

# Coversheet: Strengthening New Zealand’s counter-terrorism legislation

Advising agencies	<i>Ministry of Justice</i>
Decision sought	<i>Agreement to amend the “terrorist act” definition, and introduce new offences for terrorist weapons and combat training and planning or preparation for a terrorist act</i>
Proposing Ministers	<i>Minister of Justice</i>

## Summary: Problem and Proposed Approach

**Problem Definition**

**What problem or opportunity does this proposal seek to address? Why is Government intervention required?**

The current Terrorism Suppression Act 2002<sup>1</sup> (TSA) was developed in the early 2000s. It predominantly responds to the threat posed by organised terrorist entities and groups rather than a fuller range of terrorist activities, such as attacks that involve lone actors and low-sophistication.

In late 2018, the Prime Minister and the Minister of Justice directed officials to explore possible improvements to counter-terrorism legislation to ensure the legislation remains clear and effective, given the evolving nature of modern terrorism, with a strong focus on early intervention and prevention. This review targeted areas of improvement for the current legislation and was expedited after the 15 March 2019 Christchurch Mosques terrorist attack.

The review has been carried out in two tranches. Cabinet agreed to the first tranche of amendments to improve the current legislation (widening the scope of the terrorist financing offence, and a new offence for international travel for terrorist purposes) in November 2019. This Regulatory Impact Statement covers the second tranche of amendments.

Notably, as detailed further under section 1.1, reviewing and strengthening counter-terrorism legislation is only one part of the work the government is doing to strengthen counter-terrorism measures in New Zealand.

**“Terrorist act” definition**

The “terrorist act” definition remains untested by the courts, with the only case that has been successfully prosecuted (*R v Tarrant*<sup>2</sup>) resulting in a guilty plea. However, agencies, including New Zealand Police, have identified that there are aspects of the definition that may impede their ability to utilise the TSA as intended. Given the “terrorist act” definition is the cornerstone of the TSA, it is important that the definition is clear and its scope is appropriate. Issues with some of the wording in the definition were identified as one of the

<sup>1</sup> The Terrorism Suppression Act 2002 can be found at: <http://www.legislation.govt.nz/act/public/2002/0034/latest/DLM151491.html?src=qs>

<sup>2</sup> *R v Tarrant* [2020] NZHC 2192.

potential improvements to the TSA, and we now have the opportunity to ensure that the definition is clear and usable.

### **Planning or preparation to carry out a terrorist act**

There has been uncertainty about whether planning or preparation for a terrorist act was criminalised in the TSA. In 2020, the High Court decision, *R v S*<sup>3</sup>, found that planning or preparing to carry out a terrorist act is not criminalised in the TSA. The judge noted that “the absence of an offence of planning or preparing a terrorist act (falling short of existing inchoate offences) could be an Achilles heel”. The judge also noted that Australia and the United Kingdom have this offence.

This gap in the law could hinder our ability to intervene early to prevent preparatory conduct from escalating into a terrorist attack. This is because it is possible for those involved in preparing to undertake a terrorist act to alter or accelerate their planning with little or no forewarning.

Additionally, New Zealand has international obligations under the United Nations Security Council Resolution (UNSCR) 1373 (2001) to criminalise terrorism-related planning or preparations.

### **Terrorist training**

New Zealand has an obligation to criminalise terrorist training under UNSCR 2178 (2014)<sup>4</sup>. Terrorist training is already captured by existing or proposed offences in the TSA. However, because different aspects of training are covered by different offences it is not clear, particularly to members of the public, that terrorist weapons and combat training, an inherently dangerous type of training, is criminalised. It is an important component of the rule of law that any legislation is clear, easily accessible and understandable to all.

### **Why Government intervention is required**

Legislative amendments to the TSA to amend and create new offences are required to address the problems and utilise the opportunities discussed above. There is no other mechanism to capture the identified conduct.

It is appropriate for the government to delineate what conduct should, and should not, be criminal. This includes the creation of offences and penalties to denounce terrorist conduct and address the risk posed to the public by terrorism.

### **Summary of Preferred Option or Conclusion (if no preferred option)**

**How will the agency’s preferred approach work to bring about the desired change? Why is this the preferred option? Why is it feasible? Is the preferred approach likely to be reflected in the Cabinet paper?**

Our preferred options are set out below.

#### **(1) Make technical changes to the “terrorist act” definition**

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<sup>3</sup> *R v S* [2020] NZHC 1710, hereinafter *R v S*.

<sup>4</sup> It can be found at: <http://unscr.com/en/resolutions/doc/2178>

This is our preferred option because it would improve the clarity of the law and ensure that it is fit for purpose, giving agencies such as New Zealand Police the confidence to use the definition appropriately.

### **(2) Introduce an offence to criminalise planning or preparation to carry out a terrorist act**

This is our preferred option because it would address the existing gap in the TSA, allow early intervention and therefore assist with prevention of terrorism, and better enable New Zealand to meet its international obligation to criminalise this behaviour. Built-in safeguards of requiring proof of intent, a connection to a terrorist act, as well as consent from the Attorney-General to prosecute, ensure a balance between infringement on the freedoms provided by the New Zealand Bill of Rights Act (NZBORA) and protection from the threat of terrorism and the harm it causes.

### **(3) Terrorist training: the Ministry does not have a preferred option**

The option proposed in the Cabinet paper for terrorist training is to create a new offence to explicitly criminalise terrorist weapons and combat training in order to clearly denounce this behaviour.

Introducing an offence to criminalise terrorist weapons and combat training, a dangerous subset of terrorist training, would improve the clarity of the law by clearly denouncing this type of behaviour. Explicitly criminalising terrorist weapons and combat training would also enhance New Zealand's ability to meet its international obligation to criminalise terrorist training. This offence would have the same safeguards as the proposed planning or preparation offence to ensure that any human rights implications can be demonstrably reasonably justified in a free and democratic society.

These options, together with amendments to the TSA that have already been agreed by Cabinet [CAB-19-MIN-0612 refers], will most effectively meet the overall objective of strengthening the counter-terrorism legislation, which is to ensure our legislation remains clear and effective given the evolving nature of modern terrorism, with a focus on early intervention and prevention.

## **Section B: Summary Impacts: Benefits and costs**

### **Who are the main expected beneficiaries and what is the nature of the expected benefit?**

The main benefit from these proposals, along with other counter-terrorism work streams (outlined in detail under section 2.1) will be enhanced public safety. This will be achieved by equipping relevant agencies, such as New Zealand Police, with the appropriate tools needed to intervene early to prevent or reduce terrorism-related harm.

The other expected benefits are:

- New Zealand's ability to meet its international obligations is enhanced;
- The law is clear and transparent in what conduct is criminalised, and its associated penalties;
- Terrorism and terrorism-related conduct is strongly denounced.

### **Where do the costs fall?**

The bulk of the direct costs fall to government. This includes the costs associated with the identification and prosecution for these new offences, i.e.:

- investigation to obtain evidence, including surveillance and undercover programmes;
- prosecution;
- legal aid;
- cost of judicial time in dealing with the charges; and
- costs of managing any sentence and rehabilitation/reintegration programme.

Although Police estimates the number of people being prosecuted for these proposed offences to be very low, there will be costs for people facing prosecution. These costs will be:

- costs of legal representation;
- social engagement if they are remanded in custody or sentenced to imprisonment.
- opportunity cost of lost employment; and
- reintegration difficulties flowing from having a conviction under the TSA.

