

7 October 2019

Attorney-General

Terrorism Suppression (Control Orders) Bill (version 22) — Advice regarding consistency with the New Zealand Bill of Rights Act 1990
Our Ref: ATT395/302

Enclosed with this cover sheet is a copy of our advice as to whether the Terrorism Suppression (Control Orders) Bill appears to be consistent with the rights and freedoms set out in the New Zealand Bill of Rights Act 1990.

Please indicate whether you accept this advice.

YES NO

If you accept this advice, please confirm whether you agree to a copy being referred to the Minister of Justice.

YES NO

If you accept this advice, we see no reason why this advice should not be published on the Ministry of Justice website. Please confirm whether this advice should be published on the website following introduction of the Bill.

YES NO



Hon David Parker
Attorney-General

7/10/2019

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Attorney-General

Terrorism Suppression (Control Orders) Bill (version 22) — Advice regarding consistency with the New Zealand Bill of Rights Act 1990
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1. Further to our provisional advice dated 25 September 2019, this briefing advises you of our view that the Terrorism Suppression (Control Orders) Bill is not inconsistent with rights affirmed by the New Zealand Bill of Rights Act 1990.

Summary of advice

2. The Bill allows for the High Court to impose restrictions on liberty, expression and association (akin to parole or extended supervision order conditions), which entail a significant degree of intrusion into a person's life and activities. This is problematic from a human rights perspective; such restrictions may generally only be imposed pursuant to criminal conviction.
3. We consider there are sufficient safeguards to overcome these concerns. The 12-hour limit on any curfew means that even the most restrictive control order (ie confinement in combination with other requirements) would not amount to detention. Further, any package of requirements must be crafted so as to be consistent with the Bill of Rights Act, such that each control order must be a proportionate response to the risk posed, and only limit rights to the extent this can be justified. Concerns that a control order may amount to a second punishment for the same "offending", or punishment without due process of law, do not arise as we consider control orders are civil in nature and do not amount to criminal sanctions.

Overview of the Bill

4. The High Court may impose a control order if satisfied, on the balance of probabilities, a person:
 - 4.1 has engaged in terrorism-related activities in a foreign country, has travelled to a foreign country to engage in terrorism-related activities, has had a visa/passport/citizenship revoked by a foreign country for terrorism-related reasons, or has been the subject of a control order regime (or analogous regime) in a foreign country; and
 - 4.2 poses a risk of engaging in terrorism-related activities.

5. The “requirements” of a control order must be necessary and appropriate to protect the public from terrorism, and prevent engagement in terrorism-related activities, and/or support the person’s reintegration or rehabilitation. The requirements are at the Court’s discretion, but examples include restricting the person to a specified address for up to 12 hours per day, electronic monitoring, restricting access to the internet, prohibiting association with certain other people, prohibiting the person from being in specified areas, prohibiting the person from possessing a passport, and requiring the person undertake rehabilitative and reintegrative needs assessments.

Arbitrary detention

Could a control order authorise detention?

6. A person subject to control order may be restricted from leaving their residence for up to 12 hours per day. In the United Kingdom jurisprudence, the core element which distinguishes a “mere restriction” from “deprivation of liberty” is confinement.¹ The length of confinement must be considered in combination with other restrictions on movement and activities, including the “type, duration, effects and manner of implementation” of the order,² especially if they lead to social isolation. The right to liberty is expressed in the European Convention on Human Rights as a “deprivation of liberty”, however a similar approach has been adopted in New Zealand as to what constitutes a “detention”.
7. The UK jurisprudence establishes that a control order with a 12-hour overnight curfew at a person’s own home does not amount to a deprivation of liberty.³ In light of this authority, we do not think a control order with a 12-hour curfew — even combined with other requirements — would invariably amount to detention, such that s 22 of the Bill of Rights Act would be engaged. Moreover, because courts are required to exercise their discretion consistently with the Bill of Rights Act, it would not be open for the Court to impose a 12-hour curfew and other requirements so stringent as to transform a restriction on liberty into “detention”.

Alternatively, would detention under a control order be arbitrary?

8. Assuming, contrary to our conclusion above, that a control order may amount to “detention”, the next question is whether that detention would be arbitrary.⁴ Two

¹ *Secretary of State for the Home Department v E* [2007] UKHL 47, [2008] AC 499, at [11], and [25]. The approach to “detention” under the Bill of Rights Act is similar to that adopted by the European/UK jurisprudence in relation to “deprivation of liberty”, which considers a range of facts relating to the alleged detention, and evaluates whether there has been a mere restriction of liberty or a deprivation that reaches the threshold of detention – see *Austin v United Kingdom* (2012) 55 EHRR 14, at [57]. The UN Human Rights Committee has also said that deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement, but includes house arrest: Human Rights Committee *General Comment 35* UN Doc CCPR/C/GC/35 (16 December 2014) at [5].

