

Impact Summary: Extended control orders

Section 1: General information

Purpose

The Ministry of Justice is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise stated.

This analysis and advice has been produced for the purpose of informing key (or in principle) policy decisions to be taken by Cabinet.

Key Limitations or Constraints on Analysis

Limitations and constraints on the analysis in this document include:

- There is little evidence about the public safety risk posed by terrorism offenders who have completed their sentences in New Zealand, but consideration has been given to overseas experience. The evidence of the problem (i.e. the limited tools to manage terrorism offenders who have completed their sentence but continue to pose a real risk of engaging in terrorism) comes from consultation with operational agencies including Police.
- There is limited evidence about the effectiveness of control orders, because overseas they are used infrequently and often in combination with other tools. In New Zealand no control orders have been made since the introduction of the regime for returnees in December 2019, which also limits available evidence about effectiveness.
- There is limited evidence upon which to base the estimates of how frequent applications for orders will be. We estimate that applications will only be made for a very small number of individuals based off the limited use of control orders in overseas jurisdictions, Police estimates and the scope of the regime. The infrequency of terrorism related offending also supports this estimate.
- The Ministry consulted with relevant government agencies but has not undertaken consultation with the public or Māori due to the initial timeframes for reporting back to the Minister of Justice.

Responsible Manager (signature and date):

Brendan Gage

General Manager, Criminal Justice Policy

Ministry of Justice

24 November 2020

To be completed by quality assurers:

Quality Assurance Reviewing Agency:

Ministry of Justice

Quality Assurance Assessment:

The Ministry of Justice's RIA QA Panel has reviewed the *Impact Summary: Extended control orders* prepared by the Ministry of Justice and considers that the information and analysis summarised in the RIA partially meets the QA criteria.

Reviewer Comments and Recommendations:

As stated in the Impact Summary, officials did not have an opportunity to consult outside government on the proposals, including with Māori, the legal profession, civil liberties' organisations, and community representatives. The Impact Summary notes other constraints on the analysis, such as limited evidence of the effectiveness of control orders due to the small number that have been issued overseas. These constraints affect the confidence that Ministers can place on the analysis in the RIA. These constraints are clearly identified and the analysis is otherwise complete, clear and convincing. For this reason, the QA Panel assesses the RIA as partially meeting the Quality Assurance criteria.

Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

Background

In December 2019 the Terrorism Suppression (Control Orders) Act was passed. Control orders are a civil order that enable the court to place restrictions on someone who returns to New Zealand after engaging in terrorism related activity overseas. When Cabinet agreed to introduce the control orders regime for returnees, officials were directed to report back on whether control orders should be extended to cover other individuals with previous convictions for terrorism, or individuals who pose a terrorism related public safety risk where prosecution would not be possible or appropriate.

Following analysis and consultation with agencies, we recommended any extension of the control orders regime be limited to individuals with previous convictions for Terrorism Suppression Act 2002 offences or specific offences under the Films, Videos, Publications Classification Act 1993 and Customs and Excise Act 2018 (**terrorism offenders**). The rationale for including these offences in the scope of eligibility for a control order is discussed below.

A broad expansion of the regime (i.e. to individuals who it may not be possible or appropriate to prosecute) was not pursued for a number of reasons. One of these was questions about the effectiveness of control orders as an early intervention tool, to pre-emptively disrupt behaviour before any offending has occurred. Using a control order as an alternative to a criminal prosecution, or as a method of disruption before criminal offending has occurred, also raised substantial concerns around natural justice and human rights, to a greater degree than a regime extended to terrorism offenders only.

Problem definition

Currently, if someone is convicted and is given a finite sentence of imprisonment for a terrorism offence, once the sentence is completed (including time spent in the community on parole or released on conditions) there are limited options for managing any ongoing terrorism related public safety risk posed by the individual. New Zealand does have post sentence orders for managing some types of offenders (Extended Supervision Orders (ESOs) and Public Protection Orders (PPOs)) but these do not cover terrorism offenders. Under the status quo agencies can interact with individuals, however there is not ability to place requirements upon the person that would help limit the public safety risk they pose or support their reintegration into the community. Surveillance is one option for monitoring behaviour, however this has a number of limitations, including its resource intensive nature which makes long term surveillance or surveillance of multiple individuals challenging to sustain. It can also be difficult to maintain in the long term without the individual becoming aware they are under surveillance and adopting counter-surveillance measures.

Scope of eligible offences

For the purposes of this analysis, we have considered options to manage individuals who have committed offences under the Terrorism Suppression Act 2002 (TSA) offences and also some specific offences under the Films Videos and Publications Classification Act 1993 (**FVPCA**). The FVPCA offences we have included are those where the offence could result in imprisonment, if the relevant publication was deemed

objectionable due to promoting or encouraging acts of terrorism. The relevant offences are:

- Section 124(1) of the FVPCA: offences (including the making, distribution, importation or supply of an objectionable publication), where the individual knew or had reasonable cause to believe the publication was objectionable. The penalty for this offence is imprisonment not exceeding 14 years.
- Section 127(4) of the FVPCA: exhibition of objectionable publications to persons under 18. The penalty for this offence is imprisonment not exceeding 10 years.
- Section 129(3) of the FVPCA: the distribution of an objectionable publication in a public place. The penalty for this offence is imprisonment not exceeding one year.
- Section 131A(1) of the FVPCA: the possession of an objectionable publication where the individual knows or has reasonable cause to believe the publication is objectionable. The penalty for this offence is imprisonment not exceeding 10 years or a fine of up to \$50,000.
- For completeness we have included offences against section 390 of the Customs and Excise Act 2018, which relates to the import or export of objectionable publications. The penalty for this offence is imprisonment not exceeding 10 years.

