Te Tari Ture o te Karauna
Crown Law

6 April 2021

Attorney-General

**BORA Vet Advice: Counter-Terrorism Legislation Bill (PCO 22558/1.41) – Consistency with the New Zealand Bill of Rights Act 1990**
**Our Ref: ATT395/306**

1. We advise on the consistency of the draft Counter-Terrorism Legislation Bill (**the Bill**) with rights affirmed by the New Zealand Bill of Rights Act 1990 (the **Bill of Rights Act**). In our opinion the Bill **is consistent** with the Bill of Rights Act.

**Purpose and structure of the Bill**

2. The Counter-Terrorism Legislation Bill seeks to strengthen New Zealand's counter-terrorism legislation to better prevent and respond to terrorist activities. It amends the Terrorism Suppression Act 2002 (**TSA**), the Search and Surveillance Act 2012 (**SSA**) and the Terrorism Suppression (Control Orders) Act 2019 (**Control Orders Act**) to facilitate the prevention of terrorist attacks and activities that support terrorism, and ensure agencies have legal authority to respond to evolving threats.[1] The Bill also implements part of Recommendation 18 in the Report of the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019, and remedies a gap identified in *R v S*,[2] which held that planning or preparation offences were not covered by the TSA.

3. In order to affect these changes, the Bill:

   3.1 amends the definition of "terrorist act" in s 5 of the TSA;

   3.2 introduces a new offence of planning or preparing to carry out a terrorist act;

   3.3 introduces a new offence of providing or receiving weapons or combat training for terrorist purposes;

   3.4 introduces a new offence travelling to, from, or via New Zealand with the intention to carry out a specified offence in the TSA;

   3.5 extends the offence of financing terrorism to criminalise the provision of 'material support; and

1 Counter-Terrorism Legislation Bill (Government Bill), Explanatory Note, PCO 22558/1.41 at1 1-2.
2 [2020] NZHC 1710.

3.6 extends the Control Orders regime to "relevant offenders": individuals who have committed and been convicted of a terrorist offence,[3] completed their determinate sentence, release conditions have expired.

3.7 Makes a number of other incidental amendments to the TSA to improve its workability.

**Amendments to the definition of 'terrorist act'**

4. Section 5 of the TSA criminalises three categories of conduct: acts carried out against a specified terrorism convention,[4] terrorist acts committed in an armed conflict as defined in s 4(1),[5] or acts satisfying the requirements of s 5(2) and (3) of the TSA.[6]

5. Section 5 provides, insofar as relevant:

> (2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:
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> (a) to induce terror in a civilian population; or
>
> (b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.
>
> (3) The outcomes referred to in subsection (2) are—
>
> (a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act):
>
> (b) a serious risk to the health or safety of a population:
>
> (c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):
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> (d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:
>
> (e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.
>
> (4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it

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3 Offences under the Films, Videos, and Publications Classification Act 1993, ss 124(1), 127(4), 129(3), and 131A(1) are included as well as offences against s 390 of the Customs and Excise Act 2018. Conviction for any renders a person liable to imprisonment. See new s 8A of the TSA per Part 2, Subpart 2, Clause 45 of the Bill.

4 TSA 2002, s 5(1)(b).

5 TSA 2002, s 5(1)(c): conduct during and armed conflict that is consistent with international law applicable at the time remains excluded (ss(4)). But see: Alan Greene, 'Defining Terrorism: One Size Fits All' (2017) 66 int'l & Comp LQ 411 at 428-429: s 5(4) is silent as to conduct criminalised by dint of its association with a *former* terrorist organisation.

6 TSA 2002, s 5(1)(a).

occurs, in accordance with rules of international law applicable to the conflict.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person—

(a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or

(b) intends to cause an outcome specified in subsection (3).

6. The Bill amends s 5(2) and (3) in the following ways:

6.1 It replaces "for the purpose of" in s 5(2) with "one or more of the purposes that are or include"

6.2 It amends the *mens rea* requirement from an intention to induce "terror in a civilian population" to inducing "fear in a population", and from "unduly compel" to "coerce" a government or international organisation to act (or not act) in s 5(2)(a)-(b).

6.3 It replaces "infrastructure facility" in s 5(3)(d) with "critical infrastructure" and "devastate" with "cause major damage to" in s 5(3)(e).

