

Hon Kiri Allan
Minister of Justice

Proactive release – Documents relating to the Counter-Terrorism Acts (Designations and Control Orders Amendment Act 2023

Date of issue: 21 June 2023

The following documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

No.	Document	Comments
1	Counter-Terrorism Acts (Designations and Control Orders) Amendment Bill 2022: Approval for Introduction <i>Cabinet Paper</i> Ministry of Justice 30 September 2022	No information has been withheld. This paper was originally classified as Restricted – Legally Privileged, but has been declassified.
2	Cabinet Decision [CAB-22-MIN-0430] <i>Cabinet minute</i> Cabinet Office <i>Meeting date: 3 October 2022</i>	No information has been withheld. This decision was originally classified as Restricted – Legally Privileged, but has been declassified.

No.	Document	Comments
3.	Urgent Amendments to the Designations Scheme of the Terrorism Suppression Act 2002 <i>Cabinet Paper</i> Ministry of Justice 29 July 2022	<p>Some information has been withheld in accordance with the following sections of the OIA:</p> <ul style="list-style-type: none"> • S 6(a) as the making available of that information would be likely to prejudice the national security of New Zealand • s6(c) as the making available of that information would likely to prejudice the maintenance of the law. • S 9(2)(a) to protect the privacy of natural persons. • s9(2)(f)(iv) to protect the confidentiality of advice tendered by Ministers of the Crown and Officials. • s9(2)(g)(i) to maintain the effective conduct of public affairs through the free and frank expressions of opinions. • S9(2)(h) to protect legal professional privilege. <p>This paper was originally classified as Restricted – Legally Privileged, but has been declassified, with the exception of Appendix 2 (which is withheld in full under s 9(2)(h)).</p>
4	Cabinet Social Wellbeing Committee Decision [SWC-22-MIN-0143] <i>Cabinet minute</i> Cabinet Office <i>Meeting date: 3 August 2022</i>	<p>Some information has been withheld in accordance with the following sections of the OIA:</p> <ul style="list-style-type: none"> • section 9(2)(a) to protect the privacy of natural persons. <p>This decision was originally classified as Restricted – Legally Privileged, but has been declassified.</p>
6	Options for an extended control orders scheme <i>Cabinet Paper</i> Ministry of Justice	<p>No information has been withheld.</p> <p>This decision was originally classified as Restricted, but has been declassified.</p>
7	Cabinet External Relations and Security Decision [ERS-21-MIN-0048] <i>Cabinet minute</i> Cabinet Office <i>Meeting date: 14 December 2021</i>	<p>No information has been withheld.</p> <p>This decision was originally classified as Restricted, but has been declassified.</p>

[Restricted – Legally Privileged]

Office of the Minister of Justice

Cabinet Legislation Committee

Counter-Terrorism Acts (Designations and Control Orders) Amendment Bill 2022: Approval for Introduction

Proposal

- 1 This paper seeks approval to introduce the Counter-Terrorism Acts (Designations and Control Orders) Amendment Bill 2022 (**the Bill**).

Policy

- 2 The Bill's purpose is to clarify and strengthen New Zealand's counter-terrorism legislation by ensuring that designation and control order provisions apply effectively. It amends two Acts:
 - 2.1 the Terrorism Suppression Act 2002 (**TSA**) [SWC-22-MIN-0143; CAB-22-MIN-0299 refer]; and
 - 2.2 the Terrorism Suppression (Control Orders) Act 2019 (**TSCOA**) [ERS-21-MIN-0048; CAB-21-MIN-0539 refer].
- 3 The Bill is one of many efforts to improve legislation in response to issues raised by the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Masjidain on 15 March 2019 (**Royal Commission**).

TSA amendments

The Bill clarifies how the designations scheme of the TSA applies to designated persons

- 4 The TSA's designations scheme provides a framework to prevent further terrorist acts. Under the scheme, the Prime Minister is empowered to designate a terrorist entity if they reasonably believe the entity has carried out or participated in the carrying out of a terrorist act. Once designated, the entity is prevented from supporting terrorism through restrictions on their use of personal finances and property, and it is a criminal offence for third parties to make property or material support available to the designated entity.
- 5 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 designations scheme reflects this. The nature of terrorism has now evolved, with threats increasingly coming from radicalised individuals acting alone.

- 6 The current designations scheme does not specifically address the circumstance of a designated person who is imprisoned in New Zealand. This means there is ambiguity in how the scheme applies to such persons, in particular with respect to:
 - 6.1 the provisions enabling a designated entity to apply for revocation of their designation; and
 - 6.2 the circumstances in which a designation can be renewed instead of automatically expiring after three years.
- 7 The ambiguities mean there is risk that an imprisoned person's designation will be revoked or not kept in place while the person continues to pose a threat of committing terrorist acts or planning, supporting, or inciting terrorist acts by others. This outcome would not accord with the purpose of the TSA.
- 8 The amendments clarify the TSA's designations scheme to ensure it applies to people who are imprisoned in a manner that accords with the TSA's purpose. Specifically, the Bill amends the TSA so that, in the case of a designated person who is imprisoned:
 - 8.1 while the person is imprisoned, no application for revocation of the designation can be made (by the entity or by a third party) 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 (**revocation application**);
 - 8.2 expiry of the designation is paused while the person is imprisoned;
 - 8.3 while the person is imprisoned, the Prime Minister must review every three years whether the designation is no longer justified; and
 - 8.4 in carrying out the review, the Prime Minister may decide a designation is no longer justified only if satisfied that none of its effects is necessary or desirable to prevent or suppress terrorism.
- 9 The requirement for the Prime Minister to periodically review whether the designation is no longer justified provides an important safeguard to ensure that, consistent with the scheme of the TSA, designations are a preventative mechanism to be maintained only in order to address a threat, not in perpetuity. The "no longer justified" test differs from the test for renewing designations (which requires the Prime Minister to be satisfied that the grounds for imposing a designation continue to be met) because the standard grounds are not an accurate measure of ongoing threat with respect to designated and imprisoned people.
- 10 The amendments do not impact the application of the TSA's current designation scheme to designated entities that are not imprisoned.

The amendments apply retrospectively

- 11 The Bill's amendments have a retrospect effect on rights and freedoms in three ways:
 - 11.1 The amendments apply to designations of terrorist entities that are in force when the Bill comes into force.
 - 11.2 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. This means that a revocation application that relates to a designated entity who is imprisoned and that is 'live' at the time the Bill comes into force can be refused or not decided.
 - 11.3 Any decision of the Prime Minister to refuse a revocation application that was made before the Bill comes into force is validated. This means that such a decision is valid after the Bill comes into force, even it was previously invalid. For clarity, this provision 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 is passed.
- 12 I consider that these retrospective effects are appropriate according to the guidelines of the Legislation Design and Advisory Committee, which state that retrospective legislation might be appropriate if it is intended to address a matter that is essential to public safety. If the Bill did not have the retrospective effects set out above, the ambiguities in the current law could lead to a designation being revoked despite the designation continuing to prevent a person from involving themselves in terrorism. This outcome would be inconsistent with the TSA's purpose of suppressing terrorism.
- 13 The transitional provisions have been drafted as narrowly as possible to ensure the public safety risk is addressed. With respect to the validating provision, officials considered whether the Bill should provide a decision is validated only if it would have been valid if made under the new law. However, this approach would have the same effect as a simple validation and would not be as transparent. While the validation of past decisions is rare, I consider there would be real and inappropriate consequences of not doing so here: a successful review of a decision to refuse a revocation application could raise a material threat to public safety.

TSCOA amendments

Cabinet agreed to a package of amendments to the control orders regime following the New Lynn supermarket attack in September 2021

- 14 Control orders are civil orders which are intended to prevent high risk individuals from further engaging in further terrorism-related activities through the imposition of appropriate restrictions. These include, for example, regular report-ins with Police, electronic monitoring, and curfews, depending on the risks that the individual presents.

- 15 The control order regime strikes a balance between the need to keep the public safe and individual rights. This balance was carefully considered by the Government when control orders were first introduced in December 2019 to address high risk arrivals to New Zealand, and in October 2021 when the regime was expanded to domestic offenders with relevant criminal convictions.
- 16 Following the September 2021 New Lynn attack, Cabinet agreed to make the following targeted changes to improve the control orders regime and to pick up on some of the lessons learned so far from the granting of New Zealand's first and only control order:
 - 16.1 providing for a broader range of objectionable publication offences to satisfy the precursor offence requirements for control order eligibility;
 - 16.2 expanding the eligibility criteria to include people sentenced to community sentences (currently it is limited to sentences of imprisonment), and allowing sentence and control order conditions to exist concurrently for these offenders to ensure consistency of risk management;
 - 16.3 allowing for greater judicial discretion in the setting of control order restrictions to ensure that they can be more closely tailored to risk; and
 - 16.4 making 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 appropriately managed.
- 17 The control order regime has the ability for the relevant person to be electronically monitored. These proposed amendments provide an opportunity to update the provisions relating to electronic monitoring to ensure they are workable in a similar way to other electronic monitoring provisions across the statute book.

Impact analysis

TSA amendments

- 18 A Regulatory Impact Statement was prepared in accordance with the necessary requirements and was submitted at the time the Cabinet Social Wellbeing Committee approved the policy relating to the amendments to the designations scheme of the Terrorism Suppression Act 2002 [SWC-22-MIN-0143 refers]. The RIS was assessed as partially meeting the Quality Assurance criteria.

TSCOA amendments

- 19 A Regulatory Impact Statement (RIS) was prepared in accordance with the necessary requirements and was submitted at the time ERS approved the policy relating to the amendments to the control orders regime [ERS-21-MIN-

0048 refers]. The RIS was assessed as partially meeting the Quality Assurance criteria.

Compliance

- 20 This Bill complies with each of the following:
- 20.1 the principles of the Treaty of Waitangi;
 - 20.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 (**NZBORA**) and the Human Rights Act 1993. However, the Bill limits some rights and freedoms contained in the NZBORA, as addressed below;
 - 20.3 the disclosure statement requirements. A disclosure statement has been prepared and is attached to this paper;
 - 20.4 the principles and guidelines set out in the Privacy Act 2020;
 - 20.5 relevant international standards and obligations;
 - 20.6 the Legislation Guidelines (2018 edition). However, as noted above, the amendments to the TSA apply retrospectively.