These are the standard types of costs attached to a person charged with, or convicted of, an offence, although the complexity of (and public interest in) terrorism-related cases may increase these costs.

We have also identified that there may be potential stigma for people who participate in weapons and combat training as hobbies, as the proposed terrorist weapons and combat training may paint these activities in a negative light.

### **What are the likely risks and unintended impacts? how significant are they and how will they be minimised or mitigated?**

There may be risks or unintended impacts as a result of the proposed new offences.

#### **Risks associated with criminalising preparatory type terrorist behaviour**

The two proposed new offences, if enacted, will capture early terrorism-related behaviours. While this would enable early intervention, and therefore prevention of terrorist acts and increased public safety, there may be some unintended consequences of capturing this early behaviour.

There are existing offences in the TSA that criminalise preparatory type behaviour, including providing financial support to a terrorist group, and participating in a terrorist group. The risks identified here exist with the current TSA offences. However, these risks increase due to the wider scope of preparatory behaviour proposed to be criminalised.

For some people, being detected and convicted for an offence will disrupt their pattern of behaviour before it escalates to more serious crime/harm and allow for the individual to be supported in a programme to disrupt behaviour. For others, however, being identified and punished or integrated into a prison environment with other serious offenders may cement and provide an avenue for them to disseminate terrorist views.

There is a risk that the creation of a preparatory offence could in itself be radicalising if a particular group perceives that this offence is (or is intended to be) used to target them. While the creation of any offence may be perceived as targeting a particular group, this risk is low because the proposed construction of the offence is neutral: it could apply equally to preparatory conduct irrespective of ideology.

There is also a risk that individuals captured by a preparatory offence could be radicalised by that capture. While difficult to approximate, the estimated number of cases for the two proposed offences are very small. Moreover, while the Department of Corrections does not provide programmes focused on mitigating the risk of radicalisation, it applies management strategies, including segregation, where radicalisation is a concern.

There is also a risk that the government is perceived to be criminalising behaviour that should not be criminalised. We also consider this risk is low and is mitigated by both new offences requiring a link to an intention for a future terrorist act. This link to a future terrorist act is what makes the behaviour criminal. In addition, the Attorney-General's consent is required for prosecuting these offences (as with all other substantive terrorism-related offences) to prevent any misuse of these offences.

Widening the scope of behaviours that could be captured by offences under the TSA also creates a risk that particular groups are disproportionately targeted or perceived to be targeted by activities such as surveillance and searches used in enforcing those offences.

### **Risks resulting from duplication of offences for similar conduct**

Duplication of offences happens when a particular behaviour is criminalised by more than one offence. The proposed weapons and combat training offence overlaps with other existing and other proposed TSA offences (see detail of the overlaps in section 2.3) thus creating duplicative offences for the same behaviour.

However, the practical impact of these overlaps on offenders is minimal. The right against double jeopardy as guaranteed by NZBORA means that in practice, no one can be charged for more than one offence for the same conduct.

The existing and proposed offences that cover aspects of terrorist training are much broader in scope than the proposed terrorist weapons and combat training offence. There is a risk that this could unintentionally narrow the scope of "terrorist training" captured by the wider offences to only this particular form of terrorist training, and the penalties of wider offences that criminalise terrorist training may be read down by the courts.

This risk is mitigated by the clear policy intent behind the proposed terrorist weapons and combat training offence, which is to complement the other more broadly cast offences to clearly denounce weapons and combat training, and to provide clarity of the law to the public. The United Kingdom also uses this approach to criminalise terrorist training.

### **Human rights implications and potential impact on Māori-Crown relations**

While the two proposed new offences will impact on freedoms identified in NZBORA, the link to an intention of future terrorist act means that the infringement on the freedoms is considered a reasonable limit when balanced with the threat of terrorism and the harm it causes. The proposed offences are not expected to impinge on peaceful action for Māori self-determination guaranteed by te tiriti o Waitangi.

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. Therefore, we do not consider that the proposals in this paper will disproportionately impact Māori.

To the extent that Māori may be the target of terrorist acts, the proposals aim to improve the safety of all New Zealanders.

The lack of public consultation, and in particular, the lack of consultation with Māori and minority groups may negatively impact the relationship between them and the Crown. In particular, as a Treaty partner, the Crown should follow the principles of partnership and participation with Māori which has not been done in this case. The select committee process will be an important opportunity for engagement with the public, including Māori.

### **Public perception of terrorism in New Zealand**

Introducing more TSA offences may make the public feel as if there is an increase in terrorism in New Zealand. In turn, the public may become more fearful even without a terrorist act occurring or being prepared. However, it is better to give agencies the statutory tools necessary to intervene early and protect the public from terrorist acts.

Furthermore, clarifying the law will give the public more certainty that terrorism is not tolerated in New Zealand. If it is not clear that terrorist weapons and combat training, and planning and preparation to carry out a terrorist act is unlawful, it may exacerbate the public's fear of terrorism.

## **Section C: Evidence certainty and quality assurance**

### **Agency rating of evidence certainty?**

Counter-terrorism legislation, particularly the TSA, has rarely been used. The evidence used in this analysis is also based on the experience of and evidence provided by relevant agencies, and case studies in New Zealand and overseas. We have relied on research into legislation in comparable jurisdictions, their experience of using their legislation, and New Zealand's international obligations to strengthen our analysis.

*To be completed by quality assurers:*

#### **Quality Assurance Reviewing Agency:**

The Regulatory Impact Assessment Quality Assurance Panel (QA Panel) was chaired by the Ministry of Justice with representatives from Treasury's Regulatory Quality Team and New Zealand Police.

#### **Quality Assurance Assessment:**

The QA Panel has reviewed the Regulatory Impact Statement (RIS) developed by Ministry of Justice for *Strengthening New Zealand's counter-terrorism legislation*. This RIS considered three of the changes proposed to strengthen New Zealand's counter-terrorism legislation; first a series of technical changes to the "terrorist act" definition, second a proposed new offence "planning or preparation to carry out a terrorist act", and thirdly a new offence for "terrorist weapons and combat training".

The panel considers that the RIS "partially meets" the quality assurance (QA) criteria.

#### **Reviewer Comments and Recommendations:**

The rating reflects the limitations faced by the Ministry in preparing the RIS, notably constraints around opportunities for consultation with the public, iwi/ Māori and other experts, and the limited availability of terrorism-related case law in New Zealand.

The QA Panel notes that targeted consultation was completed on proposals to amend the definition of "terrorist act", where the Ministry was able to engage experts. Sensitivity regarding the proposals for new offences restricted the ability to consult more widely. Where possible, this has been supplemented by officials' research into legislation and experience in comparable jurisdictions, and case studies.

Given these constraints the QA Panel has determined that the analysis is as good as can be expected and should not materially impact Cabinet decision-making. Subject to a bill

being introduced into the House of Representatives, public submission and select committee scrutiny during the parliamentary process may assist to address these constraints.

# Impact Statement: Strengthening New Zealand’s counter-terrorism legislation

## Section 1: General information

### 1.1 Purpose

The Ministry of Justice is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. The analysis and advice have been produced for the purpose of informing key policy decisions to be taken by Cabinet.

