

# Regulatory Impact Statement: Options for strengthening the control order regime

## Purpose of Document

Decision sought:	This analysis has been prepared to support Cabinet decisions regarding New Zealand's control orders regime
Advising agencies:	Ministry of Justice
Proposing Ministers:	Minister of Justice, Hon Kris Faafoi
Date finalised:	1 December 2021

## Problem Definition

Control orders are civil orders which are intended to prevent high risk individuals from engaging in terrorism through the imposition of appropriate conditions.

New Zealand's exposure to terrorism is evolving as different types of threat manifest, requiring ongoing consideration of the effectiveness of our counter-terrorism response. This was demonstrated by a terror attack at an Auckland supermarket in September, which resulted in serious injuries to members of the public and the death of the attacker, who was shot dead by the authorities.

Following the September attack Cabinet directed a report-back on potential options for strengthening the control orders regime, by the end of 2021. This regulatory impact statement assesses whether the control order regime settings are at the right level to achieve their purposes as set out in the Terrorism Suppression (Control Orders) Act 2019 (Control Orders Act).

This consideration has also included lessons learned from the experience of managing New Zealand's first and only control order, which was issued earlier this year. Reviewing and strengthening counter-terrorism legislation is a core component of the comprehensive work programme sitting under New Zealand's Counter-terrorism Strategy.

## Executive Summary

New Zealand's control order regime was introduced in December 2019 in response to concern about people arriving in New Zealand having engaged in terrorism related activity overseas. The regime was then expanded in October 2021 in order to address the risk posed by people convicted of a terrorism-related offence in this country. As part of the same counter-terrorism reforms, a range of new terrorism offences were introduced, which relate to planning or preparing for a terrorist act, weapons and combat training and travel.

To be eligible for a control order, a person must have either engaged in terrorism activities overseas or have committed a terrorism-related offence in New Zealand. For a control order to be imposed, a court must be convinced that the person poses a real risk of engaging in further terrorism-related activities. The conditions of a control order 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.

To date, one control order has been imposed **Section (9) (2) (a)**  
As yet, no control orders have been issued for a person convicted of a terrorism offence in this country, in part because

the relevant legislation was only recently enacted. Ordinarily, a legislative regime would not be reviewed after such a short duration; however, the circumstances of the recent Auckland terror attack – which occurred before the recent expansion of the control order regime – has raised the question of whether immediate adjustments are necessary.

In this context, and informed by consultation with agencies and Kāpuia, the Ministry has identified five potential improvements to the control order regime. These seek to preserve the balance carefully struck in the existing legislation between enhanced powers to manage terrorism risk and the rights of the individual. The options – which relate to the eligibility criteria control orders; the management of orders alongside other sentence conditions; the scope of control order conditions; and name suppression – aims to maintain the overall coherence of the wider legislative framework governing civil orders for high risk individuals.

These options could be included in a discrete Bill that could be introduced at the earliest available opportunity in the coming year, or within an alternative legislative vehicle, depending on the outcome of ongoing counter terrorism-related work and Government priorities for the forthcoming legislative programme.

Several more significant changes to the regime were raised through consultation with agencies, including: the retrospective application of control orders; lowering the age threshold for control orders (currently 18 years); and including non-terrorism offences in the range of eligible offences. The Ministry does not support these options due to concerns about the impact on individual rights and a lack of evidence that they would reduce the risk of future terror attacks, in light of the other counter-terrorism measures that are available.

There is likely to be an opportunity to review this position as part of the statutory review of the Control Orders Act, which is scheduled for 2023.

### Summary of Preferred Option or Conclusion

A wide range of options were canvassed through consultation and measured against:

- ability to reduce terrorism risk;
- consistency with domestic and international human rights norms; and
- consistency with existing legislative frameworks governing comparable civil orders.

Based on this analysis, we recommend a limited package of five legislative amendments to the control orders regime:

- Broaden the eligibility criteria to include additional classifications of objectionable material as eligible precursor offences for a control order.
- Expand the eligibility criteria to include people sentenced to community sentences.

AND, if agreed –

- Allow control orders and community sentences to be managed concurrently.
- Strengthen judicial discretion in the setting of control order conditions
- Move from automatic permanent name suppression to a presumption that may be lifted on application by either party with the approval of the court.

## Limitations and Constraints on Analysis

The limitations and constraints on the analysis in this document are as follows:

- The timeframes within which the advice was developed, which, for example, has limited the Ministry's ability to precisely model the impact of expanding eligibility criteria for control orders.
- There is limited evidence about the effectiveness of control orders because:
  - in New Zealand, only one control order has been issued to date;
  - comparable international regimes are governed by different legislative frameworks and threat types, limiting the value of comparisons; and
  - evidence of their effectiveness is disputed, in part due to research limitations and the fact that they can be used in combination with other interventions.
- Analysis of the nature of the terrorism risks posed by individuals who are not currently eligible for a control order has been reliant on selected case information provided by New Zealand Police.

### *Consultation*

In developing the analysis, the Ministry undertook extensive consultation with New Zealand Police, Ara Poutama Aotearoa – Department of Corrections, New Zealand Security Intelligence Service, the Department of Prime Minister and Cabinet, Crown Law Office and Oranga Tamariki.

The Ministry also undertook high-level consultation with Kāpuia (The Ministerial Advisory Group on the Government's Response to the Royal Commission of Inquiry into the terrorist attack on Christchurch mosques). However, due to timeframes for reporting back, the Ministry was unable to consult with the public or receive wider community input.