Human rights

- 21 The Crown Law Office has provided the following advice on the human rights implications of the Bill, concluding that any limitations on rights and freedoms contained in NZBORA appear to be justified.

TSA amendments

- 22 Designation as a terrorist entity primarily affects the entity's rights in respect of property and reputation, which are not guaranteed by NZBORA. Designation also limits the NZBORA-guaranteed rights of freedom of association and expression (through the isolation that designation causes). To the extent that such limits are caused they are demonstrably justified by the need for effective measures to prevent terrorism.
- 23 The amendments proposed by this Bill do not increase the limits on NZBORA-guaranteed rights, but they will prolong their effect while the entity is imprisoned. To be justified there must be a mechanism for an unjustified designation to be brought to an end. Such a mechanism is provided for in the Bill: although the ability to challenge a designation is removed while the designated entity is in prison, the Prime Minister will be obliged to conduct three yearly reviews and retains the power to revoke a designation of her own motion, a power which must be exercised consistently with NZBORA.
- 24 Although the amendments with respect to revocation applications will have retrospective effect, they are civil rather than criminal so the retrospectivity does not engage the NZBORA. To the extent that a decision made by the

Prime Minister to refuse a revocation application prior to the amendment and steps taken in consequence of those decisions are validated, they are put beyond legal challenge, but the requirements of natural justice guaranteed by section 27 of the NZBORA are procedural and do not confer any immunity from the substantive law being changed by Parliament.

TSCOA amendments

- 25 While the conditions of any control order are for a Judge to determine, they can and usually will impose substantial limits on the exercise of freedoms of movement, peaceful assembly, association and expression. As the maximum duration of any curfew/residence condition is 12 hours it is unlikely to be found to amount to a detention, but it is a very significant limit on freedom of movement. The justification for limiting these freedoms is based upon the pressing social objective of enabling the Police to prevent acts of terrorism, and to reassure the public that any person known to pose such a risk is being monitored by the authorities.
- 26 The amendments will expand the qualifying criteria for a control order but the decision whether to make such an order and impose the limitation on the freedoms of the subject remains a judicial decision, dependent on the requisite degree of risk being established. While there are marginal increments to the limitations on rights caused by designations and control orders, they appear to be justified.

Consultation

Consultation on the policy proposals

- 27 The following departments have been involved in the review of counter-terrorism legislation and consulted in the preparation for the TSA (designations) Cabinet paper: Department of the Prime Minister and Cabinet, Ministry of Foreign Affairs and Trade, New Zealand Police, Ministry of Business, Innovation and Employment (Immigration), Crown Law, the Department of Corrections.
- 28 The following departments were consulted in the preparation of the TSCOA (control orders) Cabinet paper: New Zealand Police, Department of Corrections, Department of Prime Minister and Cabinet, Crown Law Office, New Zealand Security Intelligence Service, and Oranga Tamariki. The Ministry of Justice also undertook high-level consultation with the Ministerial Advisory Group Kāpuia.

Consultation on the Bill

- 29 The following departments were consulted in the preparation of the Bill (in whole or in part): New Zealand Police, Department of Corrections, Department of Prime Minister and Cabinet, Oranga Tamariki, Crown Law Office. The Legislation Design and Advisory Committee was also consulted.

Binding on the Crown

30 The Acts amended by the Bill are already binding on the Crown.

Creating new agencies or amending law relating to existing agencies

31 The Bill does not create any new agencies.

32 The Bill extends the statutory authority of the Department of Corrections to electronically monitor individuals who are subject to electronic monitoring as a condition of an applicable control order.

Allocation of decision-making powers

33 The Bill does not affect the current allocation of decision-making powers between the executive, the courts, and tribunals.

Associated regulations

34 No regulations are required to bring the Bill into operation.

Other instruments

35 The Bill does not affect any other instruments.

Definition of Minister/department

36 The Bill does not contain a definition of a Minister or a department.

Commencement of legislation

37 The Bill will come into force on the day after the date of Royal assent.

Parliamentary stages

38 The Bill should be introduced as soon as possible after Cabinet approval.

39 I propose that the Bill be referred to the Justice Committee for consideration for four months.

40 The Bill should be passed by May 2023.

Proactive Release

41 I propose to release this paper proactively after the Bill is introduced. I also intend to proactively release the relevant previous policy papers and associated minutes considered by Cabinet when the Bill is introduced.

42 The papers will be released with appropriate redactions under the Official Information Act 1982.

Recommendations

The Minister of Justice recommends that the Committee:

- 1 **note** that the Counter-Terrorism Acts (Designations and Control Orders) Amendment Bill 2022 holds a category 4 priority on the 2022 Legislation Programme meaning it is to be referred to a select committee in the year;
- 2 **note** that the Bill clarifies and strengthens New Zealand's counter-terrorism legislation by ensuring that designation and control order provisions apply effectively;
- 3 **approve** the Counter-Terrorism Acts (Designations and Control Orders) Amendment Bill 2022 for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 4 **agree** that the Bill be introduced as soon as possible after Cabinet approval;
- 5 **agree** that the government propose that the Bill be:
 - 5.1 referred to the Justice Committee for consideration for four months;
 - 5.2 enacted by May 2023.

Authorised for lodgement

Hon Kiri Allan
Minister of Justice



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Counter-Terrorism Acts (Designations and Control Orders) Amendment Bill: Approval for Introduction

Portfolio Justice

On 3 October 2022, following reference from the Cabinet Legislation Committee, Cabinet:

- 1 **noted** that the Counter-Terrorism Acts (Designations and Control Orders) Amendment Bill (the Bill) holds a category 4 priority on the 2022 Legislation Programme (to be referred to a select committee in 2022);
- 2 **noted** that the Bill clarifies and strengthens New Zealand's counter-terrorism legislation by ensuring that designation and control order provisions apply effectively;
- 3 **noted** that on 14 December 2021, the Cabinet External Relations and Security Committee agreed to extensions to the control order regime to include as eligible offences, those specified objectionable publication offences where the publication depicts acts of torture, the infliction of serious physical harm or acts of significant cruelty, or that represents members of a particular class as inherently inferior [ERS-21-MIN-0048, paragraph 4.1];
- 4 4.1 **rescinded** the decision referred to in paragraph 3 above; and instead
 4.2 **agreed** to extensions to the control order regime to include as eligible offences, those specified objectionable publication offences where the publication depicts acts of torture, the infliction of serious physical harm or acts of significant cruelty;
- 5 **approved** the Counter-Terrorism Acts (Designations and Control Orders) Amendment Bill [PCO 24881] for introduction, subject to:
 - 5.1 drafting to reflect the change described in paragraph 4 above;
 - 5.2 the final approval of the government caucus;
 - 5.3 sufficient support in the House of Representatives;
- 6 **agreed** that the Bill be introduced as soon as possible after Cabinet approval;

7 **agreed** that the government propose that the Bill be:

7.1 referred to the Justice committee for a four month consideration period;

7.2 enacted by May 2023.

Rachel Hayward
Acting Secretary of the Cabinet

[Restricted — Legally Privileged]

Office of the Prime Minister

Office of the Minister of Justice

Cabinet Social Wellbeing Committee

Urgent Amendments to the Designations Scheme of the Terrorism Suppression Act 2002

Proposal


- 1 This paper seeks agreement to amend the Terrorism Suppression Act 2002 (the TSA) to resolve immediate issues associated with expiry and revocation of terrorist designations of persons who are also imprisoned in New Zealand.

Relation to government priorities

- 2 This paper relates to a number of government priorities, including:
 - 2.1 the response to the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 (Royal Commission);
 - 2.2 the national security objective of ensuring public safety; and
 - 2.3 the Government's commitment to the Christchurch Call to eliminate terrorist and violent extremist content online.

Executive Summary

- 3 The designation scheme of the TSA provides a framework to prevent further terrorist acts. The TSA provides the Prime Minister with power to designate a terrorist entity if they believe on reasonable grounds that the entity has carried out, or participated in, a terrorist act. Once designated, the entity is prevented from financing terrorism through restrictions on their use of personal finances and property.
- 4 The TSA was brought into force at a time when terrorism was primarily carried out by groups with a defined organisational hierarchy, and the structure of the current designation scheme in the TSA reflects this. The nature of terrorism has evolved internationally, with threats increasingly coming from radicalised individuals acting alone, and these changes are being reflected in New Zealand.
- 5 The designations scheme of the TSA does not specifically address the circumstance of a designated person being imprisoned in New Zealand. This means there is ambiguity in how the designations scheme should apply to such persons. Given the potentially devastating consequences of a terrorist attack, it is crucial that the TSA is clear about what powers the Prime Minister has in suppressing terrorism in the evolved global terrorism landscape.

- 6 Imprisonment alone is insufficient to prevent all terrorist acts. Designation may also be needed to prevent acts to plan, support, or incite terrorist attacks by others. If a designation was to expire or be revoked, an imprisoned person could use their resources to support terrorism, invest in other forms of terrorist financing, make their resources available for terrorist purposes, and receive support, including financial support, from others.
- 7 When a person is designated and imprisoned, the threshold for an application for revocation, and the threshold for renewal of the original designation's grounds in section 22, are not accurate measures of ongoing threat. In this situation, it is the restrictions placed on a person through designation and imprisonment that cause these thresholds to be met or not, rather than the entity's intention to be involved in terrorism. As a result, an entity may be so restricted by imprisonment and designation that they may have their designation revoked, or not meet the grounds under section 34 of the TSA for their designation to be kept in place.
- 8 There are two ways in which this could occur:
- 8.1 Any entity (or interested third party) can make an application for revocation of the designation at any time under section 34(3)(b) of the TSA. ^{Section 9(2)(h)}

- 8.2 Designation as a terrorist entity expires automatically after three years, unless renewed or revoked prior to the expiry date. Renewal requires that the Prime Minister be satisfied that 'there are still reasonable grounds as set out in section 22 for an entity to be designated'.
- 9 The individual who carried out the attack on Christchurch masjidain on 15 March 2019 ("the individual") has been designated and imprisoned on a life sentence. Their designation is due to expire in August 2023. It is crucial that the TSA is fit-for-purpose to deal with this situation before the designation expires, as imprisonment alone does not sufficiently prevent a person from being involved in terrorism.
- 10 We therefore propose amending the TSA so that, in the case of a designated person who is imprisoned:
- 10.1 the person cannot apply for a revocation under section 34(3)(b) while in prison;
- 10.2 expiry of the designation is paused while the person is in prison. Throughout the length of imprisonment, the Prime Minister must also periodically review whether the designation is no longer justified; and
- 10.3 in carrying out this review, the Prime Minister may consider any relevant information, must consider any information provided by the designated and imprisoned person (or certain third parties), and may weigh these pieces of information as they consider reasonable.

