

Departmental Disclosure Statement

Counter-Terrorism Acts (Designations and Control Orders) Amendment 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 Tim Bradley of 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.

21 September 2022

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Part One: General Policy Statement

This Bill clarifies and strengthens New Zealand's counter-terrorism legislation to better prevent and respond to terrorism and associated activities. The Bill is introduced under Standing Order 267(1)(a). That Standing Order permits an omnibus Bill to amend more than 1 Act to be introduced if the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy. The interrelated topic is counter-terrorism. The single broad policy is to better prevent and respond to terrorism and associated activities by ensuring that designation and control order provisions apply effectively to conduct that is, or that creates an unacceptable risk of, terrorism and associated activities.

The amendments in the Bill implement the single broad policy by amending—

- the Terrorism Suppression Act 2002; and
- the Terrorism Suppression (Control Orders) Act 2019.

Designations

With respect to the Terrorism Suppression Act 2002, the Bill amends the designation scheme provided for in that Act. This scheme enables the Prime Minister to designate a terrorist entity (either an individual or a group) if the Prime Minister believes on reasonable grounds that the entity has carried out, or participated in, a terrorist act. A designation has consequences designed to prevent further terrorist acts, including prohibiting third parties from dealing with the property of a designated entity or making property or material support available to the entity.

The Bill amends the current designation scheme to clarify matters relating to the expiry, renewal and revocation of designations. The current designation scheme does not specifically address the circumstance of a designated person being imprisoned in New Zealand. That means there is ambiguity in how the designation scheme applies to such persons. Given the potentially devastating consequences of a terrorist attack, it is crucial that the Prime Minister's powers to prevent and suppress terrorism in the evolved global terrorism landscape are clear.

To meet that objective the amendments in the Bill provide for the following, in the situation of an entity who is the subject of a final designation and is imprisoned:

- while the entity is imprisoned, no application for revocation of the designation can be made (by the entity or by a third party with a special interest) on the ground that the entity is no longer involved in any way in acts of the kind that made, or that would make, the entity eligible for designation;
- expiry of the designation is paused while the entity is imprisoned;
- while the entity is imprisoned, the Prime Minister must review whether the designation is no longer justified at least once every 3 years;
- in carrying out a review, the Prime Minister may decide a designation is no longer justified only if satisfied that none of its effects is necessary or desirable for the prevention, or other suppression, of terrorism.

Those new provisions retain the current designation scheme's structure and safeguards but amend them where necessary so that they are clear and workable in the situation of a designated and imprisoned entity. In particular,

- the expiry of a designation is maintained but paused;
- the 3-yearly review function is maintained but the grounds are amended;
- the designated entity retains their ability to challenge the designation but this is incorporated into the review function rather than a stand-alone ability to apply for revocation.

The amendments in the Bill have retrospective effect in 3 ways, as follows:

- The amendments apply to designations of terrorist entities that are in force when the Bill comes into force.
- An application for revocation of a final designation that relates to a designated entity who is imprisoned, and was made on the ground that the entity is no longer involved in any way in acts of the kind that made (or that would make) the entity eligible for designation (a **revocation application**), is to be determined under the law as

amended if the application is made, but not determined, before the Bill comes into force. That means that a revocation application that is “live” at the time the Bill comes into force can be refused or not decided.

- Any previous decision of the Prime Minister to refuse a revocation application that was made before the Bill comes into force is validated. That means that such a decision is valid after the Bill comes into force, even if it was previously invalid.

The retrospective effect of those provisions is to protect public safety. If the provisions did not apply retrospectively, the ambiguity in the current law could result in a designation expiring or being revoked despite the designated entity continuing to pose a risk of involvement in further terrorist acts (for example by aiding, assisting, counselling or procuring others to commit terrorist acts).

Control orders

With respect to the Terrorism Suppression (Control Orders) Act 2019, the Bill amends the control order regime provided for in that Act. Control orders are civil orders which are intended to prevent high-risk individuals from continuing to engage in terrorism-related activities through the imposition of appropriate restrictions. Those include measures such as prohibition of or restrictions on employment, residential curfews, and restrictions on personal associations. While a broad range of conditions can be imposed through a control order, each condition must be individually justified, and the Court must be satisfied that any conditions imposed are specifically tailored to the individual.

The Bill makes several targeted changes to improve the current control orders regime, incorporating some of the lessons learned from the granting of New Zealand’s first and only control order.

