



21 September 2022

Attorney-General

**Counter Terrorism Acts (Designations and Control Orders) Amendment Bill  
(PCO 24881/1.27) Consistency with the New Zealand Bill of Rights Act 1990  
Our Ref: ATT395/359**

1. We have examined the Counter-Terrorism Acts (Designations and Control Orders) Amendment Bill (**the Bill**) for its consistency or otherwise with the rights and freedoms guaranteed by the New Zealand Bill of Rights Act 1990 (**NZBORA**) and found no inconsistency.

**Purpose of the Bill**

2. The Bill proposes amendments, some of them retrospective, to the Terrorism Suppression Act 2002 (**the TSA**) and the Terrorism Suppression (Control Orders) Act 2019 (**the TSCOA**). These Acts enable the Government to fulfil its international commitments to prevent terrorism and respond effectively to the risk of terrorism in New Zealand.

**Amendment to the TSA**

3. The proposed amendment to the TSA concerns the designation of terrorist entities and associated entities – those who the Prime Minister is satisfied have knowingly carried out or participated in acts of terrorism or facilitated or assisted others to do so. These can be individuals or groups. The principal effect of designation is to make it unlawful to provide finance or other direct or indirect assistance to the entity. In doing so Parliament gave domestic effect to various United Nations Resolutions intended to disrupt the transactions that support or enable terrorism.
4. As designation causes a significant change in status for the entity affected, the Act provides mechanisms for review and revocation so that the Prime Minister may end an order that is no longer appropriate. All designations run for only 3 years unless renewed by the Prime Minister. On a renewal or in considering revocation one of the thresholds for continuing the designation is that the reasonable grounds found by the Prime Minister in making the final designation under s 22 of the Act still exist.

5. By this Bill Parliament is now asked to clarify what it intended in the event that the entity has since been imprisoned. Should the substantial disablement of further acts of terrorism that results from their being imprisoned affect their designation? This Bill proceeds on the basis that it is consistent with Parliament's purpose that it should not. This Bill seeks to amend the Act to defer the expiry of the designation while imprisonment continues and constrain the ability of the designated entity to seek revocation during that period. In its place will be a three yearly review of the designation by the Prime Minister while the imprisonment continues.
6. On the basis that the Prime Minister has acted consistently with the intention that Parliament is now asked to clarify, the Bill proposes to retrospectively validate all actions to date that were consistent with the law as Parliament is now expressing it and make clear that it applies to the imprisonment of a terrorist entity whether that imprisonment began before or after the amendment is passed.

#### ***Amendment to the TSCOA***

7. The TSCOA empowers the High Court to make a control order in respect of a person who has engaged in terrorism-related activity overseas or commits a terrorism-related offence in New Zealand. Controls orders can be subject to conditions that include significant restrictions on freedom, including submitting to residence and overnight curfew requirements and electronic monitoring. The Bill proposes amendments to widen the eligibility for a control order on the grounds of committing a terrorism-related offence in New Zealand. It also seeks to expand the provisions for electronic monitoring.
8. Currently a qualifying New Zealand terrorism related offence must result in imprisonment for a control order to be available. The control order is applied for when their release from prison is imminent. The Bill will extend the eligibility to include offences that have resulted in home detention and community-based sentences, in which case they may be imposed while those sentences are being served. There are consequential amendments to ensure that control order conditions are suitable for home detention and community-based sentences.
9. The definition of a New Zealand terrorism-related offence includes offences against the Films, Videos, and Publications Classification Act 1993, and Customs and Excise Act 2018 involving objectionable publications. As currently enacted s 8A limits those offences to objectionable publications that promote or encourage terrorism. The Bill will extend that to include publications that are objectionable because they depict, promote or support acts of torture or extreme violence or cruelty or which represent that any person is inherently inferior by reason of any of the prohibited grounds of discrimination in s 21 of the Human Rights Act 1993.
10. The Bill will add to the conditions that can be imposed on a control order a power to make general conditions that will give effect to the main purposes of restricting movement within or outside New Zealand and the incidental purpose of restricting their contact with specified persons likely to exacerbate their risk to the community.

11. The Bill also clarifies the effect on control orders of appeals against the conviction or sentence for the terrorism-related offence, and the effect of recall to prison.

