

## Privacy Commissioner's Submission to the Foreign Affairs, Defence and Trade Committee on the Terrorism Suppression (Control Orders) Bill (183-1)

### Executive Summary

1. The Terrorism Suppression (Control Orders) Bill ('the Bill') has been introduced on an urgent basis to address a small number of individuals who the Government believes will return or have arrived in New Zealand and have participated in terrorism-related activities overseas. The Bill seeks to introduce a civil regime of control orders to manage and monitor these individuals.
2. The Bill provides that the High Court may impose a control order if satisfied on the balance of probabilities that a person has engaged in or travelled to a foreign country to conduct terrorism-related activities or has been deported from a country for terrorism-related reasons and that they pose a real risk of engaging in terrorism-related activities.
3. The requirements the control orders would provide for include:
  - restricting the individual's movement, connectivity, access to information, ability to work and access to financial services; and
  - monitoring and tracking the individual, collecting their biometric information and undertaking drug and alcohol assessments.
4. The functions of the Privacy Commissioner include examining new legislation for its possible impact on individual privacy. The Privacy Act 1993 is New Zealand's main privacy law. It governs the collection, use, storage and disclosure of personal information and provides a mandate for my Office to consider wider developments or actions that affect personal privacy. Central to my examination of any proposed legislation is the principle that policy and legislation should be consistent with privacy rights unless there is very good reason (and evidence) to override those rights.
5. I am not aware of evidence justifying such exceptional measures contained in this Bill. Unless the Committee receives compelling evidence of some deficiency in the current law, and intelligence and security capability it should conclude that the proposed measures are not justifiable intrusions into New Zealanders privacy.
6. **I recommend that this Bill does not proceed.** I consider that the Bill is unnecessary given the tools already available to the law enforcement and intelligence agencies.
7. I understand that any conduct that could form the basis of an application for a control order could properly form the basis of a prosecution under existing law. If agencies do not have enough evidence to take a criminal case, the remedy is to gather more evidence, not to reduce the standard of proof required to achieve penal sanctions and restrict individuals' liberties without due process.

## The requirements of control orders are deeply intrusive to privacy

8. Clause 16 states examples of requirements that a control order can impose on a relevant person. Many of these requirements are deeply intrusive to the privacy of the individual, including:

### Prohibiting or restricting the individual from:

- being in or at specified places;
- communicating or associating with specified individuals or classes of individuals;
- disclosing or receiving specified information or dealing with classes of information; and
- accessing or using in any setting, including work, specified forms of telecommunication or other technology including the internet (for example, prohibiting internet use except for on devices known to Police).

### Requiring the individual to:

- reside at a particular address;
- facilitate Police access to premises, equipment or information held by the individual;
- provide their biometric information; and
- submit to electronic monitoring.

*There are other legislative regimes that should be used*

9. Individuals who pose a threat to national security are already able to be placed under surveillance under the Intelligence and Security Act 2018. Individuals who have been found to be involved in terrorist-related activity can already be prosecuted under the Terrorism Suppression Act 2002. These two statutes provide significant powers for the state and are appropriately highly regulated.
10. The control order regime in this Bill proposes weakening the proper protections normally afforded to individuals suspected of being a risk to national security. It is inappropriate to impose criminal-level penalties on an individual for an act that did not result in the bringing of a successful criminal prosecution.
11. Establishing a control order regime also risks disincentivising the prosecution of individuals for terrorist-related activity, as it establishes a regime with a lower threshold of proof.<sup>1</sup> In other words, faced with a case in which obtaining evidence to the criminal standard of proof will be difficult, Police might opt for the easier path of obtaining a control order.

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<sup>1</sup> <https://www.inslm.gov.au/sites/default/files/files/control-preventative-detention-orders.pdf>  
<https://www.humanrights.gov.au/our-work/legal/submission/submission-review-certain-police-powers-control-orders-and-preventative>  
[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/RP0708/08rp28](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP0708/08rp28)  
<https://www.cis.org.au/app/uploads/2015/04/images/stories/policy-magazine/2007-autumn/2007-23-1-greg-roebuck.pdf>

*A civil regime is unjustified*

12. The bringing of terrorist related conduct into a civil context is unjustified. The regime proposed in this Bill provides Police with highly intrusive powers to monitor and control an individual in a way that is normally restricted to criminal cases.
13. For control orders the Court would be making orders ‘on the balance of probabilities’ that an individual has been involved in terrorist-related activity. This is a lower threshold than the criminal standard of proof, despite control order conditions being as strong as in criminal situations.
14. The lower threshold for control orders is particularly concerning in regard to individuals who may be considered to ‘facilitate’ or ‘support’ terrorist related activity. The Bill potentially allows a control order to be made in relation to a relevant person’s family members and associates where they may only be tenuously connected to such activities.
15. The threshold for issuing a control order is especially important given they can be issued *ex parte* and with evidence withheld from the individual concerned. However, I am pleased to see that the Supplementary Order Paper issued on 24 October included the requirement that the court appoint a special advocate for individuals where there is a need to withhold information relevant to the necessity of the application.

