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Privacy Commissioner's Submission to the Justice Committee on the Counter-Terrorism Legislation Bill (29-1)

Executive Summary

1. The Counter-Terrorism Legislation Bill (the Bill) proposes to amend:
    - The Terrorism Suppression Act 2002 (the TSA)
    - The Search and Surveillance Act 2012 (the SSA)
    - The Terrorism Suppression (Control Orders) Act 2019 (the Control Orders Act)

2. The Bill seeks to strengthen New Zealand's counter-terrorism legislation to better prevent and respond to terrorism and associated activities by:
    - creating new offences to—
        - criminalise travel to, from, or via New Zealand with the intention to carry out a specified offence in the TSA
        - criminalise planning or preparation for a terrorist act (and apply warrantless powers of entry, search, and surveillance to that offence)
        - more clearly criminalise weapons training or combat training for terrorist purposes
    - extending the terrorism finance offence framework to criminalise wider forms of material support for terrorist activities or organisations
    - updating the definition of terrorist act in section 5 of the TSA
    - extending the control order regime to 'relevant offenders' so that individuals who have completed a prison sentence for specified offences related to terrorism may be subject to the regime if they continue to present a real risk of engaging in terrorism-related activities
    - making other amendments to the TSA to improve its workability

3. The functions of the Privacy Commissioner include examining new legislation for its possible impact on individual privacy. The Privacy Act 2020 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.

4. While I recognise that the Bill addresses some of the gaps in New Zealand's current counter-terrorism legislation, I consider that several of the proposals have significant impacts on privacy that are not necessary given the tools already available to law enforcement agencies. In particular, I maintain my position that the control order regime introduced by the Control Orders Act is an unjustifiable intrusion on privacy and I oppose the proposal to extend the control order regime to 'relevant offenders'.

5. **I recommend that changes are made to the Bill if it does proceed.** A summary of my recommendations is provided in **Appendix A** of the submission. My comments relate to clauses 6 – 9 and Part 2 of the Bill.

The extension of the control order regime

6. The Control Orders Act was passed under urgency in 2019 to address a small number of individuals who the Government believed would return or had arrived in New Zealand and had participated in terrorism-related activities overseas (now referred to as 'relevant returners' in the Bill).

7. Part 2, Subpart 2 of the Bill proposes to amend the Control Orders Act to extend the control order regime to 'relevant offenders'. These are individuals who:
    - commit and are convicted of a terrorism-related New Zealand offence
    - are given a determinate sentence of imprisonment for that offence and
    - have a statutory release date, or whose last day as an offender who is subject to release conditions, is after the commencement date of the Counter-Terrorism Legislation Act 2021.

8. I do not support the proposal to extend the control order regime to 'relevant offenders'. I refer the Committee to my submission on the Terrorism Suppression (Control Orders) Bill (see **Appendix B**) in which I opposed the introduction of a control order regime on the following basis:
    - The requirements that may be imposed on an individual under a control order are deeply intrusive to the privacy of an individual.[1]
    - There are other legislative tools available to law enforcement and intelligence agencies that can be used to manage individuals who pose a threat to national security.
    - The bringing of terrorist related conduct into a civil context is unjustified.
    - There is insufficient evidence that a control order regime will be effective.

9. I remain of the view that the control order regime is an unwarranted and unjustifiable intrusion on privacy. I note that the Control Orders Act was passed under urgency 18 months ago, yet the first control order was only issued in May 2021.[2] I encourage the Committee to reconsider whether it is necessary to have a control order regime in New Zealand.

Extension of warrantless powers to offence in new section 6B

10. New section 6B provides that a person commits an offence if "the person carries out a terrorist act…by planning or other preparations to carry out the act, whether it is actually carried out or not; and the planning done is, or other preparations made are, for the purposes of section 72(2) of the Crimes Act 1961, only preparation for the commission of, and too remote to constitute an attempt to commit, an offence against section 6A(1)."

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[1] Section 17, Terrorism Suppression (Control Orders) Act 2019.
[2] *Commissioner of Police v R* [2021] NZHC 1022.

11. Part 2, Subpart 1 of the Bill proposes to confer the warrantless powers of entry, search and surveillance found in sections 15, 16, 17 and 48 of the SSA to the proposed offence in new section 6B. These powers authorise a constable (or enforcement officer in the case of section 48) to:
    - Enter and search a place without a warrant if they have reasonable grounds to suspect than an offence has been committed or is being committed or is about to be committed and believe that evidential material relating to the offence in that place will be destroyed, concealed, altered or damaged if entry is delayed in order to obtain a search warrant.
    - Search a person without a warrant in a public place if they have reasonable grounds to believe that the person is in possession of evidential material relating to an offence.
    - Enter and search a vehicle without a warrant in a public place if they have reasonable grounds to believe that evidential material relating to an offence is in or on the vehicle.
    - Use a surveillance device for a period not exceeding 48 hours without obtaining a surveillance device warrant if the enforcement officer is entitled to apply for a surveillance device warrant in relation to 1 or more of the situations listed in section 48(2) but obtaining a surveillance device warrant within the time in which it is proposed to undertake surveillance is impracticable in the circumstances.