A number of civil liberties and human rights organisations submitted to select committee on the Terrorism Suppression (Control Orders) Act 2019, including Amnesty International, the New Zealand Council for Civil Liberties and the Human Rights Commission. Submissions noted concerns about the rights limitations control orders enable and these may be raised again in relation to the proposed extension to the regime.

## Responsible Manager

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1 December 2021

**Quality Assurance (completed by QA panel)**

Reviewing Agency: Ministry of Justice

Panel Assessment & Comment: *The QA Panel assesses the RIA as partially meeting the Quality Assurance criteria. The analysis is complete and overall clear and convincing, but has limitations, as set out in the RIA. Except as stated in the RIA, 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. The RIA also notes 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 set out in the RIA. 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 constraints identified affect the confidence that Ministers can place on the analysis in the RIA.*

Proactive Release

## Section 1: Background and policy problem

### How New Zealand's control orders regime works

Control orders are civil orders applied for by the Police Commissioner and made by the High Court. They impose post-sentence conditions on “relevant persons” who are proved, on the balance of probabilities,<sup>1</sup> to pose a real risk of engaging in terrorism-related activities.

A “relevant person” is a person who:

- is aged over 18; and
- has engaged in terrorism-related activity overseas.<sup>2</sup> OR
- has been sentenced to a term of imprisonment for a specified terrorism-related offence in New Zealand<sup>3</sup>

The conditions that can be imposed under a control order include measures such as prohibition of or restrictions on employment, prohibition against holding a bank account, residential curfews, electronic monitoring and restrictions on personal associations. While a broad range of conditions can be imposed through a control order, the Court must be satisfied that any conditions imposed are only those that are necessary and appropriate to achieve the purposes of the Act, which are:

- to protect the public from terrorism;
- to prevent engagement in terrorism-related activities; and
- to support the relevant person's reintegration into New Zealand or rehabilitation, or both.

A control order can be issued for up to two years and be renewed twice, on application to the High Court, up to a maximum of six years.

The control orders regime balances the need to keep the public safe against the rights of the individual to be free from retroactive penalties and double jeopardy, and the need to uphold civil and democratic rights, including freedom of expression, movement and assembly.

### Evolution of the control orders regime and link to new counter-terrorism offences

New Zealand's control order regime was first introduced by the Control Orders Act. At that time, the regime was limited to people who had engaged in terrorism-related activities overseas and who subsequently arrived in New Zealand. New Zealand's first and only control order was issued under this regime.

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<sup>1</sup> The civil burden of proof, that of ‘on the balance of probabilities’, is lower than the criminal burden of proof, being ‘beyond reasonable doubt’. Further, the protections afforded to a defendant in criminal proceedings are not similarly available to a respondent in civil proceeding.

<sup>2</sup> 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.

<sup>3</sup> 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.

The control orders regime was expanded by the Counter-Terrorism Legislation Act 2021 (CT Act) to address the risk of re-offending by people convicted of a terrorism offence in this country. Due to its novel and human rights implications, a statutory review of the control orders regime is scheduled for 2023.

The CT Act also introduced new criminal offences of planning or preparing for a terrorist act, as well as other pre-cursor activities, such as weapons and combat training and travel. These offences, which focus on the preparatory stages of terrorist activity, enable investigation and prosecution of criminal offending before an attack is carried out, providing greater opportunities to prevent the escalation of terrorist-related behaviour and activity.

A person who commits one of these offences on or after the CT Act came into effect on 5 October 2021 can be considered for a control order, providing that the other eligibility criteria are met.

New Zealand's control order regime is comparable to other common law jurisdictions in that it is a civil regime with a terrorism-related purpose. However, context in some of these jurisdictions makes it difficult to draw a direct comparison.

### **Evolving terrorism risks**

Police advise that in recent years they have observed a steady increase in the levels of threat, risk and demand related to violent extremism and terrorism relevant to New Zealand. The number of persons of national security concern that Police is aware of, and the seriousness of their activities, has also increased. For example, the number of individuals charged with Films, Videos, and Publications Classification Act 1993 (FVPCA) offences relating to terrorism has increased following the Christchurch mosques attack.<sup>4</sup>

Many of these newly emerging persons of concern are young people, who are frequently highly active online, exposed to and influenced by extremist messaging, and can be technically skilled. The Combined Threat Assessment Group (CTAG) currently assesses the risk of a terrorist attack in New Zealand as 'medium', meaning an attack is feasible and could well occur.

A terrorist attack at an Auckland supermarket in September 2021 is illustrative of the risk presented by such individuals, particularly those who are determined to use violence in an improvised way, without regard to the personal consequences. While such scenarios were factored into previous advice on control order design, the reality of the attack inevitably raises questions about whether the current legislative framework is adequate.

### **Responding to emerging priorities**

Following the Auckland attack, the CT Act – including expansions to the control order regime – was passed in October 2021. It was recognised at the time that any additional changes to the regime need to be carefully considered to ensure that any legislative gaps could be properly understood, and any remedial measures would be proportionate and effective. Cabinet therefore directed a report-back by the end of 2021.

The corresponding analysis set out in this RIA takes account of the evolving threat landscape and, the circumstances of the Auckland attack described above, in the development and evaluation of options to strengthen the control orders regime. The analysis also considers any shortfalls identified through agencies' experience of applying for and managing New Zealand's first and only control order.