7. The amendments set out in 7.1 and 7.3 are clarificatory and do not give rise to issues in relation to the Bill of Rights Act. The more significant changes are those set out at 7.2, above, which broaden the *mens rea* element of a terrorist act.

8. Section 5(2) provides that terrorist acts are those which are carried out carried out for the purpose of advancing an ideological, political, or religious cause. Insofar as the TSA criminalises acts carried out for one of those purposes, they may limit one of the following rights affirmed by the Bill of Rights Act:[7] freedom of expression (s 14); the right to manifest religion and belief (s 15); freedom of peaceful assembly (s 16); freedom of association (s 17).

9. Limitations on these rights may be justified under s 5 of the Bill of Rights Act, if they pursue the legitimate aim of preventing, deterring and punishing terrorist activity, in a way that is rationally connected with that aim and go no further than is necessary to achieve that aim.[8] In practice, this means that anti-terrorist legislation should criminalise those activities which are properly to be regarded as terrorist, without criminalising the protestor or political activist, or religious adherent whose actions may be disruptive or even dangerous but whose actions can be effectively and proportionately regulated by the criminal law in relation to criminal damage, public order or assault.

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7 There is no independent right to protest in the Bill of Rights Act but it is protected by ss 14 and 16: *Wadsworth v Auckland Council* [2013] NZHC 413, [2013] NZAR 430.

8 The right to protest, assembly and association are not absolute but must be balanced against other public interests and rights, including the right not be arbitrarily deprived of life. Articles 21 and 22 of the ICCPR, which are incorporated by ss 16 and 17 of BORA, may be limited where necessary to protect national security or public safety, public order, public health or morals or other's rights and freedoms of others.

*Amendments to s5(2)(a)*

10. The Bill changes the *mens rea* requirement of s 5(2)(a) from requiring an intention to induce "terror in a civilian population" to "fear in a population". The removal of the reference to a 'civilian' population is unproblematic, since a population will include civilians regardless of whether it also includes military personnel.

11. However, it is necessary to consider whether the change from 'terror' to 'fear' might capture those involved in civil unrest. For example, it might be argued that those who take part in widespread strikes or protests with the aim of causing significant disruption or damage to the economy or infrastructure might be said to intend to cause worry, alarm or even 'fear' in the population.

12. The policy justification that has been advanced for changing the intention to induce 'terror' to an intention to induce 'fear' is that it accurately reflect the underlying concern: an intention to cause more than 'intimidation' but less than 'terror'.[9] Further, it avoids the circuity of incorporating the offence itself into the definition of the offence.

13. We do not find it necessary to consider how well the founded these justifications are because, for the following reasons it is our opinion that the amendment will not give rise to a real risk that the activities of protestors or strikers will be criminalised under the TSA:

    13.1 The retention of the requirement that the person must not only intend to cause fear but also to bring about one of the outcomes specified in s 5(3) means that terrorists acts remain those in which the defendant intended to cause the types of significant death, injury or destruction that are associated with terrorism.

    13.2 Further protection against terrorist legislation being used against those simply exercising their rights of protest, expression or association is to be found in s 5(5) which provides that 'the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis' to infer a person carries out a specified act for the purposes outlined in subsection (2), or intending any of the outcomes in subsection (3).

*Amendment to s 5(2)(b)*

14. Although a requirement to intend mere compulsion of a government rather than the current intention to 'unduly compel' a government might arguably give rise to a greater risk that strikers or protestors might be caught by the legislation[10] we think the maintenance of the requirement that the person should intend one of the outcomes set out in s5(3) and the protections of s 5(5) ensure that the law cannot be improperly used.

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9 Coversheet (CT Leg) at p 18-19.

10 For example, it was be argued that the fuel protestors in the UK during the Blair lead Government of … sought to compel the government and endangered life by preventing ambulances from moving and risked the importation of medical supplies. Strikes by essential service workers, might also be accused of endangering life.

15. Finally, we note that there is no authoritative definition of terrorism in international law[11] but that following the amendments brought about by the Bill, New Zealand's definition would continue to be more prescriptive, than those adopted in the United States, Canada and United Kingdom, which have all survived constitutional challenge.[12]

16. The definition of 'terrorist act' is one of the key definitions in the TSA. It determines the ambit of several offences under the TSA and therefore whether they are consistent with the rights and freedoms affirmed by the Bill of Rights Act. Rather than individually consider the extent to which, following the amendments to the definition of terrorist Act, they are consistent with those rights and freedoms, we consider them once through the consideration of the implications of the amended definition of terrorist act.