12. As currently drafted, the powers in sections 15, 16, 17 and 48 of the SSA generally apply to offences punishable by imprisonment for a term of 14 years or more, subject to some additional situations in s 48(2)(b)-(f). The Bill proposes to amend these sections, so they would also apply to new section 6B which has a maximum imprisonment term of only 7 years.

13. I do not support the proposal to extend the warrantless powers in sections 15, 16, 17 and 48 of the SSA to the proposed offence in new section 6B. The principle that searches by law enforcement officers must be authorised by an independent judicial officer should only be departed from in exceptional circumstances, when the public interest in quickly acting outweighs the privacy interests of the individual.[3] I am not satisfied that this threshold has been met in respect to new section 6B.

14. Determining whether an offence against new section 6B has been committed will require a complex legal judgement, weighing evidence of the credibility of the threat and the degree of imminence, against matters such as the reliability of the evidence (the hearsay of friends/contacts), and the legitimate rights of people to robustly debate online, engage in satirical speech and the like. Those kinds of judgements ought to be made by an independent judicial officer rather than any Police Officer.

15. Warrantless powers are more likely to be justified when the timing of the threat is such that seeking a warrant would risk prejudicing public safety, or the operation. If the suspect is still planning or preparing, that degree of imminence is unlikely to be present. When there is an imminent threat, it is likely that the offence would advance from planning or preparation to an attempt to commit higher penalty terrorism offences and a law

[3] Law Commission *Search and Surveillance Powers* (NZLC 97, 2007) at 22, 130.

enforcement officer could rely on the existing warrantless powers in sections 15, 16, 17 and 48.

16. I do not consider that the case has been made to justify applying these warrantless powers by exception to a proposed offence with the lower maximum term of imprisonment. Currently, the warrantless powers in sections 15, 16, 17 and 48(2)(a) only apply to offences punishable by imprisonment for a term of 14 years or more. They do not explicitly apply to any of the other offences in the TSA that have a maximum term of imprisonment of 7 years. I do not see any compelling reason why an exception would be made for the proposed offence in new section 6B, especially considering its preparatory nature.

17. While I oppose the proposal to confer the warrantless powers in sections 15, 16, 17 and 48 of the SSA, an issuing officer can still issue a search warrant on application by a constable if they are satisfied on reasonable grounds that an offence punishable by imprisonment has been committed, or is being committed, or will be committed, and believe the search will find evidential material relating to the offence. This means that a search warrant will still be able to be issued for the proposed offence in new section 6B provided it has authorisation from an issuing officer.

New section 6B (Terrorist act: planning or other preparations to carry out)

18. Clause 9 of the Bill amends the TSA to create a new offence that criminalises the planning or preparing for a terrorist attack. I recognise that this proposed amendment is being created to address a gap identified in New Zealand's counter-terrorism legislation. However, it is important from a privacy perspective that the introduction of this new preparatory offence does not allow a disproportionate infringement on individual freedoms and rights to privacy.

19. I have some concerns about the breadth and lack of particularity in the drafting of new section 6B. It potentially applies to a wide range of personal activity and expression, and could capture actions that are otherwise lawful (e.g. purchasing a knife, sending a communication, or expressing an online opinion). As the usual criminal law protections that apply to attempts do not apply to the proposed planning offence, very careful attention should be given to incorporating all necessary procedural safeguards.

20. I recommend the drafting is amended to include additional safeguards that will ensure an individual's privacy can only be compromised if the threat of terrorism is credible and actually capable of being executed. I have recommended some suggested drafting changes in **Appendix C** including:
    - limiting the definition of carrying out a terrorist act to 'credible planning or other credible preparations' in new section 5A (see clause 7)
    - limiting the offence to individuals who 'wilfully' carry out terrorist acts without reasonable excuse through 'direct' planning or preparations, and making this a requirement for the prosecution to prove in new section 6B (see clause 9) and
    - 'planning or other preparations' to not include the carrying out of an act that, in fact, cannot feasibly be carried out by the person concerned in new section 6B (see clause 9).

Other matters for the Committee's consideration

Amendments to the definition of 'terrorist attack'

21. Clause 6 of the Bill proposes to amend the definition of 'terrorist act' under section 5(2) of the TSA so that one of the intentions that has to be met is to induce 'fear in a population' rather than 'terror in a civilian population'.