### 1.2 Key Limitations or Constraints on Analysis

We have identified the following limitations and constraints on the analysis:

- a) Counter-terrorism legislation, particularly the TSA, has rarely been used. We have used research into legislation in comparable jurisdictions, New Zealand’s international obligations, domestic and international terrorism case studies, and the experiences of agencies who implement the legislation when developing these proposals.
- b) The analysis on terrorist training was limited to terrorist weapons and combat training, because the previous Minister of Justice sought further advice on criminalising this subset of terrorist training.
- c) The proposals increase the scope of the offences in the TSA; however, we cannot put a precise number on the number of people that would be captured. We expect this to be low because these offences are not volume crimes, either in New Zealand or overseas.
- d) Due to the restrictive nature of the counter-terrorism work programme, particularly as there was an active court case when we undertook this review, we were only able to consult a targeted group of external experts of the “terrorist act” definition, and we were not able to consult on the proposed new offences. It is expected that public consultation will take place at the select committee stage.
- e) We were unable to undertake any public consultation on the two proposed new offences. This is because any public consultation may expose potential gaps (or uncertainties) in the current legislative framework and risk these existing vulnerabilities being abused. Public consultation will take place at the select committee stage (if the proposals are agreed by Cabinet).

### 1.3 Responsible Manager (signature and date):

Brendan Gage  
  
General Manager, Criminal Justice Policy  
Ministry of Justice  
  
24 November 2020

## Section 2: Problem definition and objectives

### 2.1 What is the current state within which action is proposed?

#### The evolving nature of terrorism

Terrorism is an enduring global threat including in New Zealand. The nature of terrorism, its geographic footprint, and the extent of the threat posed by different terrorist groups and individuals with violent extremist views, continues to evolve, both internationally and domestically.

New Zealand's existing counter-terrorism legislative settings were primarily developed as a response to international experience, particularly the 2001 Al Qaida terrorist attack in the United States and to give effect to New Zealand's international obligations (including under international terrorism conventions and United Nations' Security Council Resolutions).

The TSA was developed to manage prominent terrorist entities and groups, and has not been significantly amended since 2007 when a specific offence was made for engaging in a terrorist act. However, other counter-terrorism legislation has been developed, primarily the Countering Terrorist Fighters Legislation Bill<sup>5</sup> in 2015 which responded to the rapidly evolving threat posed by the issue of foreign terrorist fighters and growing international terrorism.

Other jurisdictions have reviewed and refined their laws in response to the evolving nature of terrorism. International experience shows a growing number of terrorist attacks that involve low-sophistication, and as with the Christchurch Mosques terrorist attack, lone actors. Attacks utilise a range of items, including those that can be lawfully obtained and used as weapons (e.g. vehicles, firearms, or knives), and individuals who are either more loosely networked and are not under a formal group structure, or are operating independently to plan and carry out terrorist acts.

Furthermore, the ability to use technology to connect people around the world in real time means that New Zealand is no longer protected by its geographic isolation.

#### Broader counter-terrorism workstreams

In late 2018, the Prime Minister and the Minister of Justice directed officials to explore possible improvements to counter-terrorism legislation. The aim was to address urgent known gaps and to improve the clarity and effectiveness of the current legislation. This programme of work was expedited after the Christchurch Mosques terrorist attack on 15 March 2019.

In September 2019, Cabinet approved the Counter-Terrorism Strategy<sup>6</sup>. The aim of the Strategy is to work together to prevent terrorism and violent extremism of all kinds in New Zealand, while ensuring the systems and capabilities are in place to act early and respond when needed.

Central to the Counter-Terrorism Strategy is a comprehensive work programme that focuses on reducing the threat of terrorism and violent extremism. Reviewing and

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<sup>5</sup> Countering Terrorist Fighters Legislation Bill is available at:  
<http://www.legislation.govt.nz/bill/government/2014/0001/latest/DLM6316017.html?src=qs>

<sup>6</sup> See detail at <https://dpmc.govt.nz/our-programmes/national-security-and-intelligence/national-security/counter-terrorism/new-zealands>

strengthening counter-terrorism legislation is part of this work programme. It sits alongside a range of other workstreams on:

- social cohesion;
- reducing racism and hate speech;
- keeping communities and crowded places safe;
- countering violent extremism online;
- improving how agencies access and share information; and
- s9(2)(f)(iv)

The work also sits alongside wider government work aiming to improve community safety including amendments to the Arms Act 1983 to prohibit and restrict access to certain types of firearms.

### **Impact of the Christchurch Mosques Terrorist Attack 2019**

On 26 March 2020 the man accused of the Christchurch Mosques terrorist attack pleaded guilty to 51 charges of murder, 40 charges of attempted murder and one charge of engaging in a terrorist act. On 27 August 2020 he was sentenced to life imprisonment without the possibility of parole. This was the first prosecution under the TSA and the first time this sentence (life without parole) has been handed down in New Zealand.

As at 25 November 2020, the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019<sup>7</sup> (Royal Commission) was due to provide its report (with recommendations) to the Governor-General on 26 November 2020. The Royal Commission investigated what State sector agencies knew about the individual's activities before the attack, what, if anything, they did with that information, what measures agencies could have taken to prevent the attack, and what measures agencies should take to prevent such attacks in the future. The report was confidential. We did not have access to the report during the development of the proposals.

### **New Zealand's current threat level means a terrorist attack is feasible and could well occur**

The Combined Threat Assessment Group 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".

The number of individuals charged with Films, Videos, and Publications Classification Act 1993 (FVPCA) offences relating to terrorism increased following the Christchurch Mosques terrorist attack, although it is unclear if this trend will continue. 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 terrorist attack livestream.

These recent events, and the proximity of the March 2019 attacks means that risks around terrorism in New Zealand have been elevated in the consciousness of the New Zealand public more than they were prior to 15 March 2019.

The review of the TSA will help to mitigate the higher risk level by enabling a greater ability to intervene early to prevent terrorist attacks. It will also help to alleviate the public's concern about safety from terrorism in New Zealand.

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<sup>7</sup> See its Terms of Reference: <https://christchurchattack.royalcommission.nz/about-the-inquiry/terms-of-reference/>

## 2.2 What regulatory system(s) are already in place?

The key piece of legislation that sets out the criminal justice counter terrorism framework in New Zealand is the TSA. The TSA criminalises specific conduct related to terrorism, sets out a regime for designating terrorist entities, and implements our international obligations related to suppressing terrorism.

More recently, the Terrorism Suppression (Control Orders) Act 2019<sup>8</sup> (Control Orders Act) came into force. The Control Orders Act introduced a civil regime of control orders to manage and monitor a small number of people who may return to New Zealand after having engaged in terrorism-related activities overseas.

The general criminal law is also relevant to this context. The Crimes Act 1961 defines a broad range of serious conduct and sets penalties. For example, there are offences available under the Crimes Act that could be used and have been used (e.g. *R v Tarrant*) to prosecute individuals exhibiting certain types of behaviour that may also be relevant to terrorism.

The FVPCA prohibits objectionable publication, which includes publication that “promotes or encourages criminal acts or acts of terrorism” (section 3(3)(d) of the FVPCA).

The proposals analysed in this RIS are part of a wider package of reforms for counter-terrorism legislation. In November 2019 Cabinet approved [CAB-19-MIN-0612 refers] to proposals to amend the TSA to criminalise international travel to carry out specified terrorism offences, and to criminalise wider forms of material support under the terrorism financing offence.