17. We will not repeat that analysis when we consider the new offences created by the Bill but will instead then only address any potential inconsistency with any of the rights and freedoms affirmed by the Bill of Rights Act which are specific to those offences.

**Criminalising planning or preparation and extension of warrantless search powers**

18. It is our opinion that the new planning or preparation offence does not itself limit any of the rights or freedoms guaranteed by the Bill of Rights Act. However, as the Bill extends warrantless search and surveillance powers in the SSA to the new s 6B offence, we outline the offence below and then consider whether the extension of those powers under the SSA to this offence is consistent with the right to be secure against unreasonable search.

***Elements of planning or preparation offence – s 6B***

19. Clauses 7-9 of the Bill insert 6B into the TSA which creates an offence to plan or prepare to carry out a terrorist act, whether or not the act is carried out, providing the planning or preparation is too remote to constitute an attempt to carry out a terrorist act.

20. Section 6B(3)(c) acknowledges the reality that preparatory behaviour may occur before a decision of a specific target or attack has crystallised.[13] With the requirement for the prosecution to prove that a person planned or prepared to commit an act with the intention of carrying out a terrorist act as defined in s 5, the new offence guards against the possibility that conduct far removed from terrorist acts are criminalised.[14]

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11 *R v Gul (Mohammed)* [2013] UKSC 64 at [44] citing *Al-Sirri v Secretary of State for the Home Department (UN High Comm'r for Refugees intervening)* [2013] 1 AC 745 at [37]. For UK: Terrorism Act 2000, s 1. For Canada: Canadian Criminal Code RSC 1985 c. C-45, Part II.1, s 83.01(1). For US: United States Code, Part I, Title 18, Chapter 113B, s 2331(1) and (5).

12 This was noted in the 2001 vet to original bill: Terrorism (Bombings and Financing) Bill/ Terrorism Suppression Bill, dated 9/11/01. Both the UK and Canada use the lower threshold of "intimidating" the public and unlike the New Zealand definition are not expressly linked to an intention to cause violent harm: Terrorism Act 2000, s 1, 2(a) and (d) (United Kingdom); Canadian Criminal Code s 83.01(1)(b)(B) and (E) (Canada). See: *R v Khawaja* [2012] SCC 69, [2012] 3 SCR 355; *United States of America v Nadarajah* [2010] ONCA 859; *R v F* [2007] QB 960 (CA); *R v Gul (Mohammed)* [2014] AC 1260. Section 2331(1) and (5) of the US Criminal Code uses "intimidate or coerce" and does not contain a "motive" requirement: Title 18, Part I, Chapter 113B –Terrorism, s 2331.

13 Cabinet Paper (CT Leg) p 5 at [32].

14 See: A Cornford, 'Terrorist precursor offences: evaluating law and practice' (2020) 8 Crim. LR 663 at 665-671; *Ulhaq* [2016] EWCA Crim 2209 at [7], and *R v Dart (R v Iqbal)* [2014] EWCA Crim 2158 at [77]-[90], [120]-[124], [131] and [134] for the expansive conduct captured under the broader UK offence. But see in contrast: *R v S* [2020] NZHC 1710 at [37].

***Consistency of extension of powers of warrantless search and surveillance to the new offence of planning or preparation***

21. Sections 15-17 and 48 of the Search and Surveillance Act authorise constables to:[15]

    21.1 Enter and search a place without a warrant if they have reasonable grounds to suspect that an offence against s 6B(1) has, is or is about to be committed and evidential material relating to the offence in that place will be 'destroyed, damaged or altered' if entry is delayed to get a warrant (s 15);

    21.2 Search a person without a warrant in a public place if there are reasonable grounds to believe the person is "in possession of evidential material relating to … and offence against s 6B(1)" (s 16);

    21.3 Enter and search a vehicle that in a public place if there are reasonable grounds to believe that 'evidential material relating to an … offence against section 6B(1)' is on or in the vehicle (s 17); and

    21.4 Use a surveillance device for a period not exceeding 48 hours if obtaining a warrant is impracticable, the officer would be entitled to apply for a warrant and has reasonable grounds to suspect an offence against s 6B(1) has, is or is about to be committed, and surveillance would obtain evidential material in relation to that offence (s 48).