FVPCA allows for material to be deemed objectionable due to promoting or encouraging acts of terrorism (for example, the video of the Christchurch mosques attack). While FVPCA offences do not cause the same degree of harm as a terrorist act,¹ the TSA also includes offences that result in less harm than a terrorist act (for example, credible threats or providing financial services to a terrorist entity). In overseas jurisdictions (including the United Kingdom and Australia) FVPCA style offences are included in counter-terrorism legislation, which indicates their seriousness. However, in New Zealand these offences sit in the FVPCA, so we consider it is appropriate to include these as terrorism offences.

Prevalence of terrorism offences in New Zealand

Although the number of terrorism offenders in New Zealand is small, we cannot guarantee this will remain the case coming years, and we need the right tools in place to manage any future terrorism related public safety risks. While terrorism related offences are infrequent, the significant harm that can be caused by terrorism and New Zealand's international obligations, heighten the need for a robust response. The number of individuals charged with FVPCA offences relating to terrorism has increased following the Christchurch mosques attack,² although it is unclear if this trend will continue. The overall terrorism threat level faced in New Zealand has also changed since the mosques

¹ As defined in the TSA, a terrorism act is an act that is intended to induce terror in a civilian population or unduly compel a government or international organisation that results the death or serious injury of one or more people, or a number of other specified outcomes listed at s 5 of the TSA.

² Police advise that in the three years prior to 2019, four individuals were prosecuted under FVPCA. From 15 March to 20 October 2019 there were 28 prosecutions for offences related to the 15 March livestream

attack and the threat of an attack occurring has increased. The Combined Threat Assessment Group (CTAG) currently rates the threat of a terrorist attack in New Zealand as 'medium', meaning an attack is feasible and could well occur. In previous years the threat level was rated at 'low'.

In relation to TSA offences, currently one individual has been convicted of a TSA charge (although the control orders regime would only apply to individuals who receive finite sentences – someone imprisoned for life without the possibility of parole could not be subject to them). The proposed new TSA offences may result in additional terrorism charges in the future.

Evidence suggests that while terrorism offenders may reoffend at a lower rate than general violent offenders, the recidivism rate is unlikely to be zero and this cohort still poses a risk of reoffending.³ The February 2020 attack in Streatham, London, provides a recent example of reoffending by someone with a terrorism related conviction. Reoffending by terrorism offenders is particularly problematic, as the nature of these offences can result in considerable harm to large numbers of people and just one incident has the potential to undermine national security.

A response is therefore needed to manage individuals who complete a sentence for terrorism offending who continue to pose a real risk of engaging in terrorism related activities after completing their sentence. This is necessary both to ensure public safety and to support the rehabilitation and reintegration of the individual, which in turn supports public safety. This would be consistent with New Zealand's approach to managing other serious offenders who continue to pose a public safety risk after completing their sentence (e.g. serious violent and sexual offenders who can be managed under ESOs and PPOs).

If no action is taken it may result in terrorism offenders who have completed their sentence but continue to pose a real risk of engaging in terrorism activity being released into the community with limited statutory options available to mitigate the terrorism risk posed. This puts public safety at risk.

Although we are constrained by the limited available evidence about the effectiveness of control orders, we have reasonable confidence in the evidence that is available and the assumptions underpinning this problem definition.

³ Jesse Morton and Mitchell Silber for Countering Extremism Project, *When terrorists come home*, p. 7, see also UK Parliament written question for the Ministry of Justice, 27 January 2020. In the UK, between 2013 and 2019, 196 individuals were convicted of a terrorist offence. Of this group six were released and subsequently convicted of a further terrorist offence.

2.2 Who is affected and how?

The key group affected will be terrorism offenders who have completed their sentence.⁴ This group will be eligible for a control order should they pose a real risk of engaging in terrorism activity after their sentence is complete. A control order would not be automatic or routine – it would still require a court to be satisfied on the balance of probabilities that based on evidence presented the person did pose a real risk of engaging in terrorism related activity.

A control order is a court imposed civil order, designed to manage individuals who present a real risk of engaging in terrorism related activity. The requirements that can be placed on an individual through a control order are designed to mitigate high-risk behaviours (for example, by preventing association with specified individuals or restrictions on international travel) and encourage engagement with services designed to rehabilitate or reintegrate the individual. The requirements that can be imposed through a control order are tailored to the public safety risk posed by the individual and their specific circumstances.

The court can require an individual to undertake an assessment to identify particular needs (e.g. alcohol and drug assessment), although subsequent engagement with professional services is entirely voluntary. A control order cannot mandate someone engage with health or social services. However, an individual may seek to do so as engaging with these services could result in a lower risk profile and less stringent order requirements. The intention is that services supporting reintegration be delivered in a co-ordinated way across agencies.