Work has also been carried out on whether to expand the control order regime to cover other individuals who pose a terrorist risk within New Zealand. Cabinet will consider whether to expand that regime at the same time as considering the proposals in this RIS and a separate RIS has been developed for that proposal. The Counter-Terrorism Legislation Bill will include the proposed amendment to the Control Orders Act, and all the proposed amendments to the TSA.

The key agencies with a substantive interest in the counter terrorism framework include Ministry of Justice, Ministry of Foreign Affairs and Trade (MFAT), DPMC (National Security Group), New Zealand Police, New Zealand Security and Intelligence Service (NZSIS), Government Communications Security Bureau (GCSB), New Zealand Customs Service (Customs), Ministry of Business Innovation and Employment (MBIE) (Immigration) and Department of Internal Affairs (DIA).

The counter-terrorism framework is linked to the anti-money laundering and countering terrorism financing regime which imposes obligations on reporting entities (identified as at-risk of money laundering and terrorist financing) to put measures in place to detect and prevent terrorist financing. The Criminal Proceeds (Recovery) Act 2009 also enables forfeiture of assets to ensure proceeds of crime are not reinvested into terrorism.

In general, the criminal law and in this case the enforcement of counter-terrorism offences and use of counter-terrorism powers is appropriately placed with the state, particularly given the need to protect human rights. Non-legislative measures will not, on their own, address the problem or give effect to our international commitments.

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<sup>8</sup> The Control Orders Act can be found at: <http://www.legislation.govt.nz/act/public/2019/0079/18.0/LMS258603.html>. It's accompanying RIS is available at: <https://www.treasury.govt.nz/sites/default/files/2019-10/ria-moj-ctlt-oct19.pdf>

## 2.3 What is the policy problem or opportunity?

The review of counter-terrorism legislation has identified areas where the legislation could be strengthened. Two areas where the TSA could be strengthened are providing agencies the appropriate offences and powers to intervene early to prevent terrorism-related behaviours from escalating into terrorist acts, and ensuring the legislative framework is clear, consistent, and fit for purpose.

Additionally, we have identified areas where we are not adequately meeting our international obligations.

Addressing these gaps and improving the clarity of the law is essential to the effective operation of the overall counter-terrorism regulatory system, including its operational effectiveness. It is also part of the work to deliver one of the Counter-Terrorism Strategy priorities, i.e. reviewing and strengthening the counter-terrorism legislation.

### Specific policy problems and opportunities

#### *Improving the clarity of the “terrorist act” definition to make sure it is fit for purpose in the changing landscape of terrorism*

The definition of “terrorist act” is the cornerstone of New Zealand’s counter-terrorism legislation. It is important that the definition is clear and the scope is appropriate as it is referenced throughout the TSA and in other legislation such as the Immigration Act 1987. There is also a specific offence of engaging in a terrorist act in the TSA.

Evidence from agencies who use this definition suggests that there are aspects of the definition that may negatively impact on their ability to carry out their functions to protect national security. This highlights the need to ensure the “terrorist act” definition to be clear and fit for purpose.

#### *Planning or preparation to carry out a terrorist act*

There has been uncertainty about whether planning or preparation for a terrorist act was criminalised in the TSA. This was because section 25 of the TSA, which refers to planning or preparation, is currently located in the “terrorist designations”<sup>9</sup> sections of the TSA. This created uncertainty about whether it applied to the whole TSA or just to terrorist designations.

In July 2020, the High Court decision, *R v S*, found that planning or preparation to carry out a terrorist act is not criminalised in the TSA. New Zealand has obligation under the United Nations Security Council Resolution (UNSCR) 1373 (2001) to criminalise terrorism-related planning or preparation.

This also leaves a gap in our own ability to prevent terrorism. Case studies from agencies highlighted that this gap in the law could hinder their ability to intervene early to prevent a terrorist attack. The judge also noted that “the absence of an offence of planning or preparing a terrorist act (falling short of existing inchoate offences) could be an Achilles heel” and that Australia and the United Kingdom have this offence.

#### *Terrorist training*

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<sup>9</sup> The Prime Minister may designate an entity as a terrorist entity under section 20 and section 22 of the TSA, if the Prime Minister believes on reasonable grounds that the entity has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts.

While there is no international definition of “terrorist training”, it is characterised as being both provided and received, delivered in person, online or through other communication channels, involving an instruction or capacity or capability-building, and participation knowing that the training is in respect of preparation for the commission of a terrorist act.

However, as aspects of terrorist training are covered by different offences, it is unclear particularly to the public that this behaviour is captured. This may be an issue particularly for weapons and combat training, which makes a person inherently more dangerous due to the violent nature of the training.

Terrorist training is captured by existing or proposed (if they are enacted) offences in the TSA:

- Provision of training is covered by the existing offence of participation in a terrorist group. This covers where a person participates in a terrorist group for the purpose of enhancing its ability to carry out a terrorist act. The person must know that the group carries out terrorist acts, or be reckless as to whether they do or not.
- Provision of training will also be covered by the proposed offence of providing material support (which specifically includes providing “training”) to a terrorist act/entity should this offence be enacted. This offence covers where a person knows or is reckless as to whether the training would be used to carry out a terrorist act.
- Receipt of training is covered by the existing offence of participation in a terrorist group. This covers where a person participates in a terrorist group for the purpose of enhancing its ability to carry out a terrorist act. The person must either know that the group carries out terrorist acts, or be reckless as to whether they do.
- Receipt of training will also be covered by the proposed offence of planning or preparation to carry out a terrorist act, should this offence be enacted. In this case, the person must have the intention to use the training to carry out a terrorist act.

The review of the TSA provides us an opportunity to clarify that terrorist weapons and combat training is criminalised, and to specifically denounce this behaviour.

New Zealand also has an international obligation to criminalise terrorist training under UNSCR 2178 (2014).

## **2.4 What do stakeholders think about the problem?**

As counter-terrorism measures affect the New Zealand public generally, both in terms of increasing public safety and in preventing behaviours that are not desirable, the public are identified as stakeholders.

The groups that will be more specifically impacted by the proposals are those whose conduct fall within the scope of the conduct criminalised by offences, individuals and communities who will be protected by the offences, and relevant agencies, such as New Zealand Police, NZSIS, and GCSB, who will benefit from improving their ability to fulfil their statutory functions.

There is likely to be public interest in the legislation given the harm caused by terrorist acts, the need to protect human rights (such as right to life and security guaranteed by

NZBORA), the widened scope of criminal offences, and powers that may be available to relevant agencies.

However, we were unable to consult with the public on these proposals for a number of reasons:

- public consultation may expose potential gaps (or uncertainties) in the current legislative framework and risk these existing vulnerabilities being abused,
- the nature of the counter-terrorism work programme is restricted,
- there was an active court case when we undertook this review.

We consulted with a targeted group of external experts on review of the “terrorist act” definition as described below.

As the proposals will become a government bill, they will go through the select committee process which will scrutinise and seek public submissions on the Bill.

We worked closely with relevant central government agencies, as relevant stakeholders on all three issues, because they are the operational arms of the TSA, who implement and use this legislation, and therefore have valuable insights into whether it is fit for purpose.

#### **“Terrorist act” definition**

Relevant central government agencies, including New Zealand Police, DPMC and NZSIS, identified potential issues with the “terrorist act” definition.