22. In 2008 and 2009, we advised the then Attorney-General, that the SSA was consistent with the right to be free from unreasonable search and seizure.[16] We reached this conclusion on the basis that whilst the SSA authorised considerable intrusion into privacy, such intrusion was justified given the serious harm the powers are intended to prevent, and the safeguards within the Act.[17]

23. Applying those considerations to the extension of powers under the SSA to the new offence of planning and preparation:

    23.1 The powers may only be exercised where the *actus reus* and *mens rea* elements of s 6B are suspected. As "planning to plan" is excluded from the *actus reus*, the application of ss 15-17 and 48 is unlikely to be warranted for conduct that is not sufficiently proximate to the commission of a terrorist act.

    23.2 The requirements in the SSA must also be met: there must be reasonable grounds to believe that evidential material related to an offence against s 6B may be obtained, and for ss 15 and 48, there must also be reasonable grounds to suspect an offence against s 6B 'has been, is being or is about to be committed'. In addition, there must be reasonable grounds to believe both that the *conduct* is planning or preparatory and is *for the purpose and with the*

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15 Part 2, Subpart 1, Clauses 37 to 41 amending ss 15-17 and 48 of the SSA to include reference to s 6B(1) TSA (amended).

16 The Attorney-General's reports on the Search and Surveillance Bill dated 17 November 2008 and 12 June 2009.

17 There has been no consideration of the equivalent provision in the United Kingdom (s 43 of TA 2000). The legality of warrantless searches has been considered in the context of the random stop and search powers under ss 44-46 which did not contain a 'reasonable suspicion' requirement. The ECHR held the absence of a 'reasonable suspicion' requirement contributed to the unlawfulness of the regime: *Beghal v United Kingdom* (28 February 2019) App. No. 4755/16 at [109]; *Gillian & Quinton v United Kingdom* (12 January 2010) App. No. 4158/05.

*intention of* planning or preparing to carry out a terrorist act per s 5(2)-(3). "Reasonable" is an objective standard.[18] Personal suspicion will not suffice.

23.3 The special rules in relation to searching persons in s 125 of the SSA will apply.

23.4 If the powers are exercised unlawfully and the matter is prosecuted, s 30 Evidence Act 2006 protections will apply to exclude unlawfully obtained evidence.

24. We therefore consider that the risk of imminent violent harm which the extension of the powers are intended to guard against provide compelling justification and mean that the searches authorised by the extension are not unreasonable, and are consistent with s 21 Bill of Rights Act.[19]

**New weapons or combat training offence**

25. The Bill amends the TSA to expressly criminalise weapons and combat training for terrorist purposes. The Bill inserts s 13AA, which provides:[20]

> (1) A person commits an offence if the person—
>
> (a) provides or receives weapons or combat training; and
>
> (b) knows that the training is provided or received for 1 or both of the following purposes:
>
> (i) to carry out 1 or more terrorist acts (whether any or all of them is or are actually carried out or not):
>
> (ii) to enhance the ability of any entity to carry out, or to participate in the carrying out of, 1 or more terrorist acts (whether any or all of them is or are actually carried out or not).
>
> (2) In a prosecution for an offence against subsection (1), the prosecutor need not prove a specific target, location, date, or time for the 1 or more terrorist acts referred to in subsection (1)(b)(i) or (ii) …

26. Since either providing or receiving weapons training is something that must be undertaken with others, it may be that the offence limits the right to freedom of association, affirmed by s 17 of the Bill of Rights Act, as broadly interpreted in *Borrowdale v Director General of Health*.[21] However, the offence requires the person to knowledge that the training was provided or received to carry out a terrorist act or to enhance the ability to participate in or carry out a terrorist act as defined by s 5 of the TSA. Therefore, the limitation is justified under s 5 of the Bill of Rights Act on the

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18 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [213]; *R v Sanders* [1994] 3 NZLR 450 (CA) at 461; *McVeigh v Police* [2013] NZHC 1350 at [28]; Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [3.8].