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<sup>4</sup> Police advise that in the three years prior to 2019, four individuals were prosecuted under the FVPCA. From 15 March to 20 October 2019 there were 28 prosecutions for offences related to the 15 March attack livestream.

## Section 2: Options analysis

### Overview of evaluative criteria

Assessment of options against the status quo focuses on whether the option can affect the terrorism process without unduly interfering with individual and human rights.

Options will be assessed against:

1. Ability to reduce terrorism risk

The purpose of the control orders regime is to prevent terrorism-related activity through appropriate restrictions and rehabilitative/re-integrative interventions.

Overseas experience and research indicates that control orders can be an effective tool to manage the risks presented by people who have been convicted of a terrorism offence.

2. Consistency with domestic and international human rights norms

Any option for expanding New Zealand's control orders regime needs to protect the rights of the individual and, where an option risks engages those rights, any restrictions should be demonstrably justifiable as required by the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).

Specific conditions imposable under a control order will have implications for individual rights. For example, a restriction on the use of communication devices will directly limit the individual's right to freedom of expression. Individual rights protect people from double jeopardy and arbitrary detention, which could be engaged by a significant expansion of the control order regime.

3. Consistency with existing legislative frameworks governing civil orders

New Zealand has a range of civil orders which are intended to protect the public from future serious offending, including extended supervision orders (ESOs), returning offenders orders (ROOs) and public protection orders (PPOs). These have some common characteristics, including those relating to eligibility, the application process and the type of conditions that can be imposed.

The common features of civil orders are underpinned by the need to ensure due process, workability, the flexibility to respond to the circumstances of people subject to orders and the protection of individual rights.

Where orders differ by design, consideration needs to be given to ensuring the legal framework remains coherent and consistent in respect of these core considerations.

### What scope will options be considered within?

The analysis in this RIA focuses on options that can be implemented immediately without unintended consequences, in response to the recent terrorist attack in Auckland and the experience of managing New Zealand's first control order.

There will be an opportunity to consider more complex, controversial or longer-term issues as part of the 2023 statutory review.

## Summary of options considered

The Ministry, in consultation with agencies responsible for operational implementation and oversight of counter-terrorism legislation and regulation, has identified nine options for adjustments to the regime.

These options are described in brief below, followed by a tabulated analysis and in-depth consideration of each option.

### **Option One: Status Quo**

Currently, control orders for domestic relevant persons are available where the relevant person is convicted of terrorism-related activities, terror acts domestically and abroad, and specified terrorism-related New Zealand offences, and continues to present a real risk of engaging in terrorism-related activity.

The specific details of the current control order regime are set out in full at Appendix 1.

### **Option Two (a) – Include a broader range of objectionable publications offences**

Objectionable publications are classified using a set of criteria, which includes “promotes or encourages criminal acts of terrorism”.<sup>5</sup> Currently, only objectionable publications classified on this basis are included in the eligibility criteria for a control order.

Police has indicated that in their experience, there is a strong link between some of the other criteria used to classify objectionable publications and terrorism risk. Consideration has therefore been given to expanding the eligibility criteria for control orders to reflect this position.

### **Option Two (b) – FVPCA ‘restricted’ publications**

The FVPCA provisions relating to restricted publications could also be included in the eligibility criteria for control orders, as per the rationale in option (2)(a).

Under section 3 of the FVPCA, a publication may be restricted if it describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence. If a publication is restricted or banned, this means that it is likely to be harmful to society if made freely available. Such publications may be restricted for possession or distribution, for example based on the age of the individual possessing or distributing the publication.

### **Option Two (c) – Other offences**

The inclusion of offences which are less closely related to terrorism (for example, violence offences) in the control order eligibility criteria has also been considered, specifically in terms of whether such a step would be justified and effective in mitigating a terrorism risk.

### **Option Three (a) – Including community-based sentences in eligibility criteria**

Currently, only people who receive a prison sentence for a relevant offence qualify for a control order, on the basis that imprisonment is used as a proxy for more serious risk in all similar civil orders.

Control order eligibility could be expanded to include offenders who receive community-based sentences to recognise that in some cases the seriousness of a sentence is not always a reliable indicator of future terrorism risk.

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<sup>5</sup> Films, Videos, Publications and Classifications Act, s 3.



### **Option Three (b) - Allowing control orders and community-based sentences to run concurrently**

Under existing settings, it is expected that in most cases control orders will take effect when the relevant person's post-prison release conditions come to an end. This is because release conditions can be as stringent and varied as the conditions of a control order so concurrence may not serve a practical purpose.

If option 3(a) is preferred, it is likely that control order conditions would need to apply from the beginning of a community-based sentence, because the conditions of community-based sentences are generally more limited.

### **Option Four – The range of conditions that can be imposed by a control order**

Currently, the range of conditions that can be imposed is limited to those set out in legislation. The exhaustive list of conditions was introduced to address concerns that a catch-all provision could result in the imposition of overly-stringent conditions.

Enabling the Court to impose any other condition that the Court considers necessary to achieve the purposes of the Control Orders Act could be added to the list of available conditions.

### **Option Five – Name suppression**

Under the existing regime, name suppression is automatic and required for people subject to a control order. Section (9) (2) (a)

The regime could be altered to incorporate a presumption of suppression instead of a requirement for suppression.