The Bill—

- expands the eligibility criteria to include a terrorism-related New Zealand offence involving a broader definition of specified objectionable material:
- expands the eligibility criteria to include people sentenced to home detention and community sentences (it is currently limited to people sentenced to imprisonment) and allow sentence conditions and control orders to exist concurrently for those offenders to ensure consistency of risk management:
- allows for greater judicial discretion in the setting of control order restrictions to ensure that they can be more closely tailored to risk:
- provides for requirements of the following kinds in more detail:
 - requirements that the relevant person reside at and remain at a specified address; and
 - electronic monitoring requirements:
- makes name suppression requirements more flexible, so that an appropriate balance can be struck between preventing the glorification of terrorism activity and reassuring the public that a known terrorism risk is being managed appropriately.

Division of the Bill

This Bill is currently not intended to be divided, by select committee or committee of the whole House, into separate amendment Bills.

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?	NO
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Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
The purpose of the Terrorism Suppression Act 2002 includes meeting our international commitments regarding terrorism, including the implementation of United Nations Security Council sanctions related to counterterrorism and preventing terrorist financing. For example: United Nations Security Council Resolutions 2178 (2014), 1267 (1999), 1373 (2001), 1333 (2000), 1988 (2011), and 1390 (2002). However, the amendments in the Bill do not specifically relate to these international obligations.	

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>The Ministry of Justice drafted the Regulatory Impact Statement (RIS) 'Options for strengthening the control orders regime' to accompany the Cabinet policy paper 'Options for an extended control orders regime', which were considered by the Cabinet External Relations and Security Committee on 14 December 2021.</p> <p>The Ministry of Justice drafted the RIS 'Designation of terrorist entity, options analysis, and recommendations' to accompany the Cabinet policy paper 'Urgent Amendments to the Designations Scheme of the Terrorism Suppression Act 2002', which were considered by the Cabinet Social Wellbeing Committee on 5 August 2022.</p> <p>The two RIS will be published following the introduction of the Bill, with appropriate redactions under the Official Information Act 1982, at https://www.justice.govt.nz/justice-sector-policy/regulatory-stewardship/regulatory-impact-assessments/</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
The regulatory impact statements identified above did not meet the threshold for receiving an independent opinion from the Regulatory Impact Analysis Team based in the Treasury.	

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?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO

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?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO

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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Through developing the RIS for both the amendments to the Terrorism Suppression Act 2002 and the Terrorism Suppression (Control Orders) Act 2019, the policy options were assessed against criteria for consistency with New Zealand's international commitments and international human rights. More information is available in the two RIS.
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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?

Officials consulted with relevant government agencies and analysed the proposals in this Bill against the principles of the Treaty of Waitangi and the Crown's Treaty obligations. Officials did not consider there to be a real potential for the proposed Bill to affect Māori rights and interests protected by the Treaty of Waitangi.
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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 the Crown Law office, or a section 7 report of 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 at http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/
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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)?	NO
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(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
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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?	NO
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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
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Public consultation was not possible in the timeline required to resolve an ambiguity in the TSA that could otherwise have reduced its effectiveness. There is currently one individual who is imprisoned and designated, whose designation will expire in August 2023. It is crucial that the TSA is fit for purpose to deal with this situation before the designation expires.

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?	YES
Officials have worked closely with relevant agencies to ensure that the provisions in the Bill are workable and can be operationalised.	