19 Cabinet Paper (CT Leg) p 5-6 at [33]-[39].

20 Clause 15 of the Bill.

21 [2020] NZCH 2090.

basis that it pursues the legitimate aim of preventing terrorism in a rational and proportionate way.[22]

**Amendment to financing and material support offence (ss 8 and 10)**

27. The Bill amends ss 8 and 10 to criminalise the financing and provision of material support for terrorism (s 8) and making property and material support available to designated terrorist entities (s 10).[23] It also inserts a definition of 'material support' in s 4 which includes giving advice, services, skills, accommodation, equipment, or knowledge.[24]

28. Support may be provided directly or indirectly but must be wilful, without lawful justification or reasonable excuse and in the case of s 8, done with the intention that (or knowing or being reckless as to whether) the material support be used by an entity or person to carry out a terrorist act. With respect to s 10, the defendant must have knowledge or be reckless as to whether the entity is a designated terrorist entity.

29. The criminalisation of support for those engaged in terrorism or to designated terrorist entities may limit freedom of expression (s 14 of the Bill of Rights Act), the manifestation of religion and belief (s 15) and freedom of association (s 17) insofar as it may criminalise support for political, religious or ideological causes, providing humanitarian support or material support for family members.[25]

30. However, we consider that these limitations are justified under s 5 of the Bill of Rights Act, in that it pursues the legitimate aim of preventing and punishing terrorist activity. The means of criminalising support for terrorism and designated terrorist organisations is rationally connected to that aim. Finally, it does so in a way that is proportionate in that only specific types of support and finance are criminalised. It does so in the following ways:

    30.1 It must be proved that the individual collected funds or provided material support wilfully or recklessly, and intending the support be used by an entity that the person knows carries out or participates in terrorist acts, as defined by s 5 of the TSA.

    30.2 The offences incorporate the definition of 'material support' in s 4(1) which excludes that support which 'does or may do more than only satisfy essential human needs of those to whom, or for whose benefit it is provided, (A) in good faith for genuine humanitarian reasons; and (B) impartially or neutrally as between people who have those needs'.[26]

    30.3 Sections 8 and 10 provide for a defence of reasonable excuse or lawful justification.[27] Section 10(3) gives an example of what may be a 'reasonable excuse' for the purposes of that offence: it is where property is made available

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22 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [106]; *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 at [56] (re s 14); *Taueki v Police* [2013] NZHC 1710 at [21].

23 Clauses 10 and 13 of the Bill.

24 Clause 5(7) of the Bill.

25 See above n 23.

26 Counter-Terrorism Legislation Bill, clause 5 (inserting definition of 'material support'), see extract above.

27 See new s 8(1)(c), (1A)(c), (2A)(c), (2B)(c) and s 10(1)(b) and (3) of the Bill.

to individuals or their dependants designated under the TSA and does no more than satisfy essential human needs of those persons.

31. Finally, we note that challenges in the UK, US and Canada to offences cast in similar terms, have been unsuccessful either because they do not engage those countries' domestic human rights protections (given the prescriptive *mens rea* requirements), or because the limitations on these rights, where engaged, are justified when balanced against the harm caused by terrorist activities.[28]

**The new terrorist travel offence**

32. Section 13F of the Bill creates a new offence criminalising travelling, to, from or via New Zealand with an intention (held at any point) to commit a terrorist offence. Section 13F *prima facie* limits the right to freedom of movement that is affirmed by s 18 of the Bill of Rights Act as it may criminalise travelling within New Zealand, entering New Zealand or leaving New Zealand, all of which are protected under s 18(1) to (3).

33. However, we consider the limit is justified under s 5 of the Bill of Rights Act as a measure that rationally and proportionately pursues the legitimate aim of deterring and punishing terrorism.

34. As with other offences in the TSA, the *actus reus* and *mens rea* requirements of the offence mean that innocent travel is unlikely to be captured or deterred.[29] We consider that, to the extent that the provision deters individuals who intend to carry out a terrorist act, the limit is justified and proportionate, since deterrence in that context is consistent with the purposes of the TSA: to protect individuals from harm arising from terrorism, in all its permutations, wherever they occur.[30]

35. To the extent to which travel takes place for a religious, social, cultural or political purpose, it may also be said that the rights to freedom of expression, religion, association or protest may be limited. The offence carries a power of arrest and it may be that this power is exercised in a manner that limits travel and therefore limits the exercise of these rights. As long as the powers of arrest and any subsequent exercise of the power to prosecute are properly exercised, such limitations would be justified under s 5 of the Bill of Rights Act for the same reasons that the offence itself represents a justified limitation on freedom of movement.