We tested the identified issues confidentially with a targeted group of external experts. The Ministry received both written and oral feedback from a range of experts in this field during March 2020. The external experts were selected based on their relevant expertise and directly contacted by the Ministry of invited to participate. The group included academics, criminal lawyers, and barristers. The group were given an issues paper to guide their thinking and to provide written feedback. They were also given the opportunity to attend a face to face session to discuss their thoughts with other members of the group and the Ministry. The Ministry received seven written submissions, and eight experts attended the face to face session.

The external experts generally considered that the current definition was appropriate, even in light of the evolving nature of terrorism. Most also considered that some minor amendments could be made to improve the clarity of the definition and to ensure that the “terrorist act” definition is workable in light of the evolving nature of terrorism.

#### **Planning and preparation for a terrorist act**

Agencies agree that there is a gap in criminalising planning or preparation for a terrorist act, and this was supported by the High Court’s decision outlined earlier (on page 2).

#### **Terrorist weapons and combat training**

While agencies agree that terrorist weapon and combat training is not explicitly criminalised, it is acknowledged that this behaviour is captured by other offences in the TSA.

### **2.5 What are the objectives sought in relation to the identified problem?**

The overall objective of the review of counter-terrorism legislation is to ensure our legislation remains clear and effective given the evolving nature of terrorism, with a strong focus on early intervention and prevention.

More specifically, the individual policy objectives identified are:

- to clarify the law and to ensure that the “terrorist act” definition is fit for purpose;
- to address the gap in criminalising planning or preparation for a terrorist act;
- to provide relevant agencies with the appropriate offences and powers to detect and prevent terrorist attacks;
- to ensure New Zealand meets its international obligations; and
- to make it clearer that terrorist weapons and combat training is criminalised.

## **2.6 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?**

We have identified the below criteria to assess how the options are likely to achieve the objectives, and the likely impacts of the 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.

# Section 3: Options identification and impact analysis

## 3.1 Terrorist Act definition

### 3.1.1 What options have been considered?

We have considered two options:

#### Option 1: maintaining the status quo

This option means that no change would be made to the “terrorist act” definition<sup>10</sup>. This would not address the concerns that several aspects of the current “terrorist act” definition may impact the ability of agencies to utilise the TSA.

#### Option 2: technical changes to the definition based on a targeted review (through issues raised by agencies)

This option would make a series of technical changes to address issues raised by agencies to improve the workability of the “terrorist act” definition. This option would not involve a review of the whole definition, such as whether it is fit for purpose, but would focus only on the issues identified by agencies.

#### Options that were not considered

We ruled out conducting a full review of the “terrorist act” definition because the court has limited experience in utilising the “terrorist act” definition: the only terrorist act charge resulted in a guilty plea. We do not consider there is need to conduct a full review of the “terrorist act” definition, as the current definition broadly aligns with international law, academic commentary and legislation in comparable jurisdictions.

Non-regulatory options would include looking at whether changing practice or use of the definition would solve any of the issues. However, given that the difficulties in using the definition were raised by agencies, and that the “terrorist act” definition remains untested by the courts, we did not consider this option as it would not have been effective.

### 3.1.2 Consultation and stakeholders’ views

Central government agencies, including New Zealand Police, NZSIS, and DPMC, raised a number of specific issues with the definition of “terrorist act. We carried out a targeted consultation with 15 external experts who are academics and legal practitioners with a relevant field of expertise, such as counter-terrorism, criminal law and international law on the issues that agencies had raised. Consultation was carried out on a confidential basis.

The external group agreed that the current definition has the right elements – i.e. motive, intent and outcomes, and the avoidance of doubt clause; and that the right components of each of these elements had been identified. However, the external group, as well as agencies, agreed that small amendments to the language used in the definition would ensure that it was clear and usable. These amendments are discussed in the next section.

During the consultation we did not receive any feedback from people with expertise in Māori culture or Māori criminal law, although some with this expertise were invited to participate. However, the feedback we did receive noted the importance of ensuring that Māori are not perceived to be unfairly targeted by the law.

<sup>10</sup> The current “terrorist act” definition is attached as Appendix B. It is also available at: <http://www.legislation.govt.nz/act/public/2002/0034/latest/DLM152702.html>

3.1.3 Impact Analysis		
	Option 1: maintaining the status Quo	Option 2: technical changes to the definition based on a targeted review (through issues raised by agencies)
<b>Effectiveness, i.e. public safety, national security and harm reduction through:</b> <ul style="list-style-type: none"> <li>• clear, consistent legislative framework</li> <li>• intervention at the most appropriate stage</li> <li>• rehabilitation, reintegration, de-radicalisation, de-escalation of the risks of (further) terrorist acts</li> <li>• social cohesion</li> <li>• proportionate response</li> </ul>	<p style="text-align: center;"><b>0</b></p> <ul style="list-style-type: none"> <li>• Agencies will continue to lack the confidence in using the “terrorist act” definition in cases where its application may not be clear</li> </ul>	<p style="text-align: center;"><b>+</b></p> <ul style="list-style-type: none"> <li>• Would improve the clarity of the law</li> <li>• Would address concerns raised by agencies and improve their confidence to use the “terrorist act” definition</li> </ul>
<b>Uphold democratic and constitutional principles</b> (consistency with democratic/ constitutional norms, demonstrably justifiable in a free society, consistent with Te Tiriti)	<p style="text-align: center;"><b>0</b></p> <ul style="list-style-type: none"> <li>• The option would make no changes to the “terrorist act” definition and will not add or detract from the objective to uphold democratic and constitutional principles</li> </ul>	<p style="text-align: center;"><b>0</b></p> <ul style="list-style-type: none"> <li>• The technical changes sought to the “terrorist act” definition will not add or detract from the objective to uphold democratic and constitutional principles</li> </ul>
<b>International commitments and standards</b> (including international counter-terrorism framework, and international human rights and humanitarian law)	<p style="text-align: center;"><b>0</b></p> <ul style="list-style-type: none"> <li>• Whilst there is no internationally accepted definition of “terrorism”, the current definition broadly aligns with comparable jurisdictions, academic commentary and international law</li> </ul>	<p style="text-align: center;"><b>0</b></p> <ul style="list-style-type: none"> <li>• With the proposed changes, the definition will still align with comparable jurisdictions, academic commentary and international law.</li> </ul>
<b>Overall assessment</b>	<b>0</b>	<b>+</b>

- ++ 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

### 3.1.4 What is the preferred option?

#### **Option 2, technical changes to the definition based on a targeted review (through issues raised by agencies)**

This option will best achieve the benefit of clarifying the law to ensure a clear and consistent legislative framework and improve the workability of the “terrorist act” definition by addressing issues raised by agencies, and providing them with more confidence in utilising the TSA.

This option would make the following clarifications to the “terrorist act” definition to improve the clarity of the law. Feedback from agencies and experts was mixed on each of the individual aspects of the definition. We consider the following proposals address each issue while ensuring the overall definition remains balanced.

#### **Motive**

*Ensure that cases where there is more than one motivation are covered*

A “terrorist act” is carried out for the purpose of advancing an ideological, political, or religious cause. The external experts and government agencies are in general agreement that these three existing motives are adequate, and no others needed to be included.

We consider an improvement could be made to clarify that this element captures cases where there may be a range of mixed motives as well as where there is just one motive. For example, as well as advancing a political cause, there could be additional motives of personal economic gain, revenge or notoriety. While mixed motives are not excluded from the current definition, the added clarity will be beneficial.