### **Consistency with the NZBORA**

#### ***TSA amendments***

12. Designation as a terrorist entity primarily affects the entity's rights in respect of property and reputation which are not guaranteed by NZBORA but the isolation that designation causes will also limit the exercise of their freedoms of association and expression. To the extent that such limits are caused they are demonstrably justified by the need for effective measures to prevent terrorism. The amendments proposed by this Bill do not increase those limits, but they will prolong their effect while the entity is imprisoned.
13. We note that deferral of the expiry date of the designation occurs regardless of whether the entity is imprisoned for a terrorism related offence or unrelated offending. It is not clear why imprisonment for an unrelated offence should itself defer the expiry of a terrorist designation and in that regard the rational connection of the measures to the Act's objectives could be questioned but the amendments do not preclude revocation of a designation that has become inappropriate during a term of imprisonment. As well as the duty to conduct the mandatory three year reviews (proposed s 35D) the Prime Minister retains the power under s 34(1) to revoke a designation on her own initiative, a power which must be exercised or withheld reasonably and consistently with the NZBORA.
14. Although the amendments are retrospective in effect, they are civil rather than criminal so the retrospectivity does not engage the NZBORA.
15. Decisions made by the Prime Minister prior to the amendments and steps taken in consequence of those decisions will be retrospectively validated, and thereby be put beyond legal challenge, but this does not infringe the guarantee of natural justice in s 27. The right to natural justice is procedural and does not confer any immunity from the substantive law being changed by Parliament.
16. The most important component of the right to natural justice for present purposes is the right to bring judicial review proceedings in respect of designation decisions, and that right is expressly acknowledged by s 33 of the TSA and is not restricted by these amendments.
17. We have found no NZBORA inconsistency in the proposed amendments to the TSA.

#### ***TSCOA amendments***

18. 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.

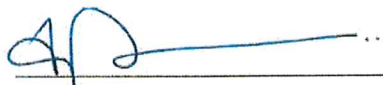
19. The justification for limiting these freedoms is based upon the pressing social objective of enabling the Police to prevent acts of terrorism, and to reassure the public that any person known to pose such a risk is being monitored by the authorities.
20. The Act and this proposal to amend it confer the power to make control orders on the judiciary, and the discretion to make such an order, or to decline to do so, is not subject to any constraint. When a Court is given a fully discretionary power, it may be relied upon to make only those orders that are a justified and proportionate limit on those guaranteed freedoms.
21. There is greater provision made for electronic monitoring when it is combined with an order that the person remain at a particular address but the provision that limits the maximum period to 12 hours will not be changed and the Court may not impose an electronic monitoring requirement if lesser restrictions will achieve the statutory purpose.
22. The Bill expands the qualifying criteria for an order. Persons in possession of objectionable material of the type now suggested to be added may not necessarily pose a risk that warrants such an order being made, but whether an order is made will be determined by a Judge. The proposed amendment does not carry any risk that limitations on personal freedoms will be imposed when they should not be.
23. If a control order is made following conviction and sentence for a New Zealand terrorism-related offence, the filing of an appeal against that conviction or sentence will not suspend the control order pending determination of the appeal. The criminal consequences of conviction and sentence are normally stayed pending an appeal, but the preferred view is that a control order is not one of the criminal consequences of offending.<sup>1</sup> A relevant conviction is only a qualifying criterion, and the other qualifying criterion (engagement in terrorism-related activities overseas) does not require a criminal conviction. A Judge can only make the order if satisfied that there is a risk of terrorism.
24. Public safety and reassurance in respect of the risk of terrorism are values of high public utility. The continuation of an order meanwhile is justified even while the appellate Courts determine an appeal that may require it to be rescinded. The Court retains the power to modify or revoke such an order to meet the justice of the case in the meantime.
25. We see no NZBORA inconsistency in the proposed amendments to the TSCOA.

---

<sup>1</sup> As advised to you in respect of the Counter Terrorism Legislation Bill 2021 on 6 April 2021


**Review of this advice**

26. In accordance with Crown Law's policies, this advice has been peer reviewed by Bronagh McKenna, Crown Counsel.

  
\_\_\_\_\_  
Austin Powell  
Senior Crown Counsel

Encl.

~~Noted / Approved / Not Approved~~

  
\_\_\_\_\_  
Hon David Parker  
**Attorney-General**

10/9 /2022