**Control Orders Act extension**

36. The Bill extends the Control Orders regime to individuals who commit, are convicted of and given a determinate sentence of imprisonment for a terrorism-related offence,[31]

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[28] Canada: *R v Khawaja* (2012) SCC 69. For US: *Holder v Humanitarian Law Project* 130 SCt 2705; *United States v Afshari* (14 April 2009) 635 F.Supp.2d 1110; *United States v Taleb-Jedi* (23 July 2008) 566 F.Supp.2d 157; *United States v Warsame* (12 March 2008) 537 F.Supp.2d 1005; *States v Al-Kassar* (29 April 2014) 660 F.3d 108. For UK: *R v Choudary* [2018] 1 WLR 695.

[29] We have been unable to find overseas jurisprudence assessing rights consistency of terrorist travel offences but note: under s 83.18(1) of the Criminal Code: *R c Habib* 2017 QCCA 1788, 2017 CarswellQue 10109 (leave to appeal was dismissed: *c R* 2019 CarswellQue 10760, 2019 QCCA 2044; *R. v. Hersi* 2014 ONSC 4414, [2014] OJ No. 3564 (leave to appeal the conviction on constitutional and human rights grounds has been filed in the SCC.

[30] Agreeing with the comments of Sir Judge P in: *R v F* [2007] EWCA Crim 243; [2007] QB 960 at [26]-[30].

[31] 'Terrorism related offence' is defined in s 8A (newly inserted) to include offences against the TSA, whether committed in or outside of New Zealand, or offences against ss 124(1), 127(4), 129(3) or 131A(1) of the Films, Videos and Publications Act 1993 or s 390 of the Customs and Excise Act 2018 if it involves a publication that is objectionable on the basis it promotes terrorism

and who have completed that sentence ("relevant persons").[32] The Bill amends the definitions in Terrorist Suppression (Control Orders) Act 2019 (the Control Orders Act) to include these relevant persons and inserts ss 16A and 16B to provide for interim and final orders for this new category of people.

37. These amendments aim to protect the public from those who continue to pose a risk of engaging in terrorist activities upon release from a determinate terrorism-related sentence, and also to extend rehabilitative and reintegrative support to these offenders, so their risk may decrease.[33]

**Our previous advice on the Control Orders Act**

38. On the 7 October 2019 this office advised you on whether the Terrorism Suppression (Control Orders) Bill was consistent with the rights and freedoms affirmed by the Bill of Rights Act. We advised that:

    38.1 A control order need not necessarily involve detention and would not, therefore be inconsistent with the right to be free from arbitrary detention within the meaning of s 22 of the Bill of Rights Act;

    38.2 The procedure for making a control order was not inconsistent with the right to natural justice that is affirmed by s 27(1); and

    38.3 Other criminal procedural protection rights, such as the presumption of innocence, the prohibition on retroactive penalties and the prohibition on double jeopardy did not apply because, on balance control orders were to be regarded as civil and did not involve the imposition of a criminal penalty. This view was reached on the basis that the entry point to the regime was "not necessarily a prior conviction, sentence, or even proof to the criminal standard that conduct occurred" but engaging in terrorism activities overseas, terrorist travel, residence/visa or passport revocation based on terrorism or having been subject to a control order overseas, the regime did not necessarily require proof to the criminal standard, and the vet found its aims were predominantly preventative.[34]

**The relevance of that advice to the extension of control orders to those who have been convicted of certain offences**

39. The conclusions set out above at paragraphs 38.1 and 2, above, apply to the extension of control orders to those who have been convicted of certain offences. However, it is necessary to consider again the question of whether the orders involve the imposition of a criminal penalty, in light of the following:

    39.1 Our conclusion that the imposition of a control order did not involve the imposition of a criminal penalty, was reached, in part, on the basis that the gateway for making a control order was not a criminal conviction. However,

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32 Impact Summary: Extended Control Orders, p 3 [hereafter: 'Impact Summary (ECO)']; Clause 5 of Part 2, Subpart 2 and 3 of the Bill inserts new definitions for 'relevant person' (has the meaning in s 6(1AA)), 'determinate sentence', 'offender relevant person', 'release conditions', 'returning relevant person', 'statutory release date' and providing that a 'terrorism-related New Zealand offence' has the meaning provided in s 8A. It also inserts new sections 8A, 16A and 16B.