22. I support retaining the current provision (inducing terror in a civilian population) to help retain the key purpose of this exceptional legislation. This is an objective test that provides a clear threshold. Shifting to a threshold of 'fear' is a potentially subjective test, as people experience fear quite differently and from very different triggers, depending on their particular circumstances and cultural perspectives. I am therefore concerned that shifting to 'fear' would lower the threshold, without a strong justification for doing so. I consider the current threshold of 'terror' to be more appropriate in conveying the scope and reach of the counter-terrorism legislative scheme.

Recommendation to regularly review the Terrorism Suppression Act

23. The Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019 recommended that a regular review of the TSA should be provided for in legislation. I note that this recommendation is not addressed in the Bill and consider that it would be highly desirable to do so in order that the extraordinary nature of the powers (as proposed to be amended) can be monitored and reviewed to ensure they remain necessary and do not result in unintended over reach by the State into people's lives.

24. I recommend the Bill is amended to include a requirement to review New Zealand's counter-terrorism legislation on a regular basis. As noted above, this review should include consideration of whether it is appropriate to have a control order regime in New Zealand.

Conclusion

25. I trust my comments are of use to the Committee in its consideration of the Bill. I request to present this submission to the Committee in person and be available to answer questions.

John Edwards
Privacy Commissioner

25 June 2021

Appendix A - Summary of Recommendations

I **recommend** that this Bill proceeds but is amended to reflect the following changes:

- The control order regime does not extend to “relevant offenders”
- The warrantless powers in sections 15, 16, 17 and 48 of the Search and Surveillance Act 2012 are not extended to the proposed offence in new section 6B
- The drafting changes in **Appendix C** are made to new sections 5A and 6B
- Section 5(2)(a) of the Terrorism Suppression Act 2002 is not amended to replace “terror in a civilian population” with “fear in a population”
- The Bill include a requirement to review New Zealand’s counter-terrorism legislation on a regular basis

Appendix B – Privacy Commissioner's Submission on Terrorism Suppression (Control Orders) Bill

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.[4] 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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[4] 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.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 orders 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".[5] 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.[6] 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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[5] https://www.justice.govt.nz/assets/Documents/Publications/ris-control-orders.pdf
[6] 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.[7] 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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[7] 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.

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.

Appendix C – Drafting suggestions to new sections

5A Carrying out and facilitating terrorist acts

Carrying out includes preparations, credible threats, and attempts

(1) For the purposes of this Act, a terrorist act is carried out if any 1 or more of the following occurs:

(a) credible planning or other credible preparations to carry out the act, whether it is actually carried out or not:

(b) a credible threat to carry out the act, whether it is actually carried out or not:

(c) an attempt to carry out the act:

(d) the carrying out of the act.

Facilitation requires some actual knowledge

(2) For the purposes of this Act, a terrorist act is facilitated only if the facilitator knows that a terrorist act is facilitated, but this does not require that—

(a) the facilitator knows that any specific terrorist act is facilitated:

(b) any specific terrorist act was foreseen or planned at the time it was facilitated:

(c) any terrorist act was actually carried out.

…

6B Terrorist act: planning or other preparations to carry out

Offence

(1) A person commits an offence if—

(a) the person wilfully and without lawful or reasonable excuse carries out a terrorist act (within the meaning of section 5A(1)(a)) by directly planning or otherwise directly preparing~~ations~~ to carry out the act, whether it is actually carried out or not; and

(b) the planning done is, or other preparations made are, for the purposes of section 72(2) of the Crimes Act 1961, only preparation for the commission of, and too remote to constitute an attempt to commit, an offence against section 6A(1).

(2) Subsection (1) does not apply to planning or other preparations to—

(a) carry out an act that in fact cannot feasibly be carried out by the person concerned; or

~~(a)~~(b) plan or make other preparations to carry out the act, whether it is actually carried out or not; or

~~(b)~~(c) make a credible threat to carry out the act, whether it is actually carried out or not; or

~~(c)~~(d) attempt to carry out the act.

(3) In a prosecution for an offence against subsection (1), the prosecutor—

(a) must prove that the planning done is, or the other preparations made are to directly cause ~~for~~ an act that is, or if it were actually carried out would be, a terrorist act as defined in section 5(1)(a), (b), or (c); and

(b) in particular, if that act falls within section 5(2) (in a case to which section 5(1)(a) applies), must prove the intention and purpose elements in section 5(2) and (3); but

(c) in a case to which section 5(1)(a), (b), or (c) applies, need not prove a specific target, location, date, or time for that act.