Background

- 11 The designation scheme of the TSA provides a framework to help prevent terrorist acts by identified terrorist entities (which can be individuals or groups). It is a key part of New Zealand's contribution to international efforts to combat terrorism financing and terrorism harm. Under section 22(1) of the TSA, "the Prime Minister may designate an entity as a terrorist entity ... if the Prime Minister believes on reasonable grounds that the entity has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts."
- 12 The designations scheme does not specifically address the circumstance of a designated person being imprisoned in New Zealand. This means there is ambiguity in how the designations scheme should apply to such persons.
- 13 A designation freezes the assets of the designated entity and makes it a criminal offence to participate in or support the activities of any designated entity. This includes preventing third parties from dealing with the property of the designated entity on their behalf or making property or financial services available to the designated entity.
- 14 Under section 35 of the TSA a designation expires after three years, unless the Prime Minister renews the designation. To renew the designation, the grounds of section 22 of the TSA must continue to be met.
- 15 At any time, a designated entity or certain third parties with an interest in the designation may apply for revocation of their designation based upon fulfilment of at least one of two grounds set out in section 34(3)(a) and (b) of the TSA:
 - 15.1 that the entity concerned does not satisfy the test of having knowingly carried out, or knowingly participated in the carrying out of, a terrorist act; and/or
 - 15.2 that the entity concerned is no longer involved in any way in acts of the kind that made, or that would make, the entity eligible for designation.
- 16 Third parties that may apply for revocation of a designation include those that own, control, or with interests in property subject to the restrictions applied as a result of the designation or that have an especially close association with the designated entity.
- 17 The Ministry of Justice has lead responsibility for fulfilment of Recommendation 18 of the Royal Commission, which recommends that the Government review all legislation related to the counter-terrorism effort. **Section (9)(2)(f)(iv)**
[REDACTED]
[REDACTED] There has not been a wider review to bring the TSA up to date with either the global terrorism threat landscape or the specific terrorist threats New Zealand faces since the TSA was enacted in 2002. **Section (9)(2)(f)(iv)**
[REDACTED] the current problem identified as a result of the case of the individual needs to be addressed now, before the designation lapses in August 2023.

How these laws apply to the situation of an imprisoned and designated person

- 18 Whilst imprisonment significantly restricts a person's freedom, imprisonment alone is insufficient to prevent all terrorist acts. Designation may also be needed to prevent acts to plan, support or incite terrorist attacks by others.
- 19 Designation proscribes the financing or provision of material support for any terrorist entity and prohibits third parties from dealing with the property of the designated entity (sections 9 and 10 of the TSA). If not designated, designated persons could utilise their own financial resources to support terrorism, invest in other forms of terrorist financing, and/or make their resources available to others for terrorist purposes (for example, allowing their property to be used for terrorist training or terrorist activity in other countries).
- 20 However, an entity may be so restricted by imprisonment and designation that they do not meet the grounds under section 34 of the TSA for their designation to be kept in place. There are two ways in which this could occur:
- 20.1 Any entity (or interested third party) can make an application for revocation of the designation at any time under section 34(3)(b) of the TSA. ^{Section 9(2)(h)}
[REDACTED]
- 20.2 Designation as a terrorist entity expires automatically after three years, unless renewed or revoked prior to the expiry date. Renewal requires that the Prime Minister be satisfied that 'there are still reasonable grounds as set out in section 22 for an entity to be designated'. This is an important protection against the broad discretionary powers the Prime Minister is granted under section 22.
- 21 There is one individual currently designated who is imprisoned in New Zealand, and whose designation expires on 27 August 2023. ^{Section 9(2)(h), Section (9)(2)(a), Section 6(a)}
[REDACTED]
- 22 ^{Section 9(2)(h)}
[REDACTED]
- 23 The primary mechanism currently preventing this individual from being involved in further terrorist acts (including attempting to incite others) is their imprisonment, and the related measures such as the controls on their communication. ^{Section (9)(2)(a), Section 6(a)}
[REDACTED]
[REDACTED] The individual continues to have influence among those that share their ideology. As a recent example, the manifesto and diary of the person allegedly responsible for the 14 May 2022 terror attack in Buffalo, New York, contain

numerous references to the impact of the designated individual, and their manifesto, as the person most responsible for their radicalisation to violence.

We propose amending the TSA to resolve these issues of revocation and renewal in the situation of a designated and imprisoned person

24 **Section (9)(2)(f)(iv)**

July 2023 (when the Prime Minister will need to decide on the renewal of the currently designated imprisoned individual's designation). We are therefore proposing progressing amendments to the TSA that resolve the issues outlined in paragraph 20 above so that they are in force before the designation of the currently imprisoned individual expires in August 2023.

An imprisoned person will no longer be able to apply for revocation of their designation on the ground that they are no longer involved in acts that would make them eligible for designation

25 Section 34(3)(b) provides for a designated entity, and certain third parties, to apply for revocation of their designation on the basis that the designated entity is "no longer involved" in any way in terrorism. The rationale for this is that when there is no longer a real threat of a further terrorist act, the entity should cease to be designated.

26 However, when a person is designated and imprisoned, "no longer involved" is not an accurate measure of ongoing threat, since it is the restrictions placed on a person through designation and imprisonment which cause the person to technically meet the grounds of being "no longer involved." The person may remain a threat and intend to become involved in terrorism if the designation was revoked, or the person was no longer imprisoned.

27 We propose that, for designations to be kept in place whilst the person is a threat, the law should be amended to remove the ability for an imprisoned and designated person, and certain third parties, to apply under section 34(3)(b) for the designation to be revoked.

We propose pausing the expiry of designations for imprisoned persons during the period of their imprisonment, but the Prime Minister must review every three years whether ongoing designation is no longer justified


28 We propose that, in the situation of an imprisoned designated person, the acts that led to the designation and imprisonment should, throughout the term of imprisonment, be a valid source of information to meet the grounds for ongoing designation.

29 Whilst in the situation of a designated entity who is out in the community, it is reasonable to expect continued participation or support of terrorist acts to justify renewal of a designation, this is not practicable in the case of a designated person who is imprisoned. We must be able to properly respond to, and suppress, the threat of future terrorist activities if an imprisoned person's designation were to expire.

30 **Section 9 (2)(g)(i)**

We consider it is therefore reasonable that, when the combination of imprisonment and designation

have sufficiently restricted the person's capacity to carry out a further act, the acts that led to the designation should be strong grounds for continuation of the designation unless there is compelling evidence that it is no longer justified.

- 31 To ensure that ongoing designation of imprisoned persons is not unduly harsh, we propose that at three-year intervals during a period of such a person's imprisonment the Prime Minister should consider any new information that might indicate ongoing designation is no longer justified. This would ensure that designations remain tied to present threat and based upon information that can be realistically obtained.
- 32 We propose to achieve this by amending the TSA so that, in relation to an imprisoned and designated person:
- 32.1 expiry of the designation is paused for the length of their imprisonment; and
- 32.2 the Prime Minister is required to review every three years whether this continuation of the designation, based on the act(s) that met the section 22 grounds for the original designation, is no longer justified.
- 33 We consider this periodical review function crucial for these amendments to be a justifiable exception under the New Zealand Bill of Rights Act 1990 (BORA). Amending the TSA so that expiry of a designation is paused for the term of imprisonment without reconsideration of any new information at reasonable intervals would deny the designated person the opportunity to present information to substantiate their position that they no longer present any such threat, and would be difficult to prove as justifiable under BORA.
- 34 **Section 6(c)**  The Department of Corrections is also in the process of reviewing primary legislation to enable wider information collection from different communications sources (such as video calling and in person visits), which could assist in informing such intelligence assessments more deeply.
- 35 However, we recognise that the restrictions placed, and corresponding available information, on a designated and imprisoned person will change over time and depend on the circumstances of that person. These amendments must remain effective over time and for all environments in which designated persons may be incarcerated. We therefore propose that the TSA should not prescribe what information should be considered in this review but should instead allow the Prime Minister to consider any relevant information.

- 36 We also recognise the importance of the designated person being able to be part of the process determining whether their designation is no longer justified. We therefore propose that the amendment requires the Prime Minister to consider any relevant information put forward by the person and interested third parties as defined in the TSA. How to weigh these sources of information in making a determination, however, should be for the Prime Minister to decide.
- 37 We will provide further advice to Cabinet setting out how the Prime Minister will conduct the review, seek information from the designated person concerned, and include guidance as to the type of information likely to be considered relevant.
- 38 We considered limiting this change to apply only to persons imprisoned for the offences of carrying out a terrorist act, planning and preparation for a terrorist act, and participating in terrorist groups. However, we do not consider this to be appropriate as it could lead to situations where designated persons who were imprisoned on an offence outside of the TSA, but related to terrorism, such as murder and objectionable material offences, could use imprisonment to have their designation removed.