33 Section 3 of the Control Orders Act.

34 Terrorism Suppression (Control Orders) Bill (Version 22) advice, 7 October 2019, at [21]-[26].

the Bill extends control orders to those who have been convicted of certain criminal offences.

39.2 Since we provided our advice the Supreme Court released its judgment in *D v NZ Police*[35] in which it found that a requirement to register on the Child sex Offender Register was a penalty and the High Court released its judgment in *Chisnall* which considered what constitutes a "penalty" for the purposes of the Bill of Rights Act, in relation to extended supervision orders (ESOs) and public protection orders (PPOs).[36]

**Whether control orders imposed on a person convicted of an offence involve the imposition of a penalty**

40. It is clear from the approach of the Supreme Court in *D v NZ Police*, and indeed the earlier Court of Appeal decision in *Belcher v Chief Executive of Department of Corrections*,[37] that the fact that a measure is aimed at protecting the public from future harm does not mean that it may not be a penalty, particularly where the measure involves a restriction on liberty. However, in *D v NZ Police* the Court was considering the requirement to register on the Child Sex Offender Register was a part of the sentencing process, imposed by the sentencing Judge on the basis of evidence presented at the sentencing hearing.

41. In contrast, a control order is imposed following a separate procedure, quite distinct from the sentencing process. To this extent control orders are akin to PSOs and ESOs and the approach of the Court in *Chisnall* must be considered.

42. In *Chisnall* the Court held that whether an order amounted to a criminal penalty would depend on whether the order is: imposed following a conviction; forms part of an arsenal of sanctions imposed in the furtherance of sentencing purposes and principles and/or has a significant impact on the liberty of the person; is punitive or partially punitive; is imposed by a criminal process; is given effect to in a prison or prison-like institution or may result in imprisonment; non-therapeutic in nature; and imposes severe conditions.

43. The Court examined the respective features of the ESO and PPO regimes and concluded that PPOs were not presumptively a penalty (although that did not exclude the possibility that in certain cases a PPO might operate like a penalty) but that ESOs were penalties.[38]

44. It is therefore necessary to consider whether, in the light of the approach in Chisnall, the imposition of a control order necessarily amounts to a penalty.

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35 [2021] NZCS 2, at paras. [57]-[59].

36 *Chisnall v Chief Executive, Department of Corrections* [2019] NZHC 3126.

37 [2007] 1 NZLR 507 (CA).

38 The Court went on to find that the imposition of an ESO involved the imposition of a second penalty and involved a limitation on the prohibition on double jeopardy under s 26 (2) of the Bill of Rights Act. The Court went on to find that although a limitation on s 26(2) might be demonstrably justified under s5 of the Bill of Rights Act, it had not been demonstrably justified in respect of the ESO regime.

45. In our view a control order does not necessarily amount to a penalty, notwithstanding that the gateway for the imposition of orders may be a criminal conviction. We reach this conclusion for the following reasons:

45.1 Although the commission of an offence is a necessary condition for the making of an order, it is not a sufficient condition. The Court must also be satisfied, on the evidence before it, that the person poses a real risk of engaging in terrorism-related activities and that the making of an order and the particular conditions of the order are necessary and appropriate to protect the public from terrorism and prevent the engagement of terrorist activities in a country.[39]

45.2 The Court may only make a control order if and when the Commissioner of Police makes an application.

45.3 It is not imposed through the criminal proceedings but, like a PPO and unlike an ESO, through civil proceedings.

45.4 The nature of the conditions that may be imposed vary greatly from those which involve minimal impact (for example, the Court may prohibit possessing domestic chemicals above a certain quantity), to those which may have a significant restrictions on liberty (to remain at a specified address for no more than 12 hours in any 24-hour period) and from those which are punitive (a requirement for electronic monitoring) to those which are therapeutic (a requirement that the person undertake a drug and alcohol assessment).[40] As a result, an order need not necessarily be severe nor have an impact on the liberty of the person nor be mainly punitive in nature, although it may be all three.

45.5 An order may not involve detention in prison or in a prison-like institution. In contrast both the ESO and PPO involve detention.[41]

45.6 A control order may only last for a maximum of two years (including the duration of any interim order) it may be renewed by the Court but not more than twice.[42] In contrast an ESO is imposed for an initial period of 10 years, with a periodic 5 year review thereafter, whilst a PPO is indefinite with periodic 5 year reviews.