² *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] AC 385, at [15]–[16]: the “concrete situation of the individual” must be taken into account, including “a whole range of criteria including the type, duration, effects and manner of implementation of the measures in question”. See also *Secretary of State for the Home Department v AP* [2010] UKSC 24, [2011] 2 AC 1, at [3]. Lord Brown said at [4], “for a control order with a 16 hour curfew to be struck down as involving a deprivation of liberty, the other conditions imposed would have to be unusually destructive of the life the controllee might otherwise have been living”.

³ *Secretary of State for the Home Department v E* [2008] 1 AC 499 (HL).

⁴ Section 22 is not open to justification under s 5, as qualifications to the right are built into the definition of “arbitrary”.

factors are relevant: the reason for the detention, and the availability of judicial review.⁵

9. The criteria for a control order combine proof to the civil standard of past behaviour (that the person engaged in terrorism-related activities overseas) and predicted future behaviour (i.e. a demonstrated risk of engaging in terrorism related activities in future). The order is preventative in nature, to protect the public from future terrorism-related offences.⁷
10. This is problematic because ordinarily, detention may only be justified for proven past offending, following due process of law (i.e. pursuant to a charge, trial and conviction) — not for offences that might be committed in future. There are acknowledged exceptions to this principle, such as:
 - 10.1 detention of mental health patients under the Mental Health (Compulsory Assessment and Treatment) Act 1992, to administer therapeutic treatment;⁸
 - 10.2 the sentence of preventive detention, which is imposed on an assessment of future risk of sexual offending, but is part of an overall sentencing response to proven criminal offending.⁹
11. The House of Lords has held that control orders which involve detention based on future risk breach the right to liberty.¹⁰ The United Nations Human Rights Committee has said that detention based on future risk is an exception to general principle, and the burden lies with the State to show that the individual poses a “present, direct and imperative threat” that cannot be addressed by alternative measures. That burden increases with the length of the detention.¹¹
12. We do not consider detention pursuant to a control order would ordinarily meet the Human Rights Committee’s standard, as the low threshold for imposing an order would capture people beyond those who pose a “present, direct, and immediate threat” to public safety. Further, courts are not well placed to consider whether alternative measures (such as expanding the criminal law, or surveillance) would suffice in addressing the threat, and it would be difficult to demonstrate increasing justification for the order for its possible six-year duration.

⁵ Human Rights Committee *General Comment 35* UN Doc CCPR/C/GC/35 (16 December 2014) at [35].

⁶ See also other criteria in cl 6.

⁷ See purposes of the Act in cl 3 as “to protect the public from terrorism...to prevent engagement in terrorism-related activities...to support the relevant person’s reintegration into New Zealand or rehabilitation, or both”. ⁸ Which the High Court has held does not amount to arbitrary detention, in *S v Attorney-General* [2017] NZHC 2629, at [723].

⁸ Which the High Court has held does not amount to arbitrary detention, in *S v Attorney-General* [2017] NZHC 2629, at [723].

⁹ The Court of Appeal concluded in *Miller v New Zealand Parole Board* [2010] NZCA 600, at [176] that “detention is not arbitrary where it was in accord with the sentence imposed by the sentencing judge and the required public safety assessments had been carried out by the Parole Board in a way which accords with the parole legislation”.

¹⁰ *Secretary of State for the Home Department v JJ* [2008] 1 AC 385.

¹¹ Human Rights Committee *General Comment 35* UN Doc CCPR/C/GC/35 (16 December 2014) at [15]. See also Human Rights Committee *Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2502/2014 (Miller and Carroll)* UN Doc CCPR/C/121/D/2502/2014 (21 November 2017), at [8.5].

13. As to the second element of potential arbitrariness, both interim and final control orders (or any requirements imposed thereunder) are able to be varied or discharged at any time.¹²
14. Ultimately, because our view is that confinement authorised by a control order would not be “detention”, you do not have to reach a view on whether it would be arbitrary. But for completeness, our view is that if detention was involved it would be arbitrary, and inconsistent with s 22 of the Bill of Rights Act.

Natural justice

15. Natural justice includes the right to know the case against you, and the right to be heard. The Bill has the potential to limit this right in two ways.
16. First, the Police Commissioner may apply for an interim order without notice to the relevant person, if the Commissioner considers it reasonably necessary, and appropriate in order to manage the risks they pose. This *prima facie* inconsistency with s 27 may be overcome by the exercise of judicial discretion to direct that an application be served on the relevant person before an interim control order were made, if that were practicable and not frustrate the Bill’s objects. What is required to meet natural justice depends on the context, and if the exigencies of a situation (such as the proposed subject being overseas, but suspected to be returning to New Zealand imminently) meant it was not practicable to locate them and for the Court to direct service on them, that would not necessarily amount to a breach of natural justice. Further, the risk to natural justice is mitigated somewhat because as soon as the order is served, the subject person can apply to discharge it, which gives them an opportunity to test the evidence and challenge the justification for the order.
17. Secondly, the Bill draws a distinction between “disclosable supporting information”, and “not disclosable supporting information” to accompany an application for a control order. This alludes to a situation where Police could apply for and obtain a control order relying on information it does not disclose to the subject person, and to which they would not have an opportunity to respond or rebut. However, the Bill does not establish the architecture for any “closed material procedure”¹³ whereby the Court would be entitled to consider evidence that has not been disclosed. We doubt the Court would be able to conduct such a procedure in its inherent jurisdiction,¹⁴ therefore there is unlikely to be any material that a Court would rule is “not disclosable supporting information”.