How New Zealand's designation scheme compares to those of likeminded jurisdictions

- 39 New Zealand's designation scheme is broadly in line with the designation schemes of Australia and Canada. Both provide a discretionary power to a Minister to designate an entity once similar grounds to those set out in section 22 of the TSA have been met. Designations in both countries expire after a period of time prescribed by legislation (three and five years respectively). Both schemes require the original grounds to be met again for the designation to stay in place, however, in practice there is a strong presumption that designations will be renewed in those jurisdictions.
- 40 The United Kingdom takes a slightly different approach. The grounds for designation include the case of 'glorification' of terrorism, and the relevant Minister must apply a proportionality test once they are satisfied that the grounds for designation have been met. Lastly, designations do not automatically expire, but there are provisions for revocation applications and a related appeals body.

Implementation

- 41 Once a Bill has been passed, a Cabinet memo will be developed setting out how the Prime Minister will conduct a review of an imprisoned person's designation, seek information from the person, and what type of information is likely to be considered relevant.

Financial Implications

- 42 There are no financial implications from the proposals in this paper.

Legislative Implications

- 43 A Terrorism Suppression Amendment Bill (the Bill) will be required to implement these proposals. For any legislative changes to be applicable to the currently designated imprisoned individual, the Bill will require Royal Assent by July 2023.

- 44 To meet this timeline, the Bill will need to be introduced and referred to select committee by October 2022. As the Bill is not on the Legislation Programme for 2022, we recommend the Bill be added to the Legislation Programme, with priority 4 (to be referred to a select committee within the year).
- 45 We intend for these amendments to apply to all designations in place when amendments come into force. While this is not imposing retrospective punishment, it may have a direct retrospective effect and therefore engage section 12 of the Legislation Act 2019. We consider that any direct retrospective effect is appropriate according to the guidelines of the Legislation Design and Advisory Committee which state that retrospective legislation might be appropriate if it addresses a matter that is essential to public safety¹.
- 46 To avoid any ambiguity as to the effect of the amendments on currently designated entities, we will issue drafting instructions to include an explicit statement to this intention in the Bill.
- 47 The Bill will incorporate extensions to the control orders regime [CAB-21-MIN-0539 refers] that Cabinet agreed to progress in the “next appropriate legislative vehicle” [ERS-21-MIN-0048 refers]. These extensions are detailed in Appendix 1.

Impact Analysis

Regulatory Impact Statement

- 48 A panel within the Ministry of Justice has reviewed the Regulatory Impact Statement. The panel considers that the information and analysis summarised in the Regulatory Impact Statement partially meets the quality assurance criteria. The paper is generally complete as well as clear and concise. However, while the paper is convincing about the nature of the problem, it is not convincing about whether the options considered clearly address that problem or are the best options available. The inability to reconsider the grounds for a designation, while explicitly identified as a constraint, is a significant limitation on the quality of the analysis. Finally, the paper does not meet the consultation requirements because the proposals in the paper have not been the subject of any substantial consultation with relevant stakeholders.

Population Implications

- 49 Counter-terrorism efforts globally have often been perceived as concentrated on minority faith communities, the Muslim community in particular. In New Zealand, the Royal Commission found there was a disproportionate focus from public sector agencies involved in the counter-terrorism effort on Islamist extremist terrorism as the presenting threat. The list of entities currently designated by New Zealand includes eleven entities with a faith motivation. All entities designated by the United Nations relate to Da'esh, Al-Qaida, and the Taliban. These policies therefore risk continuing to over-securitise Muslims, by increasing the challenges of designations.
- 50 However, there have been substantial moves to broaden the designations regime to include non-Muslim terrorist entities. There are now three white identity-motivated

¹ Legislation Design and Advisory Committee Legislation Guidelines (2021 Edition), Chapter 12, Part 1 “Does the legislation have direct retrospective effect?”

extremist entities designated by New Zealand; the Proud Boys, the Base, and the individual. Muslim communities have voiced their support for these designations, as evidence of the government moving to treat all forms of terrorism equally. ^{Section 9}

[REDACTED]

- 51 The proposal for the Prime Minister to periodically consider the justification of an imprisoned person's designation by allowing the Prime Minister to consider any relevant information could be viewed by some communities as discriminatory if, for example, they believed that ethnicity or religious beliefs of a designated person would be considered relevant.
- 52 The Cabinet memo will provide guidance to ensure that discriminatory information is not relevant to the review. **Section 9 (2)(g)(i)**
- [REDACTED]

Human Rights

- 53 **Section 9(2)(h)** maintaining the designation of persons for whom there is a reasonable belief that they have engaged in acts of terrorism and a reasonable belief that they continue to pose a risk of inciting or encouraging future terrorist acts is a measure that is rationally connected to the TSA's central purpose of suppressing terrorism. The proposed amendments would provide that where a designated person has been imprisoned following the terrorist act that formed the basis of their original designation, the fact of their imprisonment will justify the continuation of the designation, subject only to three yearly reviews by the Prime Minister. They will lose the right to apply for a revocation of the designation.
- 54 If the subject's imprisonment is either for an offence against the TSA or for offending that is related to the terrorist act in such a way that it confirms the subjects involvement in that act, the continuation of the designation remains rationally connected to the purpose of suppressing terrorism, and the limitation of freedoms caused by designation will be justified. In the case of a person who is imprisoned they will only be marginal increases in the limitations of freedoms that are an inevitable consequence of their incarceration. The fact of imprisonment could be entirely coincidental and thereby not relevant to the risk of terrorism, but any risk of the amendment being overbroad is met by the fact that even with the proposed amendments the Prime Minister can still revoke a designation that is not warranted under section 34, even without an application by the subject.
- 55 For these reasons the proposed amendment to the TSA will limit freedoms guaranteed by the BORA but those limits appear to be demonstrably justified.

Consultation

- 56 This paper was prepared by the Ministry of Justice and the Department of the Prime Minister and Cabinet (National Security Group). The Department of Corrections, New


Zealand Police, the Crown Law Office, and the Ministry of Foreign Affairs and Trade were consulted during the policy process.

Proactive Release

- 57 We propose to proactively release this paper on the Ministry of Justice's website, subject to redactions as appropriate and consistent with the Official Information Act 1982.

Recommendations

The Prime Minister and Minister of Justice recommend that the Committee:

- 1 **note** that, under the Terrorism Suppression Act 2002, and in the case of designated terrorist persons who are imprisoned, renewing their designation may not be possible based on the restrictions placed on the person through imprisonment and designation;
- 2 **note** that, under the Terrorism Suppression Act 2002, and in the case of designated terrorist persons who are imprisoned, it is possible that the designation may be revoked under section 34(3)(b) on the basis that the designated person is "no longer involved" in terrorism, even if the designated person intends to become involved in terrorism if their designation is revoked;
- 3 **note** that the situations outlined in recommendations 1 and 2 above apply to one designated individual whose designation is due to expire on 27 August 2023, ^{Section (9)(2)(a)}

- 4 **agree** that the Terrorism Suppression Act 2002 be amended so that a designated entity, and relevant third parties, cannot apply for a revocation under section 34(3)(b) whilst that entity is imprisoned;
- 5 **agree** that the Terrorism Suppression Act 2002 be amended so that expiry of designation is paused for the length of a designated entity's imprisonment;
- 6 **agree** that if recommendation 5 above is agreed to, the Prime Minister must periodically review, at three-year intervals during the period of the designated entity's imprisonment, whether the entity's designation is no longer justified;
- 7 **agree** that in undertaking this review the Prime Minister may consider any relevant information in determining whether the designation is no longer justified and must consider any relevant information put forward by the designated entity;
- 8 **note** that these amendments should apply to all designations in place when the amendments come into effect, specifically the designation of the individual referred to in recommendation 3 above, and, to the extent they may have retrospective effect, are justified in that they address a matter essential to public safety;
- 9 **agree** that these amendments should apply to all designations in place when the amendments come into effect;

- 10 **note** that Cabinet has previously agreed to a package of extensions to the control orders regime, and that these extensions are appropriate for progression alongside these amendments to the Terrorism Suppression Act 2002;
- 11 **invite** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals, including any consequential amendments;
- 12 **authorise** the Minister of Justice to resolve minor policy issues in relation to the drafting of the legislation, consistent with the contents of this paper, without reference to Cabinet and following consultation with the Prime Minister, and other Ministers as necessary;
- 13 **invite** the Minister of Justice to report back to the Cabinet Legislation Committee no later than September 2022 with a Bill enacting changes agreed to in recommendations 4 to 7, and 9 above;
- 14 **note** that the Bill is not on the 2022 Legislation Programme; and
- 15 **approve** the inclusion of the Bill in the 2022 Legislation Programme, with a priority 4 (to be referred to select committee in the year).

Authorised for lodgement

Right Hon Jacinda Ardern

Prime Minister

Hon Kiri Allan

Minister of Justice

Appendix 1 – Previously agreed package of extensions to the control orders regime

- 1 Following the 2021 New Lynn attack, Cabinet invited the then-Minister of Justice, Hon Kris Faafoi, to consider options for extending the control orders regime. Hon Faafoi recommended the following extensions [CAB-21-MIN-0539 refers]:
 - 1.1 providing for a broader definition of objectionable material;
 - 1.2 expanding the eligibility criteria to include people sentenced to community sentences (currently it is limited to sentenced of imprisonment) and allowing sentence conditions and control orders to exist concurrently for these offenders to ensure consistency of risk management;
 - 1.3 allowing for greater judicial discretion in the setting of control order restrictions to ensure that they can be more closely tailored to risk; and
 - 1.4 making 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 appropriately managed.
- 2 In December 2021, Cabinet agreed to progress these extensions to the control orders regime in the “next appropriate legislative vehicle” [ERS-21-MIN-0048 refers].



