-report-2016-17.PDF]	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>To inform decisions on the policy of the Bill, the Ministry of Justice prepared a Regulatory Impact Statement entitled <i>Control orders</i>, dated 18 July 2019. A copy of the RIS can be accessed on the Ministry's website or from the following page on the Treasury website: [http://www.treasury.govt.nz/publications/informationreleases/ris]</p>	

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?	NO
<p>The Regulatory Impact Statement did not meet the threshold for an independent assessment of its quality</p>	

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?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
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2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO
<ul style="list-style-type: none"> It is estimated that the regime will involve the supervision of no more than 2 people per annum. It is estimated that agencies will be able to cover the cost of the regime within baselines. Further discussion of the costs and benefits of the regime is contained within the RIA. No specific analysis has been undertaken to estimate the size of the regime's impact on the wealth or income of any party. We expect that any impacts will be minor. Individuals subject to the regime may have restrictions placed by the Court around their financial dealings (such as limitations on transferring currency internationally) and may be restricted from specific work that may heighten their risk of engaging in terrorist activity (for example, work in an airport). However, the impacts of these controls on a person's income or wealth is unlikely to be large. No persons other than those subject to the regime will have their wealth or income affected. 	

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES
<p>The effectiveness of the control order regime will be strongly affected by the extent of returnee compliance with the regime, including their engagement in rehabilitation and reintegration programmes. The regime places requirements on returnees based on their assessed risk to public safety, the court being satisfied that those requirements are necessary to lower the risk of the returnee engaging in terrorism-related activity. If returnees do not comply with these conditions, the Bill enables the Police to take action for a breach of conditions, thereby maintaining effective management of the risk to public safety posed by returnees.</p> <p>The regime relies on Police ensuring that returnees abide by the conditions of their control orders, and that other government agencies and non-government agencies provide a co-ordinated approach with Police in delivering services that facilitate the rehabilitation and reintegration of the returnee.</p>	

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

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?
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The Ministry's scan of international obligations has not identified any obligations that conflict with the policies contained in the Bill.
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Consistency with the government's Treaty of Waitangi obligations

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?

We have undertaken analysis of the Bill against the principles of the Treaty of Waitangi. Due to the sensitive nature of the counter-terrorism response, the proposals in the Bill were not consulted on with any group outside of government, including iwi. The lack of consultation could be viewed as inconsistent with the principle of partnership under the Treaty of Waitangi. However, the direct effects of the proposed control order regime on Māori are likely to be minor, as these proposals target only returnees who have engaged in terrorism-related activity (including those who have been in "terrorist conflict zones"). We consider that the policy intent and targeted nature of the regime set out in the Bill is consistent with the principles of the Treaty of Waitangi.

Consistency with the New Zealand Bill of Rights Act 1990

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?	YES
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Advice provided to the Attorney-General by Crown Law, or a section 7 report of the Attorney-General, is generally expected to be available on the Ministry of Justice's website upon the introduction of a Bill. Such advice, or reports, will be accessible on the Ministry's website at https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/bill-of-rights-compliance-reports/

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
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(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	YES
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Offences

The Bill creates a new civil order regime, which may impose restrictions and obligations on returnees subject to the regime. The breach of the conditions of the control order, without reasonable excuse is a criminal offence, with a penalty of up to 1-year's imprisonment, or a fine not exceeding \$2,000.

The Bill also proposes that it be an offence to breach the automatic suppression of identity of the person subject to a control order, with a penalty of a \$25,000 fine for individuals or a \$50,000 fine for bodies corporate.

Jurisdiction

The Bill places the new civil order regime under the jurisdiction of the High Court (Civil). Applications for cancellation of the order, variation of conditions and extension of the order will also come under the jurisdiction of the High Court (Civil). Penalties for breaches of an order will be in the criminal jurisdiction.

3.4.1. Was the Ministry of Justice consulted about these provisions?

YES

The Ministry of Justice is the lead agency for this Bill.

Privacy issues

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?

YES

There are no specific provisions in the proposed legislation to enable access, or collection of personal information. However, to enable New Zealand Police to monitor and verify the person's compliance with any requirements imposed by the Court under an order, the Court may allow for information related to those requirements to be accessed and/or collected, eg records of financial dealings, fingerprints, electronic devices usage details.

3.5.1. Was the Privacy Commissioner consulted about these provisions?

YES

The Privacy Commissioner is concerned that he has not had time to consider this Bill and that such a significant measure has been developed without consultation. The Commissioner notes that the relationship between the Privacy Act and the Orders regime is not articulated clearly and this may result in a diminution of individual rights in the context of what are very exceptional civil proceedings.

External consultation

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?

NO

Consultation to date has only involved government departments that will be affected by the proposed legislation.

The following agencies were consulted on this proposal: New Zealand Police, Crown Law Office, New Zealand Customs, Immigration New Zealand, New Zealand Treasury, Ministry of Foreign Affairs and Trade, Department of Corrections, Department of Internal Affairs, Ministry of Social Development, Legislation Design and Advisory Committee, New Zealand Security Intelligence Service, Government Communications and Security Bureau, Department of Prime Minister and Cabinet.

Due to the sensitive nature of these proposals, consultation with individuals and/or groups outside of government has been unable to be undertaken.

Other testing of proposals

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?

NO

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
The Bill, however, will have the power to put in place restrictions that limit aspects of an individual's financial dealings that could provide support to the activities of terrorists and violent extremists.	

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
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Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
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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?	NO
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Significant decision-making powers

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?	YES
The Bill provides that the Commissioner of Police will make the decision whether to apply for a control order	

Powers to make delegated legislation

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?	NO
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4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO
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Any other unusual provisions or features

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