Other rights infringed by example requirements

18. The nature and combination of requirements imposed by a control order are at the Court’s discretion. However some of the example requirements listed limit the rights to freedom of movement, expression, and association.¹⁵
19. Ultimately, we do not think you have to reach a definitive conclusion as to whether any of the “example requirements” amount to justified limitations on rights. The

¹² Clause 26.

¹³ *Dotcom v Attorney-General* [2019] NZCA 412, at [39], referencing *Al Rawi v Security Service* [2011] UKSC 34, [2012] 1 AC 531.

¹⁴ *Dotcom v Attorney-General* [2019] NZCA 412, at [39]–[43].

¹⁵ Affirmed by ss 14, 17 and 18 of the Bill of Rights Act.

package of requirements imposed is entirely at the Court's discretion. Courts applying this regime will be required to act consistently with the Bill of Rights Act. They can be expected to go no further than setting requirements proportionate and tailored to the person's risk (and are therefore justified limitations of the rights under s 5).¹⁶

20. The Bill is open-ended as to the requirements a Court may impose, such that the power could be read down to prevent rights-inconsistent applications of the law in individual cases. An analogous situation is the New Zealand Parole Board's obligation to act consistently with the Bill of Rights Act when imposing conditions under an Extended Supervision Order (ESO). Conditions preventing contact with certain people have been quashed, where the Court has considered they limit freedom of movement and association more than reasonably necessary to achieve their purpose.¹⁷

Other criminal process rights

21. We have considered whether criminal process rights — such as the presumption of innocence, the protection against retroactive increases in penalty and the prohibition of double jeopardy — apply to control orders.¹⁸

22. The crucial point is whether a control order amounts to a criminal sanction, or a civil order. The United Nations Human Rights Committee has said that criminal sanctions relate to “acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity”.¹⁹

23. The House of Lords has held that an application for a control order does not involve the “determination of a criminal charge”, and is a civil proceeding.²⁰ This was due to the variable nature of conditions and the preventative purpose of the order. Their Lordships said:²¹

there is no assertion of criminal conduct, only a foundation of suspicion; no identification of any specific criminal offence is provided for; the order made is preventative in purpose, not punitive or retributive; and the obligations imposed must be no more restrictive than are judged necessary to achieve the preventative object of the order.

24. While this jurisprudence addresses the distinction between civil and criminal proceedings, the factors relevant to that assessment are also relevant to what measures constitute a criminal sanction.

25. The leading New Zealand case on this issue is the Court of Appeal's decision in *Belcher v Chief Executive, Department of Corrections*,²² which determined ESOs were a

¹⁶ Note cl 11(3) explicitly directs the Court to consider whether the requirements are justified limits on rights and freedoms in the New Zealand Bill of Rights Act 1990.

¹⁷ *Te Whatu v Department of Corrections* [2017] NZHC 3233, at [28].

¹⁸ Bill of Rights Act, s 25(g) and 26.

¹⁹ Human Rights Committee *General Comment 32* UN Doc CCPR/C/GC/32 (23 August 2007) at [15].

²⁰ *Home Secretary v MB* [2008] 1 AC 440 (HC).

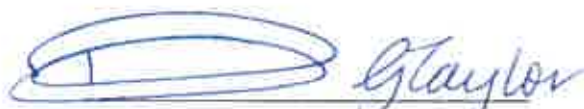
²¹ At [24].

²² *Belcher v Chief Executive, Department of Corrections* [2007] 1 NZLR 507 (CA).

criminal sanction. We have considered the features of control orders against the indicia which led Court of Appeal to that finding. We acknowledge a control order has some of the same features of a “criminal” ESO, for example:

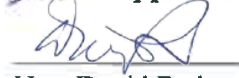
- 25.1 the consequences of an ESO are in effect a subset of the sanctions which can be imposed on offenders, and extend to detention for up to 12 months (in the form of home detention). Similarly, the “example requirements” for control orders are similar to the conditions that can be imposed on offenders as release conditions (although residential restrictions greater than 12 hours and in the nature of home detention, available in respect of ESOs, is not available in respect of control orders).
- 25.2 it is an offence to breach the terms of an ESO, and an offender is liable to up to two years’ imprisonment. It is also an offence to breach a requirement of a control order, punishable by up to one year’s imprisonment.

26. However we consider that on balance, control orders are primarily civil in nature due to the fact that the entry point into the scheme is not necessarily a prior conviction, sentence, or even proof to the criminal standard that conduct occurred;²³ and their preventative purpose.



Daniel Perkins / Genevieve Taylor
Team Manager/Crown Counsel / Crown Counsel

~~Noted/Approved/Declined~~



Hon David Parker
Attorney-General
7/10/2019

²³ Note that only one of the eligibility criteria involves the assertion of criminal conduct, namely that the person engaged in terrorism related activities in a foreign country, but it does not need to be proven to the criminal standard.