#### **Intent**

A “terrorist act” must be done with the intent:

- “to induce terror in a civilian population” OR
- “to unduly compel or to force a government or international organisation to do or abstain from doing any act”.

*Change the level of concern that should be intended from “terror” to “fear”*

The law currently requires an offender intend to induce terror. There are concerns that this threshold is unnecessarily high, and that it is not clear what “terror” means.

The United Kingdom, Australia and Canada all use “intimidate” the public. The original drafting in the TSA used “intimidation”. At the time, there were concerns raised in the public submissions that this standard was too low. In response, the Select Committee changed the wording to “induce terror” to more accurately reflect the meaning of terrorism.

There is a continuum of what level of concern could be captured:

- Terror: a common definition of “terror” is extreme fear. In the context of a terrorist act, this is broader than the fear felt by those directly and immediately impacted by a crime.
- Fear: emotion caused by the threat of danger, pain or harm.
- Intimidation: this is to frighten or threaten someone, usually to get them to do something they don’t want to do.

There were differing views from external experts on whether the use of “terror” was the right standard. Some experts considered that “terror” was the right standard, whereas others thought that it was too high and preferred “fear” or “intimidate” (others thought the latter alternatives were too low). One written submission suggested that New Zealand’s high standard here was a good thing and made the definition better than its international alternatives.

We considered changing “inducing terror” to “inducing intimidation” as an alternative. Intimidate is a term that is used internationally, and in other terrorism-related legislation in New Zealand. For example, the definition of “terrorist act in armed conflict” refers to the purpose of the act being to intimidate a population or compel a government. The Maritime Crimes Act 1999 has a similar formulation in respect of offences relating to ships.

However, given that “intimidate” has been considered by Parliament before in this context and the mixture of views both within and outside of government as to the appropriate level of concern in the population, we think “fear” as a threshold in between these two levels is more appropriate. It captures the right level of concern, it is non-circular, and is easily understood.

No concerns were raised from agencies on this proposed change.

*Remove “civilian” from the population that the offender intends to impact so that military and police are not inadvertently omitted*

The law currently restricts the population impacted to a “civilian” population. The police and the military should be included in the population in which an offender intends to induce terror. This will not unintentionally capture terrorism during armed conflict as this is defined separately in the TSA.

*Replace “unduly compel” the government with “coerce”*

The alternative to intending to induce terror in a population is intending to unduly compel a government or an international organisation to do or abstain from doing something.

Whilst it was widely agreed that this element should be retained, there were strong views from the external engagement and government agencies on the form it should take. “Unduly” is seen to give a defendant the ability to open up argument as to the validity of their beliefs, i.e. that compelling the government is not undue (it is warranted) given a particular set of beliefs. We think this should be removed. We also propose to replace compel with coerce because it more clearly captures the negative intent behind terrorism and removes any confusion that keeping the current word “compel” might raise because of the attachment of compel to legitimate behaviour.

## **Outcomes**

*Make amendments to recognise that modern infrastructure is about more than facilities*

A “terrorist act” must be intended to cause at least one of certain specified outcomes. One of the specified outcomes is serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life.

The current definition, with an emphasis on “facilities” is outdated. Facilities may be considered to include only tangible structures such as buildings, but it is important to capture systems and services such as telecommunications. Harm to individuals can result from interference with systems and networks and this should be reflected in the definition.

We consider an amendment is necessary to recognise that “infrastructure” includes more than just facilities. Some external experts agreed with this, and had suggestions including “essential service” and facility or system”.

We think the best approach would be changing “infrastructure facility” to “critical infrastructure”, and adding a definition of critical infrastructure to the interpretation section in the TSA. We think this can be defined as “critical infrastructure means systems, assets, facilities and networks and their related supply chains that provide the essential services of a population”.

Whilst this would mean widening the scope of “infrastructure facility” (for example, cyber-attacks would be included in the scope of ‘critical infrastructure’), this is essential to ensure that the “terrorist act” definition is up to date and fit for purpose. Broadening the scope is appropriate because the prosecution still must prove the other elements of the “terrorist act”, i.e. motive and intent, and that this outcome must be linked to the motive and intent of a terrorist act.

*Replace “devastate a national economy” with “cause major damage to a national economy” in the element of introduction or release of a disease-bearing organism*

The one aspect of the definition not related to the health or life of people is section 5(3)(e). To be a “terrorist act”, the act must be intended to cause “the introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country”.

Agencies had a range of views on whether introduction or release of a disease-bearing organism should be covered by the definition. There was concern that removing it would mean that intentionally releasing something like foot and mouth disease in New Zealand in order to get the government to do something, with an ideological motive would not be covered by the definition. Many agencies considered this should fall within the scope of the definition.

However, we consider that the terminology “devastate the national economy” should be changed to “major damage to the national economy”. This wording would make the threshold clearer, align with the wording of a similar offence in the Crimes Act 1961.

#### **Avoidance of doubt provision**

No change proposed.

## 3.2 Planning or preparation to carry out a terrorist act

### 3.2.1 What options have been considered?

We considered two options:

#### Option 1: maintaining the status quo

Option 1 is to do nothing. This means planning or preparation to commit a terrorist act would not be criminalised in New Zealand. If a person or entity undertakes planning or preparation to carry out a terrorist act, this would be a lawful activity. Relevant agencies, such as New Zealand Police, would only be able to act in the face of an immediate threat. This necessitates an extremely high-risk approach of waiting until such time as a person become a legally justifiable “immediate threat” and that this would be detected in time to intervene.

This option would mean that New Zealand is not meeting its international obligation to criminalise this behaviour.

#### Option 2: Creating a new offence for planning or preparation for a terrorist act

Option 2 would create a new offence that criminalises planning or preparation to commit a terrorist act. This option would mean that relevant agencies, such as New Zealand Police, would be able to intervene early, i.e. at the planning or preparation stage before those behaviours escalated into a terrorist act. It would also enable New Zealand to meet its international obligation to criminalise this behaviour.

Under this option, the prosecution would need to prove that a terrorist act was being planned for. Linking it to the “terrorist act” definition would mean that the motive, intent, and outcomes elements would still need to be proved. For example, purchasing a gun would not be captured without the relevant motive and intent. The need to prove the above elements should provide reassurance that the scope of this offence is appropriately targeted.

#### Options that were ruled out early

##### Criminalising planning or preparation to carry out a *specific* terrorist act

The nature of planning or preparation means that a person may not have a specific time or place in mind, or may be choosing between multiple options. If New Zealand Police is required to wait until a specific terrorist act was being planned to intervene, it may be too late. This option was therefore ruled out early because it would not be effective.

##### Repealing bespoke preparatory provisions in the TSA and relying on the general provisions of the Crimes Act

Planning or preparation currently exists in section 25 of the TSA (which is about terrorist designations). This created uncertainty as to whether planning or preparation applied to the whole TSA or only terrorist designation processes.

At an early stage, we considered expressly limiting section 25 to the terrorist designation process only and relying on the general criminal law of attempt to intervene prior to a terrorist act being carried out. This may have made the law clearer in the sense that planning or preparation for terrorist act would not be criminalised. However, the same limitation as option one applies: the law of attempt relates only to acts immediately proximate to the commission of a criminal act; it does not extend to the planning or

preparation stage, which necessitates an extremely high-risk approach of waiting until such time as a person becomes a legally justified “immediate threat”, which may be too late to intervene.

Non-regulatory options are not viable as they are unable to fill the legislative gap in the TSA.