*There is insufficient evidence that this Bill will be effective*

16. There is little evidence that control order regimes are effective. As the Ministry of Justice’s Regulatory Impact Statement notes “there is limited information on the effectiveness of control orders in changing behaviours” and “there is little relevant data about the number of returnees and potential risks in the New Zealand context to inform the analysis”.<sup>2</sup> This suggests the Bill proposes implementing a tool with little evidence of effectiveness in order to address an unquantified and suspected risk.
17. There is evidence from the United Kingdom that individuals subject to control orders simply amend their behaviour to bide their time until the order expires while maintaining their extremist mindset.<sup>3</sup> This suggests that control orders are ineffective tools to assist in reintegration and that a more holistic approach to social support may be more effective in altering mindsets and reintegrating individuals.

*Recommendation*

18. I **recommend** that this Bill does not proceed.

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<sup>2</sup> <https://www.justice.govt.nz/assets/Documents/Publications/ris-control-orders.pdf>

<sup>3</sup> [https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/10/The\\_Terrorism\\_Acts\\_in\\_2017.pdf](https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2018/10/The_Terrorism_Acts_in_2017.pdf)

**Should this Bill proceed, there are deficiencies that should be addressed**

19. Should the Committee hear evidence that has not been available to submitters and accepts that the proposed regime addresses a genuine deficiency in the law, I recommend several changes to improve the Bill and reduce its potentially disproportionately prejudicial consequences. I outline the following issues and recommendations for the Committee's consideration.

*The period between the issuing of an interim and final order is too long*

20. To provide for the swift administration of justice I **recommend** that the default statutory period between when an interim order may be placed before a final order must be sought is reduced from three months to one month.
21. I also **recommend** the removal of clause 15(1)(b)(ii) providing for the ability to extend this period. This is to ensure an individual can access the information necessary to defend the request for an order or appeal such an order. There is significant harm that could result from the erroneous application of an order and reducing the period between the issuing of an interim and final order will in part mitigate this.

*Additional oversight and safeguards are required*

22. There are examples of other civil regimes that provide for regular review of the appropriateness of restrictions imposed on individuals, such as the compulsory treatment orders issued under the Mental Health (Compulsory Assessment and Treatment) Act 1992. Orders are required to be reviewed every six months and are subject to independent oversight.
23. While it is appropriate that the High Court is responsible for the issuance of such intrusive orders, I **recommend** that there also be *ex post* review and oversight of the regime.
24. Both the United Kingdom and Australia have also appointed independent reviewers of their terrorism and national security laws.<sup>4</sup> These Offices provide important insight and commentary on the effectiveness of the legal regime. I **recommend** if the Bill is to proceed it should also require Police to report on the exercise of this power, to provide public transparency.
25. I also draw to the Committees attention that the privacy incursion mitigation proposed in clause 32 (anonymity) is undermined by clause 16(e). Clause 32 proposes that no person may publish the name, address or occupation of anyone a control order applies to. While this may offer some level of privacy protection for individuals subject to these orders, it is undermined by clause 16(e) providing that Police may restrict or prohibit the individual from using any form of technology including the Internet, in any setting including their work.

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<sup>4</sup> <https://terrorismlegislationreviewer.independent.gov.uk/>  
<https://www.legislation.gov.au/Details/C2010A00032>

26. In practice this would mean individuals would either have to disclose the fact of the order to their place of work, meaning any anonymity would be lost and damage to reputation would likely occur, or to avoid this they would need to resign resulting in a loss of earnings and opportunities for development.

**Conclusion**

27. I trust my comments are of use to the Committee in its consideration of the Bill, a summary of my recommendations is included as an appendix. I request to present this submission to the Committee in person and be available to answer questions.

A handwritten signature in blue ink, appearing to be 'John Edwards', written in a cursive style.

John Edwards  
**Privacy Commissioner**

## Appendix - Summary of Recommendations

I **recommend** that this Bill does not proceed.

However, should this Bill proceed I make the following recommendations:

- ❖ I **recommend** the time an interim order may be in place before a final order must be sought be reduced from three months to one month.
- ❖ I **recommend** the removal of clause 15(1)(b)(ii), which provides for the ability to extend the period between the issuing of an interim and final order.
- ❖ I **recommend** the Bill provide for an ex post reviewer to provide oversight of the regime.
- ❖ I **recommend** that there is a requirement for Police to report on the exercise of these powers.