### **Option Six – Lowering the age threshold for control orders**

Under the current settings a person must be aged at least 18 years old to be subject to a control order. This minimum age requirement could be lowered to 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.

### **Option Seven – Mandatory programme attendance for subjects of a control order**

The ability to require that an individual subject to a control order attend or engage in certain rehabilitative or reintegrative programmes could be introduced to the control order regime. Attendance cannot currently be mandated, in part because the evidence base for terrorism-related rehabilitation programmes is not well developed.

### **Option Eight – Retrospective application**

In order for a person to be eligible for a control order for offending in this country, the relevant offences must have been committed after the legislation came into force on 5 October 2021, as is standard when new coercive powers are introduced. An alternative approach would be for the legislation to apply retrospectively, should there be compelling evidence that the risk associated with certain individuals could not be mitigated through other measures available to the authorities,

## How do the options compare to the status quo/counterfactual?

Key:	
++	much better than doing nothing/the status quo
+	better than doing nothing/the status quo
0	about the same as doing nothing/the status quo
-	worse than doing nothing/the status quo
--	much worse than doing nothing/the status quo

	Prevent or mitigate terrorism	Impact on individual rights	Consistency with domestic legal frameworks	Overall assessment
<b>Option One – Status Quo / Counterfactual</b>	0	0	0	0
<b>Option Two (a) – Include a broader range of objectionable publications offences</b>	+	-	+	+
	Provides better scope to capture behaviours undertaken by terrorism offenders.	Minimal impact on individual rights if expansion is limited	Limited expansion would preserve link between the nature of the offending and the identified risk.	
<b>Option Two (b) – Expanding qualifying offences to FVCPA ‘restricted’ publications</b>	0	-	0	-
	Little evidence that it captures behaviours undertaken by terrorism offenders	Minimal impact on individual rights if expansion is limited	Link between the nature of the offending and the identified risk is less clear	
<b>Option Two (c) – Expand qualifying offences to other violent offences</b>	0	-	-	-
	Little evidence that it captures behaviours undertaken by terrorism offenders	The broad expansion of offence eligibility would increase the chance of a BORA impact.	Moving outside of terrorism-related offending would be inconsistent with the purpose of COs.	
<b>Option Three (a) – Include community-based sentences in eligibility criteria</b>	+	0	-	0
	Recent terrorist attack indicates that prison sentence may not be an adequate proxy for risk	CO’s limit rights. The expansion of sentence eligibility would minimally increase the chance of a BORA impact.	Inconsistent with other post-detention orders which require sentence of imprisonment.	
<b>Option Three (b) – Concurrence</b>	+	0	+	+
	Ensures risk mitigation is consistent from the point of sentencing	Timing of order doesn’t impact on rights	Consistent with approach taken to relevant civil orders	

<b>Option Four – Non-exhaustive list of conditions</b>	<b>+</b> Improves efficacy of CO's in addressing particular risks posed by offender.	<b>+</b> Provides allowance for judicial officers to better tailor conditions to circumstances of offenders.	<b>+</b> Consistent with approach taken with ESO and PPO's.	<b>++</b>
<b>Option Five – Name Suppression</b>	<b>0</b> No effect on prevalence of terrorism.	<b>+</b> Provides ability to apply for the removal of suppression where it is in the public interest to do so.	<b>+</b> Consistent with the approach taken in analogous court settings.	<b>+</b>
<b>Option Six – Lowering Age Threshold</b>	<b>0</b> Little evidence that control orders are an effective or appropriate way of dealing with young people of concern.	<b>--</b> Significant implications for children's rights and UNCROC values.	<b>--</b> Inconsistent with approach to youth justice.	<b>--</b>
<b>Option Seven – Mandatory programmes</b>	<b>-</b> Little evidence mandatory de- radicalisation programmes are effective and may be counter- productive.	<b>-</b> More intensive forms of psychological treatment can raise ethical issues if not consented to.	<b>--</b> Unlike treatment for serious violent and sexual offending, de- radicalisation programmes are not well developed. This makes it harder to justify a legislative mandate.	<b>--</b>
<b>Option Eight – Retrospective application</b>	<b>+</b> Would allow for people with relevant historic offending to be subject to a control order (noting that surveillance and other tools can still be applied)	<b>--</b> May be inconsistent with BORA.	<b>--</b> Inconsistent with legislative practice.	<b>-</b>

## What options are likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

The package of recommended changes to the control orders regime seeks to strike an appropriate balance between the need to protect the public from terrorism risks; the need to uphold the justice, civil and democratic rights of the individual; and maintain the consistency of the existing legal framework governing relevant civil orders.

### **Option Two (a) – Include a broader range of objectionable publications offences**

Materials which aid in the dissemination of terrorist ideology, and the training to prepare people to undertake terrorist acts often include audio-visual materials or other publications. In the context of terrorism, those objectives are to persuade people to align themselves with extremist ideology.

Under the FVPCA, objectionable materials are classified using a range of criteria, one of which is the consideration of whether they promote crime or terrorism. Under the current control orders regime, only objectionable publications classified using this criterion are included in the list of offences that make a person eligible for a control order.

Police have advised that there is a link between terrorism-related offending and objectionable publications classified using other criteria, notably:

- Material that describes, depicts or otherwise deals with acts of torture, the infliction of serious harm, or acts of cruelty (s3(3)(a)(i) FVPCA); and
- Material which 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 (s3(3)(e) FVPCA).