3.2.2 Impact Analysis		
	Option 1: maintaining the status Quo	Option 2: creating a new offence for planning or preparation for a terrorist act
<b>Effectiveness, i.e. public safety, national security and harm reduction through:</b> <ul style="list-style-type: none"> <li>• clear, consistent legislative framework</li> <li>• intervention at the most appropriate stage</li> <li>• rehabilitation, reintegration, de-radicalisation, de-escalation of the risks of (further) terrorist acts</li> <li>• social cohesion</li> <li>• proportionate response</li> </ul>	<p style="text-align: center;"><b>0</b></p> <ul style="list-style-type: none"> <li>• Planning or preparation would continue to not be criminalised in the TSA. This would not allow early intervention to prevent terrorist attack</li> <li>• This option would also not improve the clarity of the law</li> <li>• While we do not know if there will be an increase in terrorist activity, even one terrorist act event will have a huge impact on New Zealand.</li> <li>• This option is a high-risk approach that may not adequately protect public safety or national security</li> </ul>	<p style="text-align: center;"><b>++</b></p> <ul style="list-style-type: none"> <li>• Would address the gap in criminalising planning or preparation for a terrorist act , and therefore enable early intervention to better protect public safety and national security</li> <li>• Clarifying the law would make sure that the legislation remains clear and effective, which would increase agencies' confidence in utilising the TSA</li> <li>• Not requiring the prosecution to prove a specific terrorist act that the planning or preparation relates to (such as an intended date or location, or that it is intended to be carried out at a specific future event) would improve effectiveness of this offence. This is because a person preparing for a terrorist act may be undertaking preparations in advance of deciding on a specific or intended date or location. This both acknowledges the reality of planning and preparation, which may occur many months from any possible terrorist attack and ensures that the proposed offence is able to be investigated and prosecuted at the appropriate time</li> </ul>
<b>Uphold democratic and constitutional principles</b> (consistency with democratic/ constitutional norms, demonstrably justifiable in a free society, consistent with Te Tiriti)	<p style="text-align: center;"><b>0</b></p> <ul style="list-style-type: none"> <li>• The option to rely on existing legislation will not add or detract from the objective to uphold democratic and constitutional principles</li> </ul>	<p style="text-align: center;"><b>0</b></p> <ul style="list-style-type: none"> <li>• While the proposed new offence infringes on individual human rights, the Ministry considers these limits are demonstrably justified in a free and democratic society</li> <li>• The built-in safeguards of requiring proof of an intention and a connection to a terrorist act ensure that any infringement on the freedoms provided by NZBORA is considered a reasonable limit when balanced with the threat of terrorism and the harm it causes</li> <li>• Enabling early intervention would better protect other civil and political rights under NZBORA, such as right to life and security of the person for those likely to be targeted by terrorists</li> <li>• The safeguards preserve tino rangatiratanga, as expression of tino rangatiratanga is not captured when it is not connected to the elements of a terrorist act, i.e. intent, motive and outcomes under section 5 of the TSA. In other words, the ability to protest, advocate, or progress tino rangatiratanga is not affected</li> </ul>
<b>International commitments and standards</b> (including international counter-terrorism framework, and international human rights and humanitarian law)	<p style="text-align: center;"><b>0</b></p> <ul style="list-style-type: none"> <li>• New Zealand has international obligations under United Nations Security Council Resolution (UNSCR) 1373 (2001) to criminalise terrorism-related planning or preparation</li> <li>• Planning or preparation is currently legal</li> </ul>	<p style="text-align: center;"><b>+</b></p> <ul style="list-style-type: none"> <li>• Planning or preparation for a terrorist act would be criminalised</li> <li>• Enabling earlier intervention better protects people from terrorism and therefore more consistent with international human rights and humanitarian law</li> </ul>
<b>Overall assessment</b>	<p style="text-align: center;"><b>0</b></p>	<p style="text-align: center;"><b>+</b></p>

- ++ 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

### 3.2.3 What is the preferred option?

#### Option 2 is our preferred option.

This is because option 2 is the only option that is able to meet the objectives of providing relevant agencies with the ability to intervene early and enhance our ability to meet our international obligations. It would also improve the clarity of the law, and ensure that safeguards are in place to avoid overreach of the criminal law and that any human rights implications are demonstrably justified in a free and democratic society.

Within option 2 there are further options for how to implement that option. The following two key features are important.

#### *A maximum penalty of 7 years' imprisonment*

The offence of planning or preparation for a terrorist act would have a maximum penalty of 7 years' imprisonment. This proposed penalty is proportionate and appropriate because this offence would inevitably be more remote to the commission of a terrorist act than an attempt to commit a terrorist act, for which the maximum penalty is 10 years imprisonment (as provided by section 311(1) of the Crimes Act). We consider having any greater penalty cannot be justified.

Some overseas jurisdictions have a much higher penalty for planning or preparatory type offences. For example, the maximum penalty for planning or preparation to carry out a terrorist act in the United Kingdom (section 5 of the Terrorism Act 2006) and Australia (section 101.6 of the Criminal Code Act 1995) is life imprisonment. Furthermore, in the United Kingdom and Australia, attempt to carry out an offence carries the same penalty as actually carrying out the offence.

However, this is not comparable to the law in New Zealand, because New Zealand has a graduated penalty regime which differentiates between the remoteness of the conduct to the completed offence.

Our proposed penalty for the proposed planning or preparation offence follows a logical penalty graduation and is therefore appropriate in the domestic context.

#### *Making warrantless search and surveillance powers available to investigate this new offence*

Certain provisions in the Search and Surveillance Act allow warrantless powers to be exercised when an offence is punishable by a term of imprisonment of 14 years or more. These are:

- Section 15: entry without warrant to find and avoid loss of evidential material;
- Section 16: searching people in public place without warrant for evidential material relating to certain offences;
- Section 17: warrantless entry and search of vehicle for evidential material relating to certain offences;
- Section 48: surveillance device warrant need not be obtained for use of surveillance device in some situations of emergency or urgency.

We propose that these powers should also be available for the proposed planning or preparation offence, due to the nature of preparatory type of behaviours. While planning or preparation may be far removed temporally from a terrorist act, these behaviours can escalate very quickly to a terrorist act, for example if someone is opportunistic. Police

need the ability to intervene quickly if this behaviour does escalate quickly and they do not have time to get a warrant.

Powers of entry, search, surveillance, and seizure balance important sets of values. On one hand is respect for liberty, dignity, bodily integrity, privacy, and the right to peaceful enjoyment by people of their property. These values are affirmed by the right in section 21 of NZBORA to be secure against unreasonable search and seizure. On the other hand, and balanced against that right are regulatory and law enforcement objectives underlying particular powers.<sup>11</sup>

The proposed warrantless search and surveillance powers will have certain human rights implications (such as right to be secure against unreasonable search and seizure). However, given the fluid, unpredictable nature by which planning may move to more advanced conduct to commit a terrorist act, making these powers available so relevant agencies will be able to investigate and intervene early on terrorism-related behaviours is integral to preventing terrorist attacks.