The effectiveness of a control order at managing a terrorism offender post-sentence will vary depending on the individual. No counter-terrorism measure can be guaranteed to prevent terrorism activity from occurring and someone who poses an imminent risk of engaging in terrorism may still seek to carry out an attack despite the conditions of a control order. Overseas experience indicates that control orders can be successful at preventing some types of behaviour, for example preventing someone from radicalising others. Independent reviews in Australia and the UK have shown control orders can be an effective tool in managing terrorism risk, despite their infrequent use.⁵

Police, New Zealand Security Intelligence Service (NZSIS), Corrections and the Department of the Prime Minister and Cabinet (DPMC) National Security Group support extending control orders to terrorism offenders who continue to pose a real risk of engaging in terrorism after completing their sentence. Police considers a post-sentence control order would be a useful tool to have available to manage this group.

We have not undertaken consultation with the public and Māori, so we do not know their views on this issue. A number of civil liberties and human rights organisations submitted

⁴ We propose control order requirements come into force when an individual is no longer subject to any release conditions. For most individuals this will be when their sentence expires, but it is possible someone serving a short sentence could be released into the community without any release conditions being set (although it is very unlikely someone who poses a real risk of engaging in terrorism would be released without conditions being set). In this situation the control order would come into force when the person leaves prison and re-enters the community.

⁵ Examples include: Independent Reviewer of Terrorism Legislation (2018), Max Hill QC, *The Terrorism Acts 2017*, para 5.13; Independent National Security Legislation Monitor (2017), James Renwick SC, *Review of Divisions 104 and 105 of the Criminal Code: Control Orders and Preventative Detention Orders*, Sept 2017, para 8.17, 8.19 and 8.21

to select committee on the Terrorism Suppression (Control Orders) Act 2019. These included 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 it is likely the same concerns would be raised in relation to the proposed extended regime.

2.3 What are the objectives sought in relation to the identified problem?

Work on control orders is part of a broader review of counter-terrorism that is currently underway. The objective of the review of counter-terrorism legislation is to ensure our legislation remains clear and effective given the evolving nature of modern terrorism, with a strong focus on early intervention and prevention.

In relation to terrorism offenders specifically, the key objective is to protect the public from individuals who pose a risk of engaging in terrorism related activity after completing a sentence for a terrorism offence. A further objective is to support the reintegration and rehabilitation of the relevant individual, which in turn supports long term community safety by lowering the public safety risk posed by the individual.

Section 3: Options identification

3.1 What options have been considered?

Criteria used to assess options:

Effectiveness, i.e. public safety, national security and harm reduction through:

- a consistent and clear legislative framework;
- enabling and supporting intervention at the most appropriate stage, particularly with a view to prevention;
- encouraging rehabilitation, reintegration, de-radicalisation, de-escalation of the risks of (further) terrorist acts;
- contributing to and not undermining wider work to build social cohesion.

Uphold democratic and constitutional principles: consistency with our democratic and constitutional norms; demonstrably justifiable in a free and democratic society; consistency with the principles of and obligations under Te Tiriti o Waitangi.

International commitments and standards: consistency with New Zealand's international commitments, including the international counter-terrorism framework, and international human rights and humanitarian law.

Options considered:

Option 1: Status quo - continue monitoring under existing legislative settings and use of prosecution as appropriate.

Under this option terrorism offenders would serve their sentences of imprisonment, including any parole or release conditions. If the individual remained a terrorism-related public safety risk after completing their sentence, Police and other agencies could monitor the individual under existing settings (subject to existing oversight and warrant requirements). Police would determine the nature of the risk posed by the individual in collaboration with other agencies, notably Corrections, who will have an insight into the individual's risk profile from their time in prison.

If an individual did reoffend (e.g. sharing objectionable publications or engaging in preparatory offences) they could face criminal prosecution for the new offence. They could also be prosecuted under another Act (i.e. Crimes Act 1961) for other criminal offending.

Following the Christchurch mosques attack on 15 March 2019, New Zealanders are more aware of the possibility of terrorism occurring here, and Police has seen an increase in the number of leads reported to them from the public. This makes it less likely that someone who is breaking the law or engaging in suspicious behaviours (e.g. staking out a location by driving past multiple times or stockpiling materials that could be used as weapons) will go unnoticed or unreported.

This option does not place conditions or limitations on an individual's freedoms (e.g. non-association with particular people or restrictions on the use of technology), but surveillance is an intrusion into someone's privacy, which has rights implications. Surveillance by enforcement officers is strictly regulated under the Search and Surveillance Act 2012 and only occurs when it is considered to be justifiable. In most circumstances a warrant issued by a judge is required to undertake surveillance, although in some emergency situations it is not.

This option does not provide additional statutory tools to manage terrorism offenders post sentence and does not include a mandatory rehabilitative or reintegrative component (rehabilitative and reintegrative measures may be included as parole or release conditions, but these would be time limited and would not apply once a person's sentence is complete). We note that mandatory rehabilitative or reintegrative programmes are likely to be less effective than programmes entered into voluntarily.

Under the status quo individuals can access social services that would help them to reintegrate into the community (e.g. benefits, support into work or health services). There are a number of government agencies and non-government organisations (e.g. religious or community groups) that provide these types of services. Accessing these services would be voluntary.

Option 2: Control orders for terrorism offenders

Under this option the eligibility for control orders would be extended beyond returnees to include terrorism offenders. This would require an amendment to the Terrorism Suppression (Control Orders) Act 2019.

Control orders are a court imposed civil order, designed to manage individuals who pose a real risk of engaging in terrorism related activity. Control order requirements are tailored to the circumstances of each individual. While the key aim of a control order is public protection, control orders are also intended to support reintegration into the community. This option would be less resource intensive for Police than the status quo.