Cabinet Social Wellbeing Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Urgent Amendments to the Designations Scheme of the Terrorism Suppression Act 2002

Portfolios Prime Minister / Justice

On 3 August 2022, the Cabinet Social Wellbeing Committee:

- 1 **noted** that under the Terrorism Suppression Act 2002, and in the case of designated terrorist persons who are imprisoned, renewing their designation may not be possible based on the restrictions placed on the person through imprisonment and designation;
- 2 **noted** that under the Terrorism Suppression Act 2002, and in the case of designated terrorist persons who are imprisoned, it is possible that the designation may be revoked under section 34(3)(b) on the basis that the designated person is “no longer involved” in terrorism, even if the designated person intends to become involved in terrorism if their designation is revoked;
- 3 **noted** that the situations outlined in paragraphs 1 and 2 above apply to one designated individual whose designation is due to expire on 27 August 2023, **Section (9)(2)(a)** [REDACTED];
- 4 **agreed** that the Terrorism Suppression Act 2002 be amended so that a designated entity, and relevant third parties, cannot apply for a revocation under section 34(3)(b) whilst that entity is imprisoned;
- 5 **agreed** that the Terrorism Suppression Act 2002 be amended so that expiry of designation is paused for the length of a designated entity’s imprisonment;
- 6 **agreed** that the Prime Minister must periodically review, at three-year intervals during the period of the designated entity’s imprisonment, whether the entity’s designation is no longer justified;
- 7 **agreed** that in undertaking the above review, the Prime Minister may consider any relevant information in determining whether the designation is no longer justified and must consider any relevant information put forward by the designated entity;
- 8 **noted** that the above amendments should apply to all designations in place when the amendments come into effect, specifically the designation of the individual referred to in paragraph 3 above and, to the extent they may have retrospective effect, are justified in that they address a matter essential to public safety;

- 9 **agreed** that these amendments should apply to all designations in place when the amendments come into effect;
- 10 **noted** that the Cabinet External Relations Committee previously agreed to a package of extensions to the control orders regime [ERS-21-MIN-0048], and that these extensions are appropriate for progression alongside the above amendments to the Terrorism Suppression Act 2002;
- 11 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above decisions, including any consequential amendments;
- 12 **authorised** the Minister of Justice to make any decisions on minor policy issues in relation to the drafting of the legislation, consistent with the above decisions, in consultation with the Prime Minister, and other Ministers as necessary;
- 13 **invited** the Minister of Justice to report back to the Cabinet Legislation Committee no later than September 2022 to seek approval to introduce a Terrorism Suppression Amendment Bill (the Bill);
- 14 **noted** that the Bill is not currently on the 2022 Legislation Programme;
- 15 **approved** the inclusion of the Bill in the 2022 Legislation Programme, with a category 4 priority (to be referred to select committee in 2022).

Rachel Clarke
Committee Secretary

Present:

Rt Hon Jacinda Ardern
Hon Kelvin Davis
Hon Dr Megan Woods
Hon Chris Hipkins
Hon Carmel Sepuloni (Chair)
Hon Andrew Little
Hon Damien O'Connor
Hon Peeni Henare
Hon Willie Jackson
Hon Jan Tinetti
Hon Aupito William Sio

Officials present from:

Office of the Prime Minister
Office of the Chair
Officials Committee for SWC

RESTRICTED

Office of the Minister of Justice

Chair, Cabinet External Relations and Security Committee

Options for an extended control orders regime

Proposal

- 1 This paper seeks Cabinet decisions on options for extending the control orders regime created by the Terrorism Suppression (Control Orders) Act 2019 (the Control Orders Act).

Relation to government priorities

- 2 Reviewing and strengthening counter-terrorism legislation is a core component of the comprehensive work programme sitting under New Zealand's Counter-terrorism Strategy (September 2019) [ERS-19-SUB0026].
- 3 This work also links to the government response to the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain. Wider work is underway to respond to the recommendations in the report, including specific recommendations relating to the review of New Zealand's counter-terrorism legislation.

Executive Summary

- 4 Control orders are civil orders which are intended to prevent high risk individuals from engaging in terrorism through the imposition of appropriate restrictions. These can range from regular report-ins with Police and participation in rehabilitation and re-integration activities, through to electronic monitoring and curfews, depending on the risks that the individual presents.
- 5 Control orders are one of a suite of measures to protect the public from terrorism, which sit alongside prosecution for terrorism offences (including recently-introduced pre-cursor offences), community and agency-led de-radicalisation efforts, and the search and surveillance powers available to Police and intelligence agencies.
- 6 The existing control orders regime balances the need to keep the public safe against the need to protect the rights of the individual to be free from retroactive penalties and double jeopardy, and to uphold civil and democratic rights, including freedom of expression, movement and assembly.

- 7 This balance was carefully considered by the Government when control orders were first introduced in December 2019 to address high risk arrivals to New Zealand, and earlier this year when the regime was expanded to domestic offenders. Careful consideration was also given to maintaining social cohesion, given that the use of coercive powers has significant implications for the relationship between the state and minority communities.
- 8 The threat posed by terrorism continues to evolve, and Police advise that there has been a steady increase in terrorism threat and risk, as well as the number of persons of interest. This was emphasised by a recent knife attack at an Auckland supermarket, which resulted in serious injuries to members of the public and the death of the attacker, who was shot dead by the authorities.
- 9 There is a wider programme of work underway to respond to this threat. This advice on control orders forms one part of that response; in parallel, I am also asking Cabinet to consider changes to immigration settings to address the risks posed by foreign nationals who have been identified as posing a national security risk.
- 10 Having carefully considered the issues and received initial feedback from Kāpuia,¹ I recommend some targeted changes to ensure the control orders regime is fit for purpose, and to pick up on some of the lessons learned so far from the granting of New Zealand's first and only control order.
- 11 I recommend the following legislative changes are made either via a standalone bill or using an existing legislative vehicle:
- 11.1 providing for a broader definition of objectionable material;
 - 11.2 expanding the eligibility criteria to include people sentenced to community sentences (currently it is limited to sentenced of imprisonment) and allow sentence conditions and control orders to exist concurrently for these offenders to ensure consistency of risk management;
 - 11.3 allowing for greater judicial discretion in the setting of control order restrictions to ensure that they can be more closely tailored to risk; and
 - 11.4 making 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 appropriately managed.
- 12 I have considered more fundamental changes to the regime, such as expanding the eligibility criteria to include non-terrorism offences and retrospective application. I do not recommend such changes at this time due to significant concerns about individual human rights, a lack of evidence about the effectiveness

¹ The Ministerial Advisory Group on the Government's Response to the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain. Kāpuia's thirty-two members are from diverse backgrounds across Aotearoa, and include affected whānau, survivors and witnesses, representative communities, civil society, local government and the private sector.

of control orders as an early intervention tool and limitations on the predictive accuracy of risk assessment tools.

- 13 A statutory review of the control orders regime is scheduled for 2023. This will provide an opportunity to consider any further legislative changes that may be necessary based on our evolving experience with the regime.

Background

Control orders are part of a joined-up response to terrorism

- 14 The control orders regime was first introduced in 2019 to address the risk posed by people arriving in New Zealand having engaged in terrorism-related activities overseas. New Zealand's first and only control order was issued under these settings. The Counter-Terrorism Legislation Act 2021 (Counter-Terrorism Act) expanded the regime to people who have been convicted of a terrorism offence in this country.
- 15 Control orders are one of a range of measures to protect the public from terrorism. Workstreams across government are focused on the issue of effectively responding to the threat of terrorism. This includes work underway within my Immigration portfolio concerning the ability to address risks to New Zealand's safety posed by foreign nationals for whom national security issues have been identified.
- 16 Addressing issues of national security concern necessarily involves a cross-agency approach, as multiple agencies have national security functions, interests and policy responsibilities in this area.

Terrorism threat

- 17 In recent years, Police has observed a steady increase in the levels of threat, risk and demand related to violent extremism and terrorism relevant to New Zealand. National security threats can arise from people of current and past concern as well as people unknown to the authorities.
- 18 The number of persons of national security concern that Police are aware of, and the seriousness of their activities, has also increased. Many are young people, who are frequently highly active online, exposed to and influenced by extremist messaging, and can be technically skilled.
- 19 Individuals can remain radicalised and committed to an extremist violent ideology for a long time. Their national security risk can change over time depending on a wide range of factors and as circumstances change.

Control orders

How New Zealand's control orders regime works for domestic offenders

- 20 People who present a terrorism risk are managed in a number of ways, including through ongoing engagement to understand their circumstances and discuss

consequences of their actions, Police warning, disengagement efforts or criminal prosecution.

- 21 Control orders are civil orders applied for by the Police Commissioner and made by the High Court. They can impose post-sentence conditions on a “relevant person” who is proved, on the balance of probabilities, to pose a real risk of engaging in terrorism-related activities.²
- 22 A relevant person is a person who is:
- 22.1 aged over 18; and
 - 22.2 is convicted and sentenced to a term of imprisonment for a specified terrorism-related offence³ (non-returnee offenders must have committed this offence on or after 5 October 2021).
- 23 A conviction for an offence is not in and of itself sufficient to justify a control order. There are two elements specified in the Control Orders Act that the Court must be satisfied of in order to grant a control order:
- 23.1 that the person meets the eligibility criteria, and
 - 23.2 that the person poses a real risk of engaging in terrorism-related activity.
- 24 Only conditions that are specified in the Control Orders Act may be imposed. These include measures such as prohibition of or restrictions on employment, prohibition against holding a bank account, 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.
- 25 Additionally, any condition placed on a person must be proportionate to the risk the person presents. A control order can be issued for up to two years and be renewed twice, on application to the High Court, for a maximum of six years.
- 26 One control order has been sought and granted since the Act was enacted in December 2019, under the returnee provisions.⁴ The Control Orders Act will be subject to a statutorily required review of its operation and effectiveness in 2023.

New offences introduced under the Counter-Terrorism Legislation Act 2021

- 27 The Counter-Terrorism Legislation Act, which came into effect on 5 October 2021, amended the Control Orders Act to extend eligibility to relevant offenders who are

² Following the passage of the Counter Terrorism Legislation Act, a “relevant person” may be a returnee or a domestic individual.

³ The specified offences are offences against the Terrorism Suppression Act 2002, as well as a range of specified objectionable publication offences in the Films, Videos, Publications and Classifications Act 1993, or importing or exporting specified objectionable material under the Customs and Excise Act 2018, where the publication was deemed objectionable because of its promotion of terrorism.