The Ministry supports this approach on the ground that the inclusion of a broader range of classification criteria recognises that objectionable publications can be used to promote terrorism in a variety of different ways, for example to groom and desensitise others to extremist violence.

Expanding control order eligibility in this way would represent a modest expansion to the regime, which does not introduce a new offence. In 2020/2021, about 45 people were convicted of knowingly making/copying and possessing objectionable material. How objectionable material was classified is not recorded at sentencing, so it is not known at this point, how many of these cases involved material in the categories above.

### **Option Three (a) – Including community-based sentences in eligibility criteria**

Terrorism offences generally carry serious penalties and will generally result in a prison sentence that would make a person eligible for a control order. However, there may be circumstances in which a person who has engaged in terrorism-related activity may be given a community-based sentence, for example because they have served a significant amount of time in prison on remand and the sentencing judge determines that such a sentence would be an appropriate next step.

An offender who is convicted of terrorism offences and sentenced to a community-based sentence can still undertake many of the activities which control orders would ordinarily seek to restrict. Allowing for the imposition of a control order against such offenders would allow further options for managing individuals who present terrorism risks in the community.

Including community-based sentences in the eligibility criteria for a control order would be inconsistent with other relevant civil orders, all of which set the threshold at a sentence of imprisonment. On balance, however, the Ministry supports the extension because

a scenario may arise in which a person has been sentenced to a community-based sentence but are assessed as posing a real risk of committing terrorism-related offences. The offender who committed the recent terrorist attack in Auckland fell into this category.

### **Option Three (b) – Concurrence of orders**

When people are released from prison, they are subject to release conditions managed by Corrections' probation staff. People serving short sentences of two years or less are released from prison automatically at 50% of their sentence and serve the remainder in the community. People serving longer sentences are subject to the parole system and can be paroled at any point between one third and the full term of their sentence. Both categories of person are subject to standard release conditions, which can include, for example:

- reporting regularly to community probation,
- restrictions on living and working arrangements,
- restrictions on associating with certain people, or
- limitations on the offender's ability to move to a new residential address.

Both short and longer-serving prisoners can also be subject to special conditions imposed either by the sentencing judge or the Parole Board, respectively. Special conditions are not limited, provided that they are designed to reduce the risk of re-offending, support rehabilitation and/or reintegration and provide for reasonable concerns from the released person's victim. For example, they can require a person to:

- to reside at a specific residential address,
- attend an assessment and complete various rehabilitation programmes,
- not to associate with specified person/s or groups of persons,
- to remain in specified places or areas, or
- be subject to electronic monitoring.

Under the Control Orders Act, there is flexibility for a person to be managed simultaneously by both Corrections' probation staff (following their release from prison) and by Police (under the conditions of a control order). In most cases, this is unlikely to be necessary, as a combination of standard and special conditions are generally expected to be flexible and stringent enough to manage the kind of risks that a control order would be intended to manage.

If option 3(a) is progressed, it is likely that a control order would need to apply concurrently with a relevant person's community-based sentence because the conditions of some community-based sentences (notably community work and community detention) are much more limited, as these sentences are focused solely on making sure a person meets work and curfew requirements. Conversely, the conditions that may be imposed by a control order are targeted at reducing an individual's terrorism-specific risk (e.g. restrictions on use of electronic devices, disclosing or receiving certain types of information, or possessing certain kinds of chemicals).

Concurrence of sentence conditions and control order requirements may also be necessary if the sentencing judge considers that this approach would be more appropriate, on the grounds that:

- the two legislative regimes have differing purposes, and
- the specific risks identified to support control order conditions may not have been an element in the offending for which the individual is being sentenced.

On this basis, we recommend that the existing legislative settings relating to concurrence are carried over to community sentences.

Operationally, the greater use of concurrence will require Police and the Department of Corrections to work closely together to manage overlapping areas of responsibility. It would also require coordination with the Courts and the Parole Board to make sure that consistent conditions are set and no gaps in oversight arise. However, we note that the Sentencing Act provisions dealing with issue of primacy.

#### **Option Four – *Expand the range of conditions that can be imposed by control orders***

At present, the list of control order conditions is exhaustive and precludes judges from considering any other condition they may determine necessary for public safety, the rehabilitation of the offender, or the risk of terrorist attack.

When developing the existing control orders regime, officials recommended that some judicial discretion should be available in the setting of conditions so that they can be tailored to the specific risks presented by each individual. This approach is consistent with the design of other relevant civil orders and the way that the courts and the parole board impose sentence and release conditions.

Concerns have been raised about overly-broad control order conditions in some quarters. For example, the Australian Human Rights Commission suggests the limit of conditions that can be imposed is a safeguard of an individual's rights.<sup>6</sup> In addition, without a legislative limit on conditions for post detention orders they can become more onerous over time. It is then left to the court to determine the upper limits.<sup>7</sup>

The Ministry is confident that such concerns can be mitigated. The existing strict limits on the use of the most coercive conditions such as curfews and electronic monitoring couldn't be overridden by the proposed discretion. In addition, no condition can be imposed unless it is necessary to meet the purposes of the Act.

#### **Option Five – *Name suppression***

Under existing legislation name suppression is mandatory and automatic in control order cases. Section (9) (2) (a)

[REDACTED]. This was the experience when making New Zealand's first (and, currently, only) control order.