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
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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?	YES
<p>The Bill's amendments have a retrospective effect on rights and freedoms in three ways:</p> <p>Firstly, the amendments apply to designations of terrorist entities that are in force when the Bill comes into force.</p> <p>Secondly, a revocation application that is made, but not determined, before the Bill comes into force is to be determined in accordance with the law as amended:</p> <ul style="list-style-type: none">• This transitional rule applies to a revocation application that relates to a designated entity who is imprisoned and which was made on the ground that the entity is no longer involved in any way in acts of the kind that made (or would make) the entity eligible for designation (revocation application).• The effect of this transitional rule is that a revocation application that is 'live' at the time the Bill comes into force can be refused or not decided, as the Bill provides that no revocation application can be made while a designated entity is imprisoned. <p>Thirdly, any decision of the Prime Minister to refuse a revocation application (as defined above) that was made before the Bill comes into force is validated:</p> <ul style="list-style-type: none">• The effect of this validating rule is that such a decision of the Prime Minister is valid after the Bill comes into force, even if it was previously invalid.• For clarity, this validating rule applies to decisions that are the subject of court proceedings that have not been finally determined (including any rehearing, retrial or appeal) at the time the Bill comes into force. <p>These retrospective effects are considered necessary and appropriate because they address a matter that is essential to public safety:</p> <ul style="list-style-type: none">• If the provisions in the Bill do not apply to designations in force and revocation applications made before the Bill is passed, or previous decision(s) of the Prime Minister to refuse revocation requests are not validated, the lack of clarity in the current law could lead to the designation of an imprisoned entity expiring or being revoked despite the designation continuing to prevent a person from being involved in further terrorist acts. In that event, it appears the designation would be unlikely to be able to reinstated.• If an imprisoned entity's designation ceased, the consequences of a designation (designed to prevent further terrorist acts) would no longer apply to the entity. In particular, restrictions on the entity's use of personal finances that prevent the entity from financing terrorism would no longer apply. This would raise a material threat to public safety, potentially leading or contributing to a terrorist attack.• The provisions that have retrospective effect have been drafted as narrowly as possible to achieve the legal certainty necessary to address the threat to public safety. In particular, officials are mindful that validation of past decisions is rare and should only be used if there are real and inappropriate consequences of not doing so. However, it is considered that that is the position here. If past decisions are not	

valid then this may result in a designation being revoked in circumstances where revocation would raise a material threat to public safety.

The Bill's retrospective effects are intended to ensure the ambiguity in the current law does not result in an outcome that is contrary to the purpose of the Act:

- The TSA was enacted at a time when terrorism was primarily carried out by groups with a defined organisational hierarchy, and the structure of the current scheme in the TSA reflects that. The nature of terrorism has now evolved, with threats increasingly coming from radicalised individuals acting alone.
- If the designation of an imprisoned entity could not be maintained in a situation where the entity continues to pose a risk of involvement in a terrorist act, that would undermine the TSA's purpose of suppressing terrorism. The Bill's amendments and their retrospective effect are intended to ensure the TSA's application to designated entities who are imprisoned accords with the purpose of the TSA and the designation scheme by preventing those who have carried out or participated in the carrying out of a terrorist act from being involved in further terrorist acts.

It is appropriate to apply these provisions only to those designated entities who are imprisoned, as only those who are imprisoned will potentially meet the grounds to have their designation revoked because the restrictions imposed as part of their imprisonment and designation prevent them from being involved in acts that make them eligible to continue to be designated. No other forms of detention impose sufficient restrictions – for instance, a designated individual in home detention could still be involved in further terrorist acts (for example, by communicating with others online to aid, assist, counsel or procure them to commit terrorist acts).

Designations are not an offence, and therefore the provisions do not breach prohibition on retrospective offences contained in section 26(1) of the New Zealand Bill of Rights Act 1990.

As neither the policy nor the Bill have been publicly consulted on, the retrospective provisions have not been publicly consulted on.

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
<p><i>Amendments to the Terrorism Suppression Act 2002</i></p> <p>Designations are put in place, renewed and revoked through a designated authority in the TSA to the Prime Minister. A designation significantly impacts a person's rights and interests through prohibitions on dealing with property of (or derived or generated from property of) a designated terrorist entity and prohibitions on making property or material support available to a designated terrorist entity.</p> <p>This Bill amends how the Prime Minister's designated authority is to be exercised with respect to designated terrorist entities who are imprisoned. These new provisions retain the current designation scheme's structure and safeguards but amend them where necessary so that they are clear and workable in the situation of a designated and imprisoned individual. Key safeguards are:</p> <ul style="list-style-type: none"> • The Prime Minister is required to review every three years whether the continuation of the designation (through the pausing of the expiry) is justified. (This mirrors the current expiry of the designation after three years unless the Prime Minister renews the designation, but amends the grounds for the continuation of the designation.) • The Prime Minister is required to take reasonable steps to seek information from the designated terrorist entity and consider this in their review. (This mirrors the current ability to apply for revocation, but the ability to challenge the designation is collapsed into the review function rather than being a stand-alone ability to apply for revocation.) • Whether the Prime Minister has acted correctly under the designated authority will continue to be subject to judicial review. <p><i>Amendments to the Terrorism Suppression (Control Orders) Act 2019</i></p> <p>The Bill will expand the number of potential applications for a control order that may be made to the court. However, the decision whether to make such an order and impose any subsequent limitation on the freedoms of the subject remains a judicial decision, dependent on the requisite degree of risk being established.</p>	

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

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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