⁴ No individual in New Zealand has been eligible for a control order as a relevant offender since the Counter Terrorism Legislation Act came into effect on 5 October 2021.

already in New Zealand.⁵ It also introduced new criminal offences of planning or preparing for a terrorist act, as well as other pre-attack activities such as weapons and combat training and travel. These offences, which focus on the preparatory stages of terrorist activity, enable the investigation and prosecution of criminal offending before an attack is carried out.

- 28 A person who has been convicted and sentenced to a period of imprisonment after committing one of these offences will be eligible for a control order.

Considerations underpinning the existing control order regime

- 29 New Zealand's existing control orders regime balances the need to protect the public from terrorism risks against the need to uphold individual rights, including civil and democratic rights (such as freedom of expression, movement and association). Issues that informed the development of the regime remain relevant, including:
- 29.1 making sure that eligibility criteria are not broadened beyond justifiable limits, bearing in mind the potentially serious consequences for individuals subject to them, including criminal penalties for a breach of control order requirements;
 - 29.2 creating a parallel legal process in which the civil law has the potential to be used as an alternative to the criminal jurisdiction because the burden of proof required would be lower; and
 - 29.3 a lack of evidence about the effectiveness of control orders as an early intervention tool, due to the infrequency of their use and associated research limitations, and the differing circumstances of countries that have introduced them.

Recommended changes to the control orders regime

- 30 Since Cabinet invited me to report back, I have considered the changing threat landscape in light of the subsequent strengthening of our terrorism suppression laws, including the recent expansion of the control orders regime, and the lessons learned so far from New Zealand's first and only control order application. I have also taken initial feedback from Kāpuia as a means of gauging the views of a diverse range of stakeholders.
- 31 On this basis I recommend the following five legislative changes.

Extension to terrorism-related objectionable material

- 32 Under the existing law, a conviction for a specified objectionable publication offence is one of the eligibility criteria for a control order, providing that the publication was classified as objectionable under the criterion "promotes or encourages criminal acts or terrorism".⁶ This criterion is one of several used to

⁵ The Bill did not consider any changes to the regime as it applies to those returning to New Zealand, and these settings are not considered for reassessment here.

⁶ Films, Video, and Publication Classification Act 1993, s 3(3)(d).

assess whether a publication is objectionable under the Films, Video, and Publication Classification Act 1993 (FVPCA).

- 33 I recommend expanding control order eligibility to two additional FVPCA assessment criteria, which are directly relevant to terrorism, despite not being explicitly terroristic:
- 33.1 material that describes, depicts or otherwise deals with acts of torture, the infliction of serious physical harm, or acts of cruelty;⁷ and
 - 33.2 represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in the Human Rights Act 1993.⁸
- 34 Police has identified that there is a link between the illegal use of objectionable publications that depict acts of torture, the infliction of serious physical harm, and acts of significant cruelty or that represent members of a particular class as inherently inferior, and other concerning conduct that demonstrates terrorism risk.
- 35 Expanding control order eligibility to these objectionable publications would represent a relatively modest expansion to the regime. This is justified by the link between an individual's proclivity to engage with serious violent or cruel material against protected persons and a propensity to engage in terrorism-related behaviours.
- 36 There may also be merit in expanding the eligibility to offences involving the publication of restricted material under the FVPCA.⁹ Restricted publications involve material that can only be viewed or shared by certain categories of person, such as those aged 18 years and above. This would represent a more significant expansion to the regime with uncertain benefits. For these reasons, it would be more appropriate for this option to be considered part of the 2023 statutory review of the Control Orders Act.

Extending the eligibility criteria to community-based sentences

- 37 Currently, a person must have been sentenced to imprisonment for a qualifying offence in order to be eligible for a control order. This is justified on the grounds that imprisonment is a proxy for the seriousness of offending and coercive powers of the kind available under a control order should generally be reserved for people who have reached this threshold, as is the case with other post-detention orders.
- 38 Recent experience has shown, however, that a defendant may be remanded in custody for a significant period from arrest to their hearing, conviction, and sentencing. This time-served, as well as other factors, can result in non-custodial

⁷ Section 3(3)(a)(i).

⁸ Section 3(3)(e).

⁹ Police advise that there is at least one previous case of terrorism concern where the individual was convicted for a restricted publications offence.

sentences being imposed for control order qualifying offences. Sentences imposed are therefore not always a reliable indicator of terrorism risk.

- 39 Expanding the eligibility criteria as proposed is not likely to significantly increase the number of control order applications because convictions for the relevant offending are rare. For example, there were approximately 43 convictions for objectionable publications offences in 2020/21,¹⁰ and to date one conviction for a terrorism offence under the Terrorism Suppression Act.

Extending provisions allowing concurrence of control orders and sentence conditions

- 40 Should Cabinet agree to extend the eligibility criteria to community-based sentences, I also recommend extending the existing legislative provisions that allow control orders and sentence conditions to be managed concurrently.
- 41 Under the existing legislation, a person who is subject to a control order (managed by Police) can simultaneously be subject to the conditions of their release from prison (managed by the Department of Corrections). While the regime is limited to people who have been imprisoned for a relevant offence, this is unlikely to be necessary because post-detention conditions are generally flexible and stringent enough to address the kind of risk that a control order is intended to manage.
- 42 In contrast, the conditions of community-based sentences can be much more limited, reflecting the lower level nature of the sentence. For example, the conditions of community detention and community work sentences relate primarily to curfews and the completion of work hours, respectively. These are unlikely to be adequate should a person present a terrorism-related risk which is, for example, more closely related to their use of technology, associations or whereabouts.
- 43 Operationally, the greater use of concurrent conditions will require Police and the Department of Corrections to work closely together to manage overlapping areas of responsibility. However, because the number of control orders is expected to remain very low (approximately five over the next decade), this is not expected to present a significant challenge.

The range of conditions that can be imposed by a control order

- 44 Currently, the range of conditions that can be imposed under a control order is limited to a prescribed list. This was not considered to be a significant problem when the control order legislation was first introduced because the list is comprehensive (see Appendix 1). However, it was noted at the time that making the list exhaustive provides less flexibility than comparable post-detention orders, which allow judges the discretion to tailor conditions more closely to identified risks.

¹⁰ This number excludes convictions for child exploitation-related objectionable material but does not distinguish between the remaining grounds under which a publication may be deemed objectionable. As such, it is highly likely that only a small number of these convictions were for terrorism-related objectionable publication offences.

- 45 Introducing greater discretion in the setting of conditions potentially means that a person could be subject to greater restrictions on their liberty. However, I consider there to be sufficient safeguards in place to mitigate breaches of individuals rights, notably that:
- 45.1 control order conditions must be consistent with the purposes of the legislation
- 45.2 limitations on the more stringent conditions prescribed in the legislation would continue to apply – for example, a person cannot be required to remain at a specified address for more than 12 hours per day.
- 46 On this basis, I recommend that when imposing a control order, a judge should be able to impose any supplementary conditions that are necessary and consistent with the purposes of the Act.

Removing automatic name suppression

- 47 Under the current legislation, a person who is the subject of an application for a control order, or a control order if one is made, has automatic permanent name suppression.
- 48 The experience of making New Zealand's first and only control order has revealed issues with this approach. In this case, the individual's name was already in the public domain due to the fact that their circumstances had been widely reported before they returned to New Zealand. This meant that the Government was initially unable to reassure the public that the risk was being managed through the application for a control order.
- 49 I therefore recommend that the provisions concerning name suppression should be amended to provide that:
- 49.1 on a without-notice application name suppression is automatic unless the Police seek otherwise, with the Court empowered to make a decision on suppression;
- 49.2 on an on-notice application suppression is automatic unless either party (Police or the subject of the application) seeks otherwise in which case the Court makes a decision; and
- 49.3 either party can seek to either grant/lift name suppression at a later date if circumstances change.
- 50 Lifting name suppression will not be appropriate in every case. Introducing a presumption of suppression with the option, on application, for this to be lifted will ensure that suppression is available where appropriate.

Options not recommended for progression at this time

- 51 Several additional options have been considered but are not recommended at this time. However, these can be considered as part of the 2023 statutory review of the Control Orders Act.

Widening offence eligibility beyond terrorism offences

- 52 Control orders rely on assessments of future risk based on a person's past conduct. In overseas jurisdictions, control orders are primarily used to manage the ongoing risk presented by people who have already been convicted of a terrorism offence.
- 53 While some risk assessment tools have been developed internationally to predict the likelihood of terrorism-related offending, research notes the predictive accuracy of these tools has not been validated and there are limitations in their use. However, they can have value to support risk assessment processes when combined with other techniques and sit alongside structured professional judgment.^{11,12}
- 54 For this reason, I recommend that the eligibility criteria for control orders is limited to convictions for terrorism offending or objectionable publications offences that are demonstrably linked to terrorism. Widening the eligibility criteria, for example, by including violence offences, would represent a significant expansion to the underlying principles of the regime. It would also overlap with other post-detention orders aimed at serious violent offenders.
- 55 Kāpuia members highlighted that, historically, powers to intervene at lower levels of offending have been applied disproportionately to minority communities. However, it was also accepted that there should be measures in place, such as control orders, to allow for intervention when necessary.
- 56 Some Kāpuia members supported the extension of control order eligibility on the basis that these would enable intervention to protect the public and noted that terrorism activity can vary, while others felt that more information and analysis was needed before eligibility could be expanded.

Lowering the age threshold

- 57 Under the current settings a person must be aged at least 18 years old to be eligible for a control order, which is consistent with other post-detention orders and risk management tools, such as the child sex offender register.
- 58 The global reach of the internet makes it easy for violent extremists and terrorists to reach young people, and international evidence shows an increasing trend of young people being attracted to and involved in violent extremist and terrorist activities. An emerging trend, both domestically and internationally, is the increase in young people presenting national security concerns. These young people are frequently highly active online, exposed to and influenced by extremist messaging, and can be technically skilled.

¹¹ Dr Simon Copeland and Dr Sarah Marsden *Extremist Risk Assessment* (Centre for Research and Evidence on Security Threats (UK), November 2020) at 15.