For this reason, it is recommended that the regime is amended to allow for a presumption of name suppression that can be lifted on application. Any risk of misapplication is mitigated by the oversight of judicial officers who will consider the effects on and rights of the offender in granting name suppression, or in lifting that suppression.

A person may want to acknowledge their past wrongs and visibly be seen to be engaging and complying with their conditions. This would approach would mean that in some cases it may be appropriate for the public to know that a person is taking positive steps to rehabilitate and reintegrate, strengthening social cohesion.

#### **What are the marginal costs and benefits of the options?**

No additional significant costs are anticipated by the recommended options that cannot be absorbed within Police operational baselines.

<sup>6</sup> Australian Human Rights Commission *Review of AFP Powers*, 10 September 2020 at 177.

<sup>7</sup> *Review of AFP Powers* at 307.

The increased costs to Corrections of co-ordinating with Police on any issues arising from operational complexities of concurrent control orders and release-conditions are expected to be low. These adjustments will enable a more fit-for-purpose control order regime.

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.

The Crown has historically been highly reactive to perceived threats against its sovereignty, such as the New Zealand Wars, the raid and subsequent arrest of Rua Kēnana at Maungapōhatu, and most recently Operation 8 in te Urewera.

Analysis on each proposed change has involved consideration of whether the proposals are unduly prejudicial against Māori and/or impact or uphold the Crown's Treaty obligations. The definition of terrorist act and the existing provisions in the Terrorism Suppression Act 2002 (TSA) provide safeguards which mitigates the risk of disproportionate impact on Māori. The extension to the control orders regime is limited in scope to terrorism offenders, so is unlikely to disproportionately impact Māori.

The section 5 definition of "terrorist act" in the TSA underpins the control orders regime. Although the definition does not expressly incorporate challenges to state sovereignty, acts of this nature are conceptually compatible with the ideological and political motivation components of the definition.

The TSA explicitly states the fact that a person engages in protest, advocacy, dissent or engaging in a strike, lockout, or other industrial action is not enough to show intention to commit a terrorist act. To be eligible they must also intent to cause certain outcomes referred to in provisions of the TSA.

The extension to the control orders regime is limited in scope to terrorism offenders, so is unlikely to disproportionately impact Māori. The potential extension in eligibility in control orders are the result of charges in which Māori are not overrepresented. These safeguards preserve the ability of Māori to peacefully assert their right to tino rangatiratanga, unless all elements of the control order regime are met.

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.

## What options are not recommended?

### **Option Two (b) – Expanding qualifying offences to FVCPA 'restricted' publications**

Restricted publications are classified as such because there are restrictions on how they can be shared, notably using age designations such as 'R18'. Police advise that there is at least one previous case of terrorism concern where the individual was convicted for a restricted publications offence. In some cases, this could have a terrorism link if violent adult material is shared to de-sensitise younger people, making them more susceptible to extremist content.

This option is not recommended because expanding control order eligibility to restricted publication offences would capture many publications that prima facie do not necessarily have a close (or any) link to terror or terrorism. Restricted publications offences are also very low level offences, which could result in a significant number of people becoming relevant persons for the purposes of control order, noting that a control order could only be granted if a person presents a real risk of engaging in terrorism-related activity.

### **Option Two (c) - Expanding qualifying offences to other violence offences**

Violent offences are another category of offending that could potentially be included in the relevant person test for control orders, on the grounds that violence is both a form of terrorism and an indicator of terrorism risk.

Widening the eligibility criteria by including violence offences would represent a significant expansion of the underlying principles of the control orders regime. It would also overlap with ESOs and PPs, both of which apply to serious violent offenders. The conditions that can be imposed under both of these orders are analogous to control orders.

While some risk assessment tools have been developed internationally to predict the likelihood of terrorism-related offending, research identifies limitations in their predictive accuracy. However, they can have value to support risk assessment processes when combined with other techniques and sit alongside structured professional judgment.<sup>8,9</sup>

### **Option Six – Lowering the age threshold for control orders**

Under the existing legislation, the age threshold for control orders is 18 years. This threshold has been applied in accordance with international human rights norms, notably the Convention on the Rights of the Child.

The issue of whether the age threshold should be lowered was considered by select committee when the control orders regime was first introduced in 2019. At that time, Oranga Tamariki advised that the Oranga Tamariki Act 1989 provides tools to manage children or young people engaging in radicalised or extremist activities, as follows:

- 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.
- 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.
- 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.

The option of lowering the age threshold was also raised in consultation with Kāpuia. Members of the group commented that underdeveloped critical thinking skills, as well as the number of ideologies young people are potentially exposed to, create 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.

The Ministry's view is that no change should be made to the age threshold until there is clear evidence that the care and protection framework and carefully considered responses described above are insufficient to manage the risks presented by young people who are exhibiting extremist behaviours. At the same time, we note the concerns raised by New Zealand Police, which relate to:

- newly emerging young persons of concern who are highly active online, frequently exposed to and influenced by extremist messaging, and who can be technically skilled
- 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.

<sup>8</sup> Dr Simon Copeland and Dr Sarah Marsden *Extremist Risk Assessment* (Centre for Research and Evidence on Security Threats (UK), November 2020) at 15.

<sup>9</sup> 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.



Police has suggested that control orders could be an effective way of responding to these trends on the grounds that their potentially rehabilitative and reintegrative focus, including building protective factors, could achieve enduring positive outcomes for young people when compared to further criminal prosecution. The Ministry considers that these issues and potential approaches would be appropriate for consideration as part of the statutory review of control orders, which is scheduled for 2023.