Extending control orders to terrorism offenders would provide a mechanism to place requirements on individuals who pose a real risk of engaging in terrorism related activity. The requirements of an order are designed to support public safety (for example by preventing the individual from procuring items that could be used as weapons) and also to support their reintegration through the availability of support services. While access to social services is voluntary under a control order, the same as for the status quo, there is arguably more incentive for someone on a control order to access these services, because genuine engagement with these services could assist in lowering the person's terrorism risk (for example, by addressing anger issues), which in turn could result in less stringent order requirements.

Control orders last two years and can be renewed twice if the individual's risk profile remains unchanged, for a total of six years.

This option would result in limitations being placed on the rights and freedoms outlined in the New Zealand Bill of Rights Act 1990 (BORA) for those individuals subject to an order. While the control orders regime for returnees placed limits on liberty, expression and association, the safeguards of the regime overcame these concerns. However, a key difference between the existing regime and the regime for terrorism offenders is that the entry point to the extended regime will invariably be a criminal conviction. Therefore, the extended regime engages the same rights as the regime for returnees, but also engages section 26 of BORA relating to the right to be free from double jeopardy and retrospective punishment. Therefore, a court may treat the extended regime as a second punishment for the same offending.

Recently, the High Court determined that ESOs amount to a punishment, and when applied retrospectively (to individuals whose offending took place before the enactment

of the ESO regime) they cannot be justified.⁶ The court found a prospective ESO could be justified in individual cases, depending on whether the measure was a proportionate and demonstrably justified response to a particular offender. It is likely a court would take a similar view of control orders. The extended regime is designed to be prospective only to minimise BORA compliancy issues.

We note the law in this area is evolving and there is a degree of subjectivity in whether post-sentence orders are deemed a penalty or not. For example, while the High Court found ESOs to constitute a second penalty, PPOs were not found to be. Another example is when the Attorney-General considered the BORA compliance of Returning Offenders Orders (ROOs). He concluded the type of restrictions that can be placed via a ROO are not punitive in nature and therefore ROOs do not engage section 26 rights. This assessment was made prior to the recent High Court case that assessed ESOs and PPOs.

Some aspects of control orders also support a reading as non-punitive. For example, control orders operate in the civil space, have a rehabilitative and reintegration dimension and are preventative in nature (the purpose of the regime as per the legislation is expressly preventative; to protect the public and support the rehabilitation and reintegrative of people subject to orders). There are also safeguards in place to ensure requirements are not unnecessarily restrictive, notably the judicial oversight of the regime.

Option 3: Extending eligibility for Extended Supervision Orders

A third option is amending the Parole Act 2002 so ESOs could include terrorism offenders. ESOs are one of the main mechanisms currently available for maintaining a system of monitoring and control over released offenders. An ESO is used to both monitor and manage the long-term risk posed by high-risk sexual and very high risk violent offenders.

ESOs are imposed by the High Court for a period of up to 10 years, and can involve monitoring, restriction on association with certain persons and requirements to participate in treatment programmes. As with control orders, this option would be less resource intensive for Police than the status quo.

Currently, ESOs are only available for serious violent and sexual offenders who are assessed by a psychiatrist or psychologist as having a high-risk of reoffending due to limited self-regulatory capacity or intense desire, drives or urges to commit a future offence. Not all terrorism offenders would exhibit these psychological drivers, as terrorism may involve political or ideological beliefs as the key motivation for offending, rather than low regulatory capacity. For the ESO regime to be extended to terrorism offenders, the existing entry criteria for the regime would need to be significantly amended to create a separate process for terrorism offenders. This would result in a system where serious violent and sexual offenders could be placed on ESOs on the basis of psychological assessments (as is the status quo), while terrorism offenders could be subject to an ESO if the court was satisfied the individual posed a real risk of engaging in terrorism related activities based on the evidence provided. This could potentially include a psychological assessment, but may also include other evidence.

⁶ *Chief Executive of the Department of Corrections v Chisnall* [2019] NZHC 3126

Extending the ESO regime in this way would mean individuals who present a similar risk (returnees and terrorism offenders) would be managed under two different regimes by different agencies, with Corrections managing terrorism offenders on an ESO and Police managing returnees subject to the existing control orders regime.

The conditions of ESOs, like those that can be imposed via a control order, would help to support public safety and prevent the relevant individual from engaging in terrorism related activities. As with control orders, this option would place limitations on the rights and freedoms of the person subject to the ESO. Arguably, the conditions that can be placed via an ESO are more limiting than control order requirements, for example intensive monitoring which allows for the person subject to the ESO to be accompanied and monitored for up to 24 hours a day for up to one year. As noted above, the High Court recently found retrospective ESOs are not justifiable.

3.2 Which of these options is the proposed approach?

We consider that extending the control order regime to terrorism offenders who continue to pose a public safety risk after completing their sentence is the best option to address the risk posed by this group. While there are trade-offs associated with all options, this option is the most effective at upholding public safety, at a reasonable cost to both the state and the individual subject to the regime. Control orders do place limits on the rights of those subject to the regime, but this must be balanced against the right of the wider community to safety.

To ensure careful application of control orders the court must be satisfied that any requirements are proportionate to the risk posed by the individual. Requirements must be reasonably necessary and appropriate to protect the public from terrorism, and either the Commissioner of Police or the relevant person can apply for a variation or discharge of requirements if the individual's risk profile changes. New Zealand already has regimes to manage serious violent and sexual offenders who remain a risk after completing their sentence (ESOs and PPOs), so this measure would be consistent with our current approach managing individuals who commit other serious offences. A control order can be in place for two years (with the possibility of two renewals), which is shorter than the length of time someone can be subject to an ESO or PPO.