¹² Liesbeth van der Heide, Marieke van der Zwan, and Maarten van Leyenhorst *A Comparison of Risk Assessment Tools for Violent Extremism* (International Centre for Counter-Terrorism – The Hague, September 2019) at 22.

- 59 To address this kind of risk, consideration could be given to lowering the minimum age requirement for domestic eligibility to 16 years old. This would extend the threshold offending for a control order to offences proven in the Youth Court, as well as more serious offending that has been escalated to the adult court. Police supports the lowering of the age for control orders, on the grounds that the rehabilitative and reintegrative focus is more likely to achieve enduring positive outcomes for young people when compared to further criminal prosecution.
- 60 The inclusion of under 18-year-olds was raised during the introduction of the control orders regime in 2019, with the Select Committee considering evidence from Oranga Tamariki regarding the management of risk for this group.
- 61 The Select Committee noted official's advice that the Oranga Tamariki Act 1989 provides tools to manage children or young people engaging in radicalised or extremist activities:
- 61.1 The Chief Executive of Oranga Tamariki can seek care or protection orders to assume responsibility for a child's day-to-day care and wellbeing, including for behaviour that is, or is likely to, harm themselves or others.
- 61.2 If a young person is charged with an offence there are a range of conditions the Youth Court can use, including non-association requirements and limits on access to technology without supervision.
- 61.3 At the higher end a young person can be subject to a supervision with activity (i.e. a 24/7 residential programme) or a residence order involving detention for up to six months, both of which are followed by six months supervision.
- 62 In a small number of cases, because of the nature of the concerns and risks identified, there could be a need for additional operational oversight. When there are concerns relating to radicalised or extremist ideology Oranga Tamariki will work with Police and other agencies, including the Ministry of Health, Ministry of Education and the Department of Corrections, in developing and implementing risk management plans.
- 63 Oranga Tamariki is also part of He Oranga Ake - the Police-led multi-agency intervention programme to further develop monitoring and oversight of such cases.
- 64 Some Kāpuia members highlighted that underdeveloped critical thinking skills, and the number of ideologies young people are potentially exposed to, create particular vulnerabilities that require tailored and carefully considered responses. Those members that supported control orders for young people noted the importance of having a whānau-centric and wellbeing approach that includes a strong educative and rehabilitative focus that supports and promotes integration into society.
- 65 Australia enacted control orders into its criminal law in 2005, with the eligible age threshold lowered in 2015 (from 16 years old or older to 14 years old or older).¹³

¹³ A control order for an individual aged between 14 and 17 years old cannot last longer than three months. However, these may be renewed indefinitely (as opposed to the six-year maximum for New

The extension of control order eligibility to those under 18 years of age has been criticised for limiting children's rights disproportionately.¹⁴

- 66 Further, the criminal penalty of up to one year in prison is incompatible with current youth justice settings. Pursuing this option would likely raise issues relating to the United Nations Convention on the Rights of the Child, as well as other international obligations.

Retrospective application

- 67 A criminal conviction is a requirement for control order eligibility for people already in New Zealand. This could be amended to allow for control orders to be available in respect of "eligible offending" that occurs before the empowering legislation is enacted. Police supports this option as it will enable requirements to be placed on a person, when appropriate, to manage their terrorism risk.

- 68 Such an approach would be inconsistent with our legislative framework for other similar civil orders, with the exception of returnees who engaged in terrorism activities overseas.¹⁵ This approach would also be problematic because:

68.1 There is a clear common law precedent that retrospectively imposing a punishment after the commission of an offence is an unjustifiable limit on the right to be free from double punishment.¹⁶

68.2 While it is not certain that every control order would necessarily amount to a punishment under the Bill of Rights Act, it is reasonable to anticipate that some control orders would.¹⁷

- 69 I do not, therefore, recommend progressing an option to allow for control orders to apply to offences committed before the empowering legislation comes into effect. However, an option to apply the control order regime retrospectively may be appropriate for inclusion in the 2023 statutory review of the regime.

Making attendance at certain programmes a mandatory requirement

- 70 Introducing the ability to mandate participation in certain programmes would be consistent with other conditions within the justice system, such as parole conditions. However, because de-radicalisation and other relevant counter-terrorism programmes are less well developed and therefore less well evidenced than other criminogenic programmes, I do not propose any changes in this regard for the time being.

Zealand orders), and a breach of an order can result in up to five years' imprisonment (as opposed to up to one year imprisonment for breach of a New Zealand order).

¹⁴ Australian Human Rights Commission *Children's Rights Report 2019 – In Their Own Right: Children's Rights in Australia* (2019) at 248.

¹⁵ This exception is logical because in countries where terrorism is prevalent, relevant persons will often not be prosecuted for the offences they may have committed.

¹⁶ New Zealand Bill of Rights Act 1990, s 26(2).

¹⁷ Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 24.3.22.

Extending the duration of control orders

- 71 Individuals can remain committed to a violent ideology for a lengthy period, and often present a range of complex issues and vulnerabilities, and it can therefore take sustained intervention over a long period of time to effect meaningful and long-lasting protective factors and behaviour changes.
- 72 Under the existing legislation, the High Court can issue a control order for up to two years, and renew twice on application, for a maximum of six years. While this contrasts the approach taken to other relevant civil orders, such as extended supervision orders, which can be extended indefinitely, I consider it premature to extend the duration without having learned more from the domestic experience of our current control orders regime.

Adjusting the threshold for interim orders.

- 73 For returnees, the purpose of an interim order is to allow an application to be made without notice prior to a relevant person arriving in New Zealand. For people with a relevant conviction in this country, it is intended to allow time for a final control application to be made should new information about a person's risk come to light just before the end of their sentence (beyond which no control order application can be made).
- 74 Currently, the threshold for obtaining an interim control order is the same as for obtaining a final control order. Interim orders are a without-notice process and were primarily designed for the context of returnees, where an application may need to be made in a very short timeframe.
- 75 An alternative approach would be to lower the threshold for an interim order to a demonstration that the individual meets the definition of a relevant person, and not requiring the additional evidence that they pose an ongoing risk. This could potentially reduce the period where a risk management mechanism is not able to be applied and would give Police time to gather evidence for the final control order.
- 76 Adjusting the threshold for interim orders in this way would be a significant adjustment which I do not recommend making at such an early stage in the evolution of the regime.

Conclusion

- 77 The recommended changes to the control orders regime strike an appropriate balance between the need to protect the public from terrorism risks and the need to uphold the justice, civil and democratic rights of the individual.
- 78 Alongside the recent strengthening of our counter-terrorism framework and wider work across the Immigration portfolio, the proposals demonstrate a concerted effort to address the evolving nature of the terrorist threat in New Zealand.

Next steps

- 79 If Cabinet agrees, the recommended changes could be progressed in either a discrete piece of legislation or in an appropriate legislative vehicle already proposed (dependent on the outcomes of current counter-terrorism related policy work).
- 80 The Control Orders Act will be subject to a statutorily required review for operational requirement and effectiveness in 2023. Those options highlighted in this paper as being appropriate for further consideration at that time will be most appropriately included in any legislative updates arising out of that review.

Financial Implications

- 81 There are no financial implications arising from these proposals. Operational implementation of any extension to the control orders regime, once passed, would be met within agencies' baselines.

Legislative Implications

- 82 The proposals would require, at a minimum, amendments to the Terrorism Suppression (Control Orders) Act 2019. There may also be consequential amendments to other statutes required.
- 83 Subject to decisions from Cabinet, my officials will work with Parliamentary Counsel Office to draft the relevant provisions in preparation for inclusion in either a discrete amendment Bill or in the next available appropriate legislative vehicle.
- 84 These provisions will bind the Crown.

Impact Analysis

- 85 A Regulatory Impact Statement (RIS) was prepared.
- 86 The RIS was assessed as partially meeting the Quality Assurance criteria. The panel noted that the analysis is complete and overall clear and convincing but has limitations. For example, officials had only limited opportunity to consult with community representatives on the proposals and did not otherwise have an opportunity to consult outside government including with Māori, lawyers and civil liberties organisations.
- 87 The panel also noted other constraints on the analysis, such as limited evidence of the effectiveness of control orders both in New Zealand and internationally. Further, given the limited evidence in that regard, it is difficult to accurately assess the impact of the proposed extensions. However, given that the proposals are tightly constrained and limited in scope, it is likely that only a small number of people will be affected and brought within the reach of the proposals. The panel noted that the constraints identified affect the confidence that Ministers can place on the analysis in the RIS.

- 88 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirmed that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Human Rights

- 89 The proposals in this paper represent modest extensions to the control orders regime. Control orders impose a variety of limitations on the individual subject to the order, with the aim of minimising the risk they pose.
- 90 These proposals, if enacted, may limit some rights and freedoms affirmed in the New Zealand Bill of Rights Act. In particular, sections 14, 17, 18, 21 and 22 may be engaged by restrictions that may be placed under the regime, and s 27(1) may be engaged by parts of the process of applying orders.
- 91 The impact of limiting the rights and freedoms of the individual subject to a control order must be balanced against the right of the whole community to safety. However, the objective of control orders – protecting the public from people who pose a risk of engaging in terrorist or violent extremist acts – constitutes a sufficiently important objective to warrant some limitation on the individual rights and freedoms affirmed in the Bill of Rights Act.
- 92 On balance, I consider the potential limitations on the rights of the individual are justified.

Tiriti o Waitangi impact

- 93 It is not anticipated that the proposed extensions will have a disproportionate impact on Māori, who are not overrepresented in the numbers charged with terrorism and terrorism-related offending.
- 94 The definition of ‘terrorist act’ underpins the control order regime. The Crown has a complex history with Māori in this area, including, for example, the Uruwera raids.
- 95 No consultation specifically with Māori was undertaken as part of developing the proposals in this paper. Given the constitutional significance of the regime, proper consultation with Māori would give fuller effect to the Crown’s Tiriti o Waitangi obligations.