#### **Option Seven – Mandatory disengagement programme attendance for subjects of a control order**

Under the existing control orders regime, a person who is subject to a control order can be required to engage with specified rehabilitative services providing they have consented. Requiring consent to programme participation – which does not apply under other relevant civil orders for managing high risk individuals – reflects the fact that:

- the link between certain forms of clinical treatment, such as programmes to address alcohol and drug addiction, and terrorism risk are not clear
- programmes aimed at de-radicalising people who are considered to present a terrorism risk lack a strong evidence base, making it harder to mandate participation.

The Ministry considers that research evidence about the effectiveness of rehabilitative interventions in mitigating terrorism risk continues to be evaluated and used to inform future consideration of this option.

#### **Option Eight – Retrospective application**

A criminal conviction is a requirement for control order eligibility for people already in New Zealand. There are no domestic individuals in New Zealand who are currently eligible for a control order due to the requirement that eligible offending must have occurred on or after 5 October 2021.

Control order eligibility could be extended to where the precursor offending occurred prior to the passage of the empowering legislation. Police supports this option on the grounds that it would enable conditions to be placed on a person, when appropriate, to manage their terrorism risk. Due to time constraints, and a lack of available information, the Ministry has been unable to examine the precise scale and nature of the risk presented by people with relevant historic offences, or the adequacy of wider measures, such as surveillance, to manage their risk.

The Ministry notes that because the retrospective application of coercive powers is fundamentally at odds with the Bill of Rights Act, notably in relation to the rights to be free from repeat punishment for the same crime (otherwise referred to as ‘double jeopardy’), a high bar should be set for this kind of change to the current legislative regime. While it is not certain that every control order would amount to a punishment under the Bill of Rights Act, it is reasonable to anticipate that some control orders would.<sup>10,11</sup>

On this basis, the Ministry considers that it would be premature to progress a retrospectivity option at this time.

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<sup>10</sup> Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 24.3.22.

<sup>11</sup> *Chisnall v Attorney-General (Corrections)* [2021] NZCA 616.

## Section 3: Delivering an option

### How will the new arrangements be implemented?

The control order regime is administered by the New Zealand Police. Police and Corrections have been consulted on the issue of concurrent orders, which, as a result of the recommendation to include community sentences in the eligibility criteria for control orders, is likely to occur more frequently.

The inclusion of community-based sentences increases the likelihood that concurrent orders will arise in practice. Agencies will work through the practicalities of ensuring control order conditions and any other overlapping or applicable sentence conditions are effectively managed. These issues will be resolved through drafting, and any outstanding matters can be dealt with under the authority delegated to the Minister of Justice in consultation with his colleagues. However, agencies agree that these issues should be resolvable.

As discussed, concurrency will require coordination between the two agencies to ensure that any overlapping areas of responsibility are managed. Given the very low number of control orders anticipated, this is not considered to be a significant operational issue.

### How will the new arrangements be monitored, evaluated, and reviewed?

We anticipate that very few difficulties in the implementation of recommended adjustments to the control orders regime. However, the 2023 statutory review will provide an opportunity to address any emerging difficulties.

### Consultation and other considerations

**Justice Sector – New Zealand Police, Ara Poutama Aotearoa – Department of Corrections, New Zealand Security Intelligence Service, the Department of Prime Minister and Cabinet, Crown Law Office and Oranga Tamariki**

Consultation was undertaken extensively on these issues in both the implementation of the regime and on the expansions to the regime in October this year. Comparatively modest consultation was undertaken on the current policy development owing primarily to the urgency imported into the request for advice by Cabinet.

**Kāpuia - Ministerial Advisory Group on the Government's Response to the Royal Commission of Inquiry into the terrorist attack on Christchurch mosques**

Due to time constraints, high-level consultation with Kāpuia, as a group representing a diverse range of community interests was prioritised. A summary of the diverse range of feedback provided through facilitated consultation with Kāpuia on potential options for strengthening the control order regime is provided at Appendix 2. Key issues raised have also been included in the relevant sections of this regulatory impact analysis.

## Appendix 1: Current control order regime

For a control order to be issued under the current legislation, the individual to be subject to the order must be a “relevant person”. Following the passage of the Counter Terrorism Legislation Act, a “relevant person” may be a returnee or a domestic individual.

The Act defines “**relevant person**” as follows:

### 6 Meaning of relevant person

- (1) A **relevant person** is a person who is 18 years old or older, who is or may be coming to New Zealand or has arrived in New Zealand, and who before their arrival in New Zealand—
  - (a) engaged in terrorism-related activities (see section 8(1)) in a foreign country; or
  - (b) travelled, or attempted to travel, to a foreign country to engage in terrorism-related activities in a foreign country; or
  - (c) was convicted in a foreign country of an offence because of conduct that is or includes engaging in terrorism-related activities in a foreign country; or
  - (d) was deported from, had a visa cancelled by, or had any passport, citizenship, or nationality revoked by, a foreign country for reasons that are or include a security risk related to conduct that is or includes engaging in terrorism-related activities in a foreign country; or
  - (e) is or was the subject of any control order regime, or other analogous supervisory regime, in a foreign country, because of conduct that is or includes engaging in terrorism-related activities in a foreign country.

[...]