The proposed extended regime may be read by courts as a penalty, which therefore engages section 26 of BORA and cannot be justified retrospectively. We note there are some aspects of control orders that support a non-punitive reading (for example operating in the civil space, having a reintegrative and rehabilitative dimension and the safeguards to ensure requirements are not overly severe but restricted to those things necessary for public safety).

We consider that prospectively, the policy objective of control orders (protecting the public from terrorism) is a sufficiently important objective to warrant some limitations on the rights and freedoms of the individual subject to the regime. As noted above, the design of the

regime includes a number of safeguards to ensure limits on rights are proportional and minimally impairing.

A control order will not be imposed automatically following the completion of a sentence, instead it would require an application to be made by the Commissioner of Police and consideration by the court as to whether the relevant individual poses a real risk of engaging in terrorism related activity. If an individual did not pose a real risk of engaging in terrorism activities no application would be made. If measures aimed at rehabilitation and reducing the public safety risk someone presents were successful while the individual was in prison or released on parole a control order would not be required. However, if the public safety risk posed by an individual was not sufficiently mitigated by the end of their sentence, a control order would provide a longer time period for requirements aimed at protecting the public and preventing engagement in terrorism related activities to be in place.

The process for imposing a control order would be largely the same as for returnees, although Police and Corrections would have to be in contact from an early stage in the lead up to an individual's release to assess the risk level the individual posed. If an individual was assessed as posing a real risk of engaging in terrorism related activities, agencies would also need to be in contact from an early stage to ensure any parole or release conditions reflected this risk level. As with the current regime, the Commissioner of Police would apply for the order. The Solicitor-General would have to be consulted on the merits of the application and Police would then apply to the High Court for the order. A Judge would determine the requirements and duration of the order. Requirements would be based on the nature of the risk posed by the person and the Court's satisfaction the conditions were reasonable and appropriate to protect the public and prevent the individual engaging in terrorism related activities.

Unlike the current ESO regime, which hinges on psychological assessments, the test for a control order is whether a court is satisfied based on the evidence presented that the relevant individual presents a real risk of engaging in terrorism related activity. This means that someone who carried out a terrorist act for political or ideological reasons, but had otherwise normal mental health, could be subject to an order. Evidence from a psychologist could be part of the evidence presented to the court, but other evidence could also be presented. An individual may refuse to engage with a psychologist, knowing this would support a control order application, but comment could still be made about the person's engagement in programmes while in prison. Other evidence may include Parole Board outcomes, expert witnesses (e.g. academics with specialised knowledge of terrorism groups), mail sent from prison⁷, affidavits from Correction's officers or friends and family of the individual.

The effectiveness of a control order at managing a terrorism offender will vary depending on the individual. No counter-terrorism measure can be guaranteed to prevent every instance of terrorism related activity, and the same is also true for control orders. An individual who has low impulse control and poses an imminent risk of engaging in terrorism may still attempt to carry out an attack despite the conditions of their order. However, overseas experience indicates that control orders are seen as a useful tool (despite infrequent use), particularly when managing certain types of individuals, for example those who seek to radicalise others. While no measure can be guaranteed to

⁷ If this mail met the grounds to be withheld under the Corrections Act 2004

prevent someone carrying out an attack, this does not mean useful tools should be discounted.

The option of extended control orders was deemed preferable to the status quo, as the status quo does not provide any statutory mechanism to place requirements on an individual aimed at protecting public safety. Control orders were also deemed preferable over extending ESOs to include terrorism offenders, as this would result in returnees and terrorism offenders being managed under two different regimes. It would be a more coherent approach to have all individuals who pose a terrorism related public safety risk managed through the same regime and by the same lead agency, rather than returnees being managed through control orders and terrorism offenders managed through ESOs. There may be more incentive for an individual to engage with social services when subject to a control order compared to the status quo because genuine engagement with these services could help lower their risk profile and in turn result in less stringent requirements.

Careful consideration must be given to any regime that may limit the rights and freedoms of individuals. This is particularly true of control orders, which relies on a civil rather than criminal standard of proof. We consider that overall, while the regime does place limits on the rights of individuals, it is the best option for achieving the criteria listed above (effectiveness, upholding democratic norms and international commitments and standards). Achieving the policy outcome of public safety has resulted in trade-offs in relation to individual freedom for those subject to the regime.

Police and Corrections view control orders as the preferable way to manage terrorism offenders.

Section 4: Impact Analysis

Note: Treasury recommended including this table from the full RIA in this summary RIA.

Marginal impact: How does each of the options identified at section 3.1 compare with the counterfactual, under each of the criteria set out in section 3.2? Add, or subtract, columns and rows as necessary.