Consultation

- 96 The Ministry of Justice consulted the following agencies in preparation of this Cabinet paper: New Zealand Police, Department of Corrections, Department of Prime Minister and Cabinet, Crown Law Office, New Zealand Security Intelligence Service (NZSIS) and Oranga Tamariki.
- 97 The Ministry also undertook high-level consultation with the Ministerial Advisory Group Kāpuia. Their feedback was largely supportive of counter-terrorism efforts, including control orders, when balanced with human rights.

- 98 Overall, Kāpuia supported mechanisms that focus on prevention, rehabilitation, disengagement, that are culturally appropriate, applied transparently and mindfully and in a way that respects all human rights.
- 99 The group stressed the need for intervention at early signs of radicalisation through education and expressed a strong preference for community empowerment to disengage its people in a way that does not unfairly impact on ethnic, faith or other minority communities.
- 100 Kāpuia further noted that any expansion of agency powers should be coupled with a commitment to peacebuilding programs with a purpose to prevent and disengage people from extreme ideologies. The group felt strongly that trust should be built within and across communities, as well as between communities and government agencies, so there is confidence that greater intervention powers given to agencies will be used appropriately.
- 101 NZSIS noted that the current control order regime does not enable the use of classified information in support of a control order application. This means the government could hold information that an individual poses a real risk of engaging in terrorism-related activity but be unable to use that information to support a control order application.
- 102 The Security Information in Proceedings Bill, which updates New Zealand's framework for the use of classified information in proceedings, was introduced on 25 November 2021 and will apply to the control order regime. When that legislation comes into effect, any risk concerning the current inability to use of classified information in control order applications will be addressed.

Communications

- 103 I am discussing communications with the Prime Minister's Office.

Proactive Release

- 104 I intend to release this Cabinet paper in accordance with Cabinet circular CO(18)4.

Recommendations

I recommend that Cabinet:

1. **note** that New Zealand's control orders regime was introduced in 2019 by the Terrorism Suppression (Control Orders) Act and was extended by the Counter-Terrorism Legislation Bill, which came into effect on 5 October 2021;
2. **note** that the Control Orders Act will be subject to a statutorily required review of its operation and effectiveness in 2023;
3. **note** that during the passage of the Counter-Terrorism Legislation Bill I committed to providing Cabinet with further options for extending the control orders regime by the end of 2021;
4. **agree** to extensions to the control order regime to:
 - 4.1. include as eligible offences those specified objectionable publication offences where the publication depicts acts of torture, the infliction of serious physical harm, or acts of significant cruelty or that represents members of a particular class as inherently inferior;
 - 4.2. allow for a control order to be imposed where an individual has been sentenced to a community-based sentence;
 - 4.3. extend the existing legislative provisions that allow control orders and sentence conditions to be managed concurrently to ensure that individuals subject to community-based sentences can be managed appropriately;
 - 4.4. allow for greater judicial discretion in the setting of control order restrictions to ensure that they can be more closely tailored to risk;
 - 4.5. remove automatic name suppression for the person who is the subject of an application for a control order, or the control order if one is made;

Legislation

5. **agree** to introduce legislation giving effect to these recommendations using the next appropriate legislative vehicle (dependent on the outcomes of current counter-terrorism related policy work)
6. **invite** the Minister of Justice to issue drafting instructions to Parliamentary Counsel Office to give effect to the above proposals, including the decisions referred to in recommendations 4 and 5;
7. **authorise** the Minister of Justice to make additional minor policy decisions in relation to the drafting of legislation which are consistent with the contents of this paper, without further reference to Cabinet.

Authorised for lodgement

Hon Kris Faafoi
Minister of Justice

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Appendix 1: Requirements able to be imposed under a control order

Sections 17 – 20 of the Control Orders Act sets out the conditions that may be imposed on an individual who is subject to a control order as follows:

17 Requirements that may be imposed

A control order may impose on a relevant person only requirements that do all or any of the following:

Prohibitions and restrictions

- (a) prohibit or restrict the relevant person from being in or at specified areas or places (for example, international ports, gun clubs, or specified residences) without Police escort:
- (b) prohibit or restrict the relevant person from leaving New Zealand or possessing passports, or other international travel documents of any kind, issued by any country:
- (c) prohibit or restrict the relevant person from communicating or associating with specified individuals, or a specified class of individuals (for example, individuals identified as being at real risk of radicalisation, or individuals identified as posing a real risk of further radicalising the relevant person):
- (d) prohibit or restrict the relevant person from disclosing or receiving specified information or otherwise dealing with specified classes of information (for example, means or methods of carrying out terrorism):
- (e) prohibit or restrict the relevant person from accessing or using, in any setting (for example, in a place of paid or voluntary work or of study), specified forms of telecommunication or other technology (whether the devices or facilities concerned are public or private) including the Internet (for example, prohibiting the relevant person from accessing the Internet except on devices known to the Police):
- (f) prohibit or restrict the relevant person from possessing or using specified articles or substances (for example, possessing terrorist propaganda material or possessing domestic chemicals above a certain quantity):
- (g) prohibit or restrict the relevant person from carrying out specified activities related to the real risk that the relevant person poses, including specified activities in respect of their work, occupation, or recreational activities:
- (h) prohibit or restrict the relevant person from holding accounts, possessing certain financial instruments, or using specified financial services:
- (i) prohibit or restrict the relevant person from transacting in property (for example, property over a certain value or transactions involving certain people):

Other requirements

- (j) require the relevant person to reside at a specified address agreed between the relevant person and the Police (or as otherwise specified by the court) and to remain at that address between specified times each day, or on specified days (see also section 18):
- (k) require the relevant person to report to specified constables at specified times and places (for example, meeting a constable twice a week):

- (l) require the relevant person to facilitate reasonable access by the Police or their agents to premises, equipment, or information if that access is necessary for monitoring compliance with the requirements stated in the order (for example, facilitating access to search the relevant person's residence, electronic devices, or financial accounts):
- (m) require that the relevant person allow themselves to be photographed and impressions made of their fingerprints:
- (n) require that the relevant person submits to electronic monitoring of compliance with the requirements of the control order concerned and does not tamper with, or damage, or do anything to interfere with the functioning of the electronic monitoring device (see also section 19):
- (o) require that the relevant person undertake alcohol and drug assessments, and rehabilitative or reintegrative needs assessments:
- (p) require that the relevant person, if they have given and not withdrawn their informed consent to do so, engage with specified rehabilitative services (for example, alcohol and drug treatment services) (see also section 20).

18 Limit on requiring relevant person to remain at specified address

No requirement of the kind stated in section 17(j) can require the relevant person to remain at a specified address for more than 12 hours in any 24-hour period.

19 Limit on requiring electronic monitoring

The court must not impose a requirement of the kind stated in section 17(n) if the court considers that a less restrictive requirement or combination of requirements would be sufficient to achieve the main purposes stated in section 3(a) and (b) and (if applicable) 1 or both of the incidental purposes stated in section 3(c).

20 Limit on requiring relevant person to engage with specified rehabilitative services

- (1) No relevant person may be made, or may remain, subject to a requirement of the kind stated in section 17(p) unless the relevant person—
 - (a) has been fully advised, by a person who is qualified to prescribe or provide the specified rehabilitative services, about their nature and their intended and likely effects and any known real risks of engaging with them; and
 - (b) is competent to make an informed choice and give informed consent to engaging with them; and
 - (c) gives, and has not withdrawn, informed consent to engaging with them.
- (2) Informed consent of that kind can be given, withheld, or withdrawn by words or conduct.
- (3) No particular conduct, or form of words, is required to give, withhold, or withdraw informed consent of that kind.
- (4) A relevant person who withholds, or withdraws, informed consent of that kind does not breach the relevant requirement for the purposes of section 32 (offence to breach requirements).



Cabinet External Relations and Security Committee

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Options for an Extended Control Order Regime

Portfolio **Justice**

On 14 December 2021, the Cabinet External Relations and Security Committee:

- 1 **noted** that New Zealand's control orders regime was introduced in 2019 by the Terrorism Suppression (Control Orders) Act 2019 (the Control Orders Act), and was extended by the Counter-Terrorism Legislation Act 2021, which came into effect on 5 October 2021;
- 2 **noted** that the Control Orders Act will be subject to a statutorily required review of its operation and effectiveness in 2023;
- 3 **noted** that during the passage of the Counter-Terrorism Legislation Bill, the Minister of Justice committed to providing Cabinet with further options for extending the control orders regime by the end of 2021;
- 4 **agreed** to extensions to the control order regime to:
 - 4.1 include as eligible offences those specified objectionable publication offences where the publication depicts acts of torture, the infliction of serious physical harm or acts of significant cruelty, or that represents members of a particular class as inherently inferior;
 - 4.2 allow for a control order to be imposed where an individual has been sentenced to a community-based sentence;
 - 4.3 extend the existing legislative provisions that allow control orders and sentence conditions to be managed concurrently to ensure that individuals subject to community-based sentences can be managed appropriately;
 - 4.4 allow for greater judicial discretion in the setting of control order restrictions to ensure that they can be more closely tailored to risk;
 - 4.5 remove automatic name suppression for the person who is the subject of an application for a control order, or the control order if one is made;

Legislative implications

- 5 **agreed** to introduce legislation giving effect to the above paragraphs using the next appropriate legislative vehicle (dependent on the outcomes of current counter-terrorism related policy work);

- 6 **invited** the Minister of Justice to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals, including the decisions referred to in paragraphs 4 and 5 above;
- 7 **authorised** the Minister of Justice to make additional minor policy decisions in relation to the drafting of legislation which are consistent with the contents of the paper under ERS-21-SUB-0048, without further reference to Cabinet.

Janine Harvey
Committee Secretary

Present:

Rt Hon Jacinda Ardern (Chair)
Hon Grant Robertson
Hon Kelvin Davis
Hon Andrew Little
Hon David Parker
Hon Nanaia Mahuta
Hon Poto Williams
Hon Kris Faafoi
Hon Peeni Henare
Hon Kiri Allan
Hon Dr David Clark

Officials present from:

Office of the Prime Minister
Officials Committee for ERS