45.7 A court seized of an application for a control order will need to consider whether the proposed terms mean that it would be a penalty and therefore whether, it would be consistent with the criminal procedural rights as well as the other rights and freedoms that are affirmed by the Bill of Rights Act.[43] Indeed, the Control Orders Act provides that the Court must consider

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39 Section 12 of the Control Orders Act

40 Section 17 of the Control Orders Act sets out the nature of the conditions which may be imposed.

41 It is right to say that a breach of an order is itself a criminal offence and may lead to the Court imposition of a sentence of imprisonment not exceeding 1 year. However, as the House of Lords held in *Clingham v Royal Borough of Kensington and Chelsea and others*, the fact that the breach of an order was an offence did not necessarily mean that the order was itself a criminal penalty. In that case the House was concerned with anti-social behaviour orders which imposed restrictions on the liberty of those proved to have engaged in behaviour likely to have caused harassment alarm or distress. It found that anti-social behaviour orders were civil orders notwithstanding the fact that it would be a criminal offence to breach them.

42 Sections 26 and 27 of the Control Orders Act.

43 Section 3 of the Bill of Rights Act.

whether the proposed requirements of the order are justified limits on rights and freedoms in the Bill of Rights Act.[44]

46. For these reasons it is our view that whether a control order amounts to a penalty will depend on its terms. A control order that involved the imposition of significant restrictions on the liberty of the person and other conditions which are more commonly associated with the criminal justice process (such as residential restrictions, electronic monitoring, and non-association conditions) for a significant amount of time may well be regarded as a penalty. This means that if a Court seized of an application for a control order, is of the view that the conditions sought would render it a penalty, the Court would need to go on to consider whether it limited any of the criminal procedural rights affirmed by the Bill of Rights Act and, if so, whether any such limitation was justified.

47. However, we do not believe that the extension of the power to impose control orders to those who have been convicted of certain criminal offences necessarily involves the imposition of a penalty.

48. We note that that this analysis is based upon *Chisnall,* which is subject to appeal.

**In the event that a control order is a penalty, would it be inconsistent with the rights and freedoms affirmed by the Bill of Rights Act**

49. Because the extension of control orders is prospective,[45] it does not limit the right to be free from retrospective punishment under s 25(g) or s 26(1). Because it does not involve the determination of a charge, other procedural protections affirmed by s 25 are not engaged. However, if the imposition of an order amounts to a penalty then it amounts to a second penalty and would limit the right to be free from double jeopardy that is affirmed by s 26(2). It would be necessary to go on to consider whether this limitation might be justified under s 5 of the Bill of Rights Act.

50. We have not been provided with material that could lead us to conclude that the limitation is justified because we have not been provided with material that would explain why it is necessary to address the risks posed by certain defendants through a control order regime rather than building those protections into the sentencing process. However, in the event that a Court was seized with an application for a control order that would amount to a second penalty, it would consider whether the limitation on the right to be free from double jeopardy was justified in that particular case.

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[44] Section 12(3)(b) of the Control Orders Act. Section 17 of the Control Order Act sets out the conditions which may be imposed in making an order. Some of those conditions may limit other rights in the Bill of Rights Act, including freedom of association, freedom of movement and freedom of expression. V However, the requirement that the Court give effect to the rights and freedoms of the Bill of Rights Act, means that any limitation on those rights must be justified within the meaning of s 5.

[45] Part 2, Subpart 2, Clause 44 inserting s 6(5) which provides that s 6 only applies to those who "on or after the commencement date of the [the Act] *committed, and was convicted of,* a terrorism offence in New Zealand" (emphasis added), or was sentenced "*on or after the commencement date"* for that offence in relation to a determinate sentence, and whose statutory release date is after the commencement date". The Transitional and Savings provision inserted as Schedule 1AA by in Schedule 1 provide that amendments made by the Amendment Act "apply only to conduct after the commencement" (see: ss 1 and 2).

**Conclusion on control orders**

51. For the reasons set out above, it is our opinion that control orders do not presumptively amount to a second penalty. It is therefore advice that the Bill does not limit the right of to be free from double jeopardy that is guaranteed by s 26(2).

**Review of this advice**

52. In accordance with Crown Law's policies, this advice has been peer reviewed by Genevieve Taylor, Crown Counsel.

Daniel Jones
Crown Counsel

**Noted / Approved / Not Approved**

**Encl**

Hon David Parker
**Attorney-General**
/ /2021