	Option 1: Continue monitoring of high-risk individuals under existing legislative settings	Option 2: Extended control order regime	Option 3: Extended eligibility of Extended Supervision Orders
<p>Effectiveness, i.e. public safety, national security and harm reduction through:</p> <ul style="list-style-type: none"> a consistent and clear legislative framework; enabling and supporting intervention at the most appropriate stage, particularly with a view to prevention; encouraging rehabilitation, reintegration, de-radicalisation, de-escalation 	<p>0</p> <ul style="list-style-type: none"> Ongoing monitoring under existing settings has some positive impacts for public safety but does not provide additional statutory tools to manage terrorism risk Surveillance is inefficient to manage long term risk – it is primarily an investigative tool and long-term surveillance is resource intensive. Monitoring could help agencies to be informed about the individual's location, but this would not help to prevent the individual from carrying out an action. Once release conditions expire this option does not provide mandatory tools to support rehabilitation or reintegration (these could be accessed voluntarily). 	<p>++</p> <ul style="list-style-type: none"> The conditions of an order are tailored to manage the risk of the individual. A control order (like all counter-terrorism measures) does not guarantee public safety. Someone may seek to engage in terrorism related activity despite the condition of an order. Control orders can help facilitate the rehabilitation and reintegration of an individual. Control orders provide a tool for Police to manage the terrorism risk posed by an individual post-sentence. The rehabilitative and reintegrative elements of a control order support social cohesion. 	<p>+</p> <ul style="list-style-type: none"> Extending the ESO regime would result in two groups who present a similar type of terrorism risk being managed through different regimes. This would not be a clear and consistent legislative approach. Conditions of ESOs can include special conditions tailored to the individual. Some special conditions that can be imposed through an ESO have limitations (i.e. residential restrictions and intensive monitoring can only apply for 12 months) that may limit effectiveness. ESOs can apply for 10 years and can then be renewed, which would support effectiveness for individuals who continue to pose a real risk of engaging in terrorism over the long term. The overall effectiveness of ESOs at reducing terrorism risk and

	Option 1: Continue monitoring of high-risk individuals under existing legislative settings	Option 2: Extended control order regime	Option 3: Extended eligibility of Extended Supervision Orders
<p>of the risks of (further) terrorist acts;</p> <ul style="list-style-type: none"> contributing to and not undermining wider work to build social cohesion 	<ul style="list-style-type: none"> This option does not appear to have a strong impact on social cohesion. 		<p>rehabilitating individuals would vary depending on the individual.</p> <ul style="list-style-type: none"> The rehabilitative and reintegrative elements of a control order support social cohesion.
<p>Uphold democratic and constitutional principles (upholds democratic norms, demonstrably justifiable in a free society, consistent with the Treaty)</p>	<p style="text-align: center;">0</p> <ul style="list-style-type: none"> Upholds our democratic norms and constitutional principles. Surveillance has human rights and privacy implications but surveillance is closely regulated. Surveillance does not place any limits on a person's freedom of movement or association. For all options, Māori are unlikely to be disproportionately impacted. While Māori are overrepresented in the justice system generally, Māori are not overrepresented among terrorism offenders. 	<p style="text-align: center;">-</p> <ul style="list-style-type: none"> Control orders can have a significant impact on an individual's freedom and rights, depending on the requirements of an order (however, the regime has safeguards to ensure requirements are not overly restrictive). Courts may view the extended control orders regime as a penalty and treat it as a second punishment for the same offending. While it is possible to justify this prospectively for individual cases, the High Court has found that retrospectively this cannot be justified. New Zealand already has a number of post-sentence orders in place for serious offenders (ESOs, PPOs, ROOs). When considered alongside these existing orders, control orders do not present a substantive change in how we manage serious offenders who continue to pose a public safety risk after completing their sentence. 	<p style="text-align: center;">--</p> <ul style="list-style-type: none"> ESOs can have a significant impact on an individual's freedom and rights. The High Court recent found that ESOs amount to a penalty and when applied retrospectively (to people whose offending occurred before the ESO regime was established) are a form of double penalty, which is inconsistent with BORA. The court found that prospective ESOs must be assessed individually. The length of time someone can be subject to an ESO is longer than a control order (10 years vs 2 years), so any conditions could apply for a longer time period. Some ESO conditions are arguably more stringent than those that can be placed via control orders (intensive monitoring which allows for the person subject to the ESO to be accompanied and monitored for up to 24 hours a day for up to one year).

	Option 1: Continue monitoring of high-risk individuals under existing legislative settings	Option 2: Extended control order regime	Option 3: Extended eligibility of Extended Supervision Orders
		<ul style="list-style-type: none"> Acts of terrorism undermine democratic norms as they seek to force change through violent rather than democratic means, which impacts the public's rights to security and freedom of expression. Control orders support the rights of the wider community to safety and security. 	<ul style="list-style-type: none"> The ESO regime for serious violent and sexual offenders is already in place, so extending this to terrorism offenders would not be a substantive change in how New Zealand manages serious offenders who remain a risk post-sentence. As with control orders, ESOs would help to uphold democratic norms by ensuring the safety of the wider community.
<p>International commitments and standards: consistency with New Zealand's international commitments, including the international counter-terrorism framework, and international human rights and humanitarian law.</p>	<p style="text-align: center;">0</p> <ul style="list-style-type: none"> New Zealand has international counterterrorism obligations under a number of United Nations Security Council (UNSC) Resolutions (for example, UNSC Resolution 1373 requires New Zealand to outlaw the financing of, participation in and recruitment to, terrorist entities). This option would not impact these obligations. New Zealand is also party to international human rights agreements. This option does not negatively impact these. 	<p style="text-align: center;">0</p> <ul style="list-style-type: none"> Supports New Zealand to deliver on its obligations under UNSC Resolutions, particularly in relation to recruitment to terrorism entities. FVPCA offences may relate to terrorism propaganda or recruitment videos, and allowing requirements to be placed on FVPCA offenders via a control order reduces the likelihood of reoffending. Under UN resolution 1267/1989/2253 and 1988 New Zealand is obligated to take action against designated terrorist entities. If a member of a designated entity was convicted of a terrorism offence in New Zealand, control orders would enable requirements to be placed on them after their sentence is complete, if they pose a real risk of engaging in terrorism related activities. 	<p style="text-align: center;">0</p> <ul style="list-style-type: none"> Supports New Zealand deliver on its obligations under UNSC Resolutions, particularly in relation to recruitment to terrorism entities. FVPCA offences may relate to terrorism propaganda or recruitment videos, and allowing ESO conditions to be placed on FVPCA offenders would reduce the likelihood of reoffending. Under UN resolution 1267/1989/2253 and 1988 New Zealand is obligated to take action against designated terrorist entities. If a member of a designated entity was convicted of a terrorism offence in New Zealand, an ESO would enable conditions to be placed on them after their sentence is complete, should they pose a real risk of engaging in terrorism related activities.