- (5) This subsection applies to a person who is 18 years old or older and—
  - (a) who, on or after the commencement date of the Counter-Terrorism Legislation Act 2021, committed, and was convicted of, a terrorism-related New Zealand offence; and
  - (b) who was sentenced, on or after that commencement date, for that offence, to a determinate sentence of imprisonment; and
  - (c) whose statutory release date, or whose last day as an offender who is subject to release conditions, for 1 or more sentences of imprisonment that are or include that determinate sentence of imprisonment, is after that commencement date.

Engaging in **terrorism-related activities** is defined as follows:

### 8 Meaning of engagement in terrorism-related activities

- (1) A person **engages in terrorism-related activities** in a country if the person does all or any of the following in that country:
  - (a) carries out terrorism (whether as a or the principal party, any other party, or an accessory after the fact):
  - (b) facilitates or supports materially the carrying out of terrorism.
- (2) For the purposes of this Act, terrorism is **carried out** if any 1 or more of the following occurs:
  - (a) planning or other preparations to carry out the terrorism, whether it is actually carried out or not:
  - (b) a credible threat to carry out the terrorism, whether it is actually carried out or not:
  - (c) an attempt to carry out the terrorism:

- (d) the carrying out of the terrorism.
- (3) For the purposes of this Act, terrorism is **facilitated or materially supported** only if the facilitator or material supporter knows, or ought reasonably to know, that terrorism is facilitated or materially supported, but this does not require that—
  - (a) the facilitator or material supporter knows, or ought reasonably to know, that any specific terrorism is facilitated or materially supported:
  - (b) any specific terrorism was foreseen or planned at the time it was facilitated or materially supported:
  - (c) any terrorism was actually carried out.

**Terrorism-related New Zealand offence** is defined as follows:

**8A Meaning of terrorism-related New Zealand offence**

- (a) an offence against the Terrorism Suppression Act 2002 (even if that offence was committed wholly, or partly, outside New Zealand, but is prosecuted in New Zealand under any of sections 15 to 18 of that Act and sections 7, 8, and 8A of the Crimes Act 1961); or
- (b) an offence—
  - (i) against section 124(1), 127(4), 129(3), or 131A(1) of the Films, Videos, and Publications Classification Act 1993, or section 390 of the Customs and Excise Act 2018; and
  - (ii) that involves a publication that is objectionable (as those terms are defined in sections 2 and 3 of the Films, Videos, and Publications Classification Act 1993) for reasons that are or include the extent and degree to which, and the manner in which, the publication (as provided in section 3(3)(d) of that Act) promotes or encourages acts of terrorism.

The **power to make** a control order is set out as follows:

**12 Power to make**

- (2) The court may make a control order only if satisfied that—
  - (a) the relevant person poses a real risk of engaging in terrorism-related activities in a country; and
  - (b) the requirements the order imposes for the main purposes stated in section 3(a) and (b) are necessary and appropriate, and are only those necessary and appropriate,—
    - (i) to protect the public from terrorism; and
    - (ii) to prevent engagement in terrorism-related activities in a country; and
  - (c) any requirements the order imposes for 1 or both of the incidental purposes stated in section 3(c) are necessary and appropriate, and are only those necessary and appropriate, to support the relevant person’s reintegration into New Zealand or rehabilitation, or both.
- (3) In determining any requirements imposed, the court must also—
  - (a) consider how requirements, if imposed, will or may affect the person’s personal circumstances (for example, financial position, health, and privacy); and
  - (b) consider whether requirements are justified limits on rights and freedoms in the

New Zealand Bill of Rights Act 1990, and consider any other matters the court thinks relevant; and

- (c) comply with section 17 and with the limits in sections 18, 19, and 20.<sup>12</sup>

The **requirements that may be imposed** are specified 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

<sup>12</sup> Sections 18, 19 and 20 provide limitations on the conditions that may be placed on the requirement to stay at a certain address, electronic monitoring and requirements to engage with rehabilitative services, respectively.

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).

Proactive Release

## Appendix 2: Collation of Kāpuia feedback on options for reviewing control orders

### *Key takeaways from Kāpuia's preliminary discussion on control orders*

- This is a complex issue, and any such powers must be designed and used in a way that is respectful of all human rights.
- There needs to be a much clearer understanding in communities about trends and triggers of violent extremism and terrorism in Aotearoa New Zealand, and these need to be informed by New Zealand-based evidence.
- The primary focus should be on prevention and being an 'ambulance at the top of the cliff', so there must be greater emphasis on addressing disengagement and deradicalisation.
- Education and wider support for communities is also important.
- New Zealand considers itself to be a restorative society, and this needs to be a fundamental basis for all levels of intervention. Grief, trauma and healing in New Zealand should also be approached in a culturally appropriate way.
- Trust needs to be built within, across and between communities and government agencies so there is confidence that greater intervention powers will be used appropriately.
- In the context of the points above, it is accepted that there should be some measures (such as control orders) to allow for early interventions but with some caveats:
  - it needs to be clear who these orders could apply to and the definition of terms to which the orders might apply (such as 'terrorist') need to be very clearly and widely understood;
  - all intervention measures must be respectful of all human rights in the way they are developed and used, and must be used mindfully and transparently;
  - such interventions should not be used in a way that unfairly impacts on ethnic, faith or other minority communities; and,
  - for all tamariki in Aotearoa New Zealand - it is important that there is a wrap-around approach to protect children from trauma in the future.