	Option 1: Continue monitoring of high-risk individuals under existing legislative settings	Option 2: Extended control order regime	Option 3: Extended eligibility of Extended Supervision Orders
		<ul style="list-style-type: none"> • May pose issues for New Zealand's obligations under international human rights laws, in particular, the International Covenant on Civil and Political Rights, which provides for rights including liberty of movement and peaceful assembly. However, the Covenant provides for restrictions on these rights provided for in law when necessary to protect national security and public order. 	<ul style="list-style-type: none"> • May pose issues for New Zealand's obligations under international human rights laws, in particular, the International Covenant on Civil and Political Rights, which provides for rights including liberty of movement and peaceful assembly. However, the Covenant provides for restrictions on these rights provided for in law when necessary to protect national security and public order...
Overall assessment	0	+	0

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

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

Affected parties (identify)	Comment: nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts</i>
Additional costs of proposed approach, compared to taking no action		
Regulated parties – individuals subject to a control order	<p>There are non-monetised costs for the individual subject to the order, in that some limits will be placed on their rights and freedoms. The extent of these limitations will vary for individuals depending on the requirements of their order, but there is potential for limitations to be significant if this is required to protect public safety.</p> <p>As control orders are not publicised it is unlikely being subject to an order would prevent the individual from engaging in work or study. However, terrorism offenders may find it difficult to find work due to their previous conviction.</p> <p>The number of people in this cohort is likely to be very low.</p>	Low to medium non-monetised impact (will vary for individuals)
Regulators – New Zealand Police costs	Police estimate the cost the control order regime in Year 1 to be \$950,767 and Year 2 to be \$1,591,116. This is based on an estimate of two people per year being subject to a control order (i.e. two people in Year 1 increasing to four people in Year 2), which is at the high end of possible estimates. These costs include Police personnel costs and \$190,000 for Crown Law costs (covering the High Court application and hearing costs). These costs are higher than the estimate used for the control orders regime for returnees as they include some costs not previously included.	Average cost of \$436,581 per individual. ⁸ Electronic monitoring: \$35,000 per individual.

⁸ This is based on average Year 1 costs (\$950,767 ÷ 2) plus average Year 2 Costs (1,591,116 ÷ 4) divided by two, to average out to the approximate cost per order. Electronic monitoring costs have been averaged in the same way.

	Electronic monitoring costs are estimated to be an additional \$70,000 (Year 1) and \$140,000 (Year 2), if required, based on two individuals (Year 1) and four individuals (Year 2) being subject to an order.	
Wider government – needs assessment	Costs of any needs assessment ordered by the Court (MOJ estimate). There are no additional costs of providing health and social services to support reintegration (employment support, mental health services, housing etc) as services are available in the absence of an order.	\$1,000 to 5,000 for assessment depending on the needs of the individual
Corrections	Sentence for breach of conditions (MOJ estimate based on costs of breach of Returning Offenders Order).	\$6,000 per individual
Court costs	For returnees, costs were estimated at approximately \$75,000 based on two hearings and an appeal for each application (e.g. interim order, final order and appeal). Assume an individual would appeal and/or seek variation in conditions. Estimate based on average cost of High Court civil case and appeal to Court of Appeal.	\$75,000 per individual
Justice	Costs of legal aid (estimated average).	\$16,000 per individual
Police, Corrections and other agencies involved in managing an individual subject to an order.	There may be some resourcing implications for agencies involved in managing the individual subject to a control order. The resourcing required would depend on the requirements of an order. Given the small number of people likely to be subject to an order this cost is likely to be low.	Low monetised value
Total Monetised Cost	Estimate 0-5 control orders over a five-year period.	Approximately \$574,000 per order.
Non-monetised costs		Low

Expected benefits of proposed approach, compared to taking no action

Regulated parties – the individual subject to the control order	Has ongoing coordinated access to services to support reintegration and rehabilitation. While access to social services is available under the status quo,	Low non-monetised benefits
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	a control order is intended to enable these services to be delivered in a wrap around way. There is also potentially more incentive for the individual subject to a control order to engage with these services.	
Regulators – Police	Greater visibility and monitoring of individuals subject to a control order. Increased ability to detect, disrupt and deter terrorist activity. Potentially reduced surveillance costs.	Medium non-monetised benefits
Other parties – the public	The public benefit from increased public safety and a reduced risk of terrorism offenders engaging in terrorism related activity. This supports the rights of the public to freedom of association, expression and movement.	Low – Medium non-monetised benefits
Total Monetised Benefit		
Non-monetised benefits		Low non-monetised benefits

4.2 What other impacts is this approach likely to have?

The Ministry consulted with relevant government agencies but has not undertaken consultation outside government departments due to the initial timeframes for this work.

Consultation with iwi and hapū has not occurred. This policy is not likely to disproportionately impact Māori. While Māori are overrepresented in the justice system in general, Māori are not overrepresented specifically in relation to terrorism offences. The two groups that pose the highest risk domestically in New Zealand are violent right-wing extremists and violent Islamic extremists, and Māori are not overrepresented in these groups.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

Key stakeholders include Police, Corrections and the NZSIS. Police and the security agencies are interested in this from a security perspective, while Corrections has an interest as the party that manages individuals in prison and when offenders are released in the community subject to conditions.

Government interagency consultation has been undertaken in developing the initial policy proposal including with Police, NZSIS, DPMC (National Security Group), the Ministry of Foreign Affairs and Trade (MFAT) and the Department of Corrections.

There is broad agreement across agencies that there are limited statutory tools available for managing terrorism offenders who have completed their sentence and pose a real risk of engaging in terrorism related activities. Police has noted that in some instances they prosecute individuals of terrorism concern under other Acts, for example the Crimes Act 1961 or Arms Act 1983. For this reason, Police support extending control orders more broadly, to all individuals whose offending relates to terrorism in some way. The Ministry of Justice considers this would be a significant overreach. A key issue with this approach is the difficulty of establishing a clear legal threshold that links to the beliefs motivating offending, as beliefs or wider behaviours are not proven by a conviction. This introduces a degree of subjectivity to the eligibility criteria and we have therefore opted to retain a more clearly defined scope for eligibility.

The proposal has been modified as a result of stakeholder feedback. Initially the Ministry of Justice considered recommending that control orders should not be extended until the 2021 statutory review of the current regime has taken place. However, a number of agencies questioned why this should wait until 2021 if there is a strong case for extending to terrorism offenders. The definition of terrorism offender was extended to include FVPCA offences based on Police feedback.

As noted above, consultation has occurred with government departments but not with iwi or Māori representative groups, or with the general public. The public will have the opportunity to make submissions as part of the standard select committee process.

The select committee process for the original control orders regime gave the public the opportunity to express views on the regime for returnees. These views may also be raised in relation to an extended regime. Key views included:

- Questioning the need for control orders given existing criminal law measures (i.e.

prosecution under the Crimes Act or TSA).

- Concerns about the adequacy of safeguards for rights and freedoms.
- Concerns that control orders operate in the civil rather than criminal jurisdiction.

The departmental report on control orders for returnees addressed these points and modifications were made to a regime as a result. However, some of the key views and concerns about control orders (e.g. that they are a civil rather than criminal regime and that existing criminal law measures are sufficient to manage terrorism risk) are likely to apply to the extended regime also.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

The expansion of the control orders regime to people convicted of terrorism offences will be given effect by amending the Terrorism Suppression (Control Orders) Act 2019.

The Ministry of Justice administers the Terrorism Suppression (Control Orders) Act. New Zealand Police will be responsible for the ongoing operation and enforcement of the extended control orders regime. Police will work closely with Corrections to ensure they have accurate information about terrorism offenders.

Subject to the timing of the passage of legislation, these arrangements will come into force in 2021. Agencies are aware of this and it provides sufficient time to all parties to prepare for the change.

The control orders regime for returnees is already in place, which minimises potential implementation risks. We will continue to monitor the existing regime to identify and mitigate any possible implementation risks. An implementation risk of the extended regime is that Police may be unaware of the release date of a terrorism offender who poses a real risk of engaging in terrorism activity. This risk can be mitigated through good interagency communication and by utilising existing communication channels between Corrections and Police. A further mitigation is that the Parole Act 2002 also requires Police be notified before an individual is released. This means Police would be told in advance when individuals come up for parole or release.

We have also allowed for an interim order process in the unlikely event that new information become known about a terrorism offender in the days immediately prior to their release, which would not allow enough time for a final order to be made. An interim order can be made without notice, which allows the order to be made more quickly.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

The Ministry of Justice is responsible for administering the control orders legislation. Police is responsible for making applications for a control order as well as monitoring and managing a person subject to the order.

The Minister of Justice has agreed to move the statutory review of the Terrorism Suppression (Control Orders) Act from 2021 to 2023. This review will consider the operation and need for the control orders regime. Moving the review to 2023 provides time for the extended regime to bed in and be considered at part of this review.

Data will be collected about the number of individuals subject to control orders. The number of orders is expected to be low, so this will not require additional resourcing.

7.2 When and how will the new arrangements be reviewed?

The Terrorism Suppression (Control Orders) Act will be reviewed in 2023. Due to the low number of orders likely to be made, there is no ongoing or recurring monitoring or evaluation of the regime. The regime will also be examined periodically as counter-terrorism legislation is reviewed against emerging terrorism threats.

Outside of the 2023 review and periodic review of counter-terrorism legislation, stakeholders from other agencies could raise specific questions or concerns with the operation of the regime by contacting the Ministry of Justice.

New Zealand Police will be responsible for control order applications and monitoring individuals subject to an order. The Independent Police Conduct Authority (IPCA) handles complaints about New Zealand Police misconduct or neglect of duty, Police practices, policies and procedures. Anyone who has a complaint about New Zealand Police can make a complaint. The IPCA can recommend improvements to Police practices, policies and procedures and identify training needs.