Furthermore, there are built in safeguards to ensure that these powers are not misused:

- these powers are constrained by the requirement that the enforcement officer (such as New Zealand Police) exercising the power has reasonable grounds to believe certain matters essential to the exercise of the power exist (such as a real risk that a person is posing a serious and imminent threat); and
- warrantless search and surveillance powers can only be exercised in very limited circumstances, that is, when there are exceptional, rapidly evolving circumstances, where a warrant could not have been readily obtained.<sup>12</sup>

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<sup>11</sup> Chapter 21, Creating powers of search, surveillance and seizure, *Legislation Guidelines: 2018 edition*, the Legislation Design and Advisory Committee: <http://www.ldac.org.nz/guidelines/legislation-guidelines-2018-edition/new-powers-and-entities/chapter-21/>

<sup>12</sup> See *SF v R* [2014] NZCA 313 at [46] and *Hall v R* [2018] NZCA 279. See also the Law Commission's report on *The Review of the Search and Surveillance Act 2012*, June 2017, Wellington, Report 141.

### 3.3: Terrorist training

#### 3.3.1 What options have been considered?

We considered four options:

##### **Option 1: maintaining the status quo**

Option 1 is to do nothing and rely on existing or proposed offences in the TSA to capture terrorist weapons and combat training.

As outlined in section 2.3, terrorist weapons and combat training would be captured by existing and proposed new offences in the TSA. However, as aspects of terrorist training are covered by different offences (e.g. participation in terrorist groups, proposed material support offence, the proposed planning or preparation offence), it is unclear, particularly to the public, that this behaviour is captured. This may be an issue particularly for weapons and combat training, which makes a person inherently more dangerous due to the violent nature of the training.

##### **Option 2: introducing a stand-alone offence to criminalise providing or receiving weapons or combat training to carry out a terrorist act**

The scope of this proposed offence is limited to weapons and combat training, as this subset of training makes a person inherently more dangerous. This is similar to section 54 of the Terrorism Act 2000 in the United Kingdom. This proposed offence would make it clear to the public that this behaviour is criminalised to specifically denounce it.

The two core components of this offence are:

- the act of providing or receiving weapons or combat training, and
- intending to use this training for a terrorist act.

For this option, prosecution would not need to prove the details of a specific terrorist act that was being trained for, but more broadly that a terrorist act was being trained for, as training can happen very early on before a specific terrorist attack has been planned out.

Linking this specific and more dangerous subset of terrorist training to the “terrorist act” definition would mean that the motive, intent, and outcomes elements of a future terrorist act would still need to be proved. This is consistent with how most TSA offences are constructed and with comparable international offences for terrorist training, e.g. section 13 of the TSA which criminalises participating in terrorist groups, and the construction of the terrorist training offence in the United Kingdom, i.e. section 6 of the Terrorism Act 2006. Retaining this link to a future act is crucial in avoiding overcriminalisation, as the criminal law is not designed to, nor should it ever be used to, punish malign thoughts.

##### **Option 3: Introduce a stand-alone offence to criminalise providing or receiving weapons or combat training to:**

- **Carry out a terrorist act; OR**
- **Enhance the ability of an entity (including an individual, designated terrorist entity or non-designated entity) to carry out a terrorist act.**

This option builds on option 2, providing a wider scope that criminalises enhancing the ability of an entity other than oneself to carry out a terrorist act.

As with option 2, the details of a specific terrorist act would not need to be proved, but instead the connection to a future terrorist act more broadly.

**Option 4: introducing a stand-alone offence to criminalise providing or receiving weapons or combat training intending to carry out any act in the future that, if it were carried out, would have been done with:**

- **intention to advance an ideological, political or religious cause; and**
- **intention to induce terror in a population or unduly compel a government or international organisation to do/abstain from doing any act.**

This option further widens the scope from options 2 and 3. This option does not link to a terrorist act, but rather selects the motivation and intent elements of the terrorist act definition to link to. This means that the outcomes of a terrorist act, which generally relate to serious harm to people, would not need to be proved for this offence.

Note that “terror” would be changed to “fear”, and “unduly compel” would be changed to “coerce” If Cabinet agrees to the proposed change to the “terrorist act” definition (detailed in section 3.1.4).

#### **Options that were not considered**

Other options to criminalise terrorist weapons and combat training that were not considered include:

1. Specifically criminalise terrorist weapons and combat training in relation to a specific terrorist act;

This was ruled out early because it would not be workable. Terrorist weapons and combat training is an inherently dangerous subset of terrorist training, and can happen months before a specific terrorist act is formed (such as an intended date or location, or that it is intended to be carried out at a specific future event).

This option would risk not being able to disrupt terrorist weapons and combat training before any serious harm materialises.

2. Using a previous conviction under the Human Rights Act 1993 as evidence to point towards an individual having a malign motivation. This when coupled with weapons or combat training could then be criminalised under a terrorist training offence

This option was ruled out early because the scope was too wide and risked overcriminalisation. As discussed above, it is the connection to a malign terrorist act in the future that makes a conduct a criminal offence. Having a bad thought in of itself is not criminal. This option would not be consistent with our human rights framework.

3. Criminalising attending a place of terrorist training or training with a terrorist entity where there is no intent to carry out a terrorist act.

Like above, and in particular, this option would be covered by the offence of participation in terrorist groups.

3.3.2 Impact analysis				
	Option 1: maintaining the status quo (noting that the proposed planning or preparation offence, if enacted, would cover aspects of the same behaviour)	Option 2: Introduce a stand-alone offence to criminalise providing or receiving weapons or combat training to carry out a terrorist act	Option 3: Introduce a stand-alone offence to criminalise providing or receiving weapons or combat training to:	Option 4: Introduce a stand-alone offence to criminalise providing or receiving weapons or combat training intending to carry out any act in the future, if it were carried out, would have been done with:
<p><b>Effectiveness i.e. public safety, national security and harm reduction through:</b></p> <ul style="list-style-type: none"> <li>a consistent and clear legislative framework;</li> <li>enabling and supporting intervention at the most appropriate stage, particularly with a view to prevention;</li> <li>encouraging rehabilitation, reintegration, de-radicalisation, de-escalation of the risks of (further) terrorist acts;</li> <li>contributing to and not undermining wider work to build social cohesion.</li> </ul>	<p><b>0</b></p> <ul style="list-style-type: none"> <li>Maintaining the status quo would make no change to the effectiveness of the regulatory regime</li> <li>It would remain unclear to the public as to whether terrorist weapons and combat training is criminalised</li> <li>While we do not know if there will be an increase in terrorist activity, even one terrorist act event will have a huge impact on New Zealand</li> </ul>	<p><b>+</b></p> <ul style="list-style-type: none"> <li>Would more clearly criminalise weapons and combat training, and therefore more clearly signal to the public that this particular behaviour (which is inherently dangerous) is unlawful</li> <li>If the proposed planning or preparation offence is not enacted, this proposed offence would enable earlier intervention and prevention of terrorism in circumstances within the scope of the training offence that would otherwise be covered by the planning or preparation offence</li> </ul>	<p><b>+</b></p> <ul style="list-style-type: none"> <li>Would more clearly criminalise weapons and combat training, and therefore more clearly signal to the public that this particular behaviour (which is inherently dangerous) is unlawful</li> <li>If the proposed planning or preparation offence is not enacted, this proposed offence would enable earlier intervention and prevention of terrorism in circumstances within the scope of the training offence that would otherwise be covered by the planning or preparation offence</li> <li>The scope of this offence is wider than that in option 2 as it also covers the behaviour of providing or receiving weapons and combat training to enhance the ability of an entity to carry out a terrorist act..</li> </ul>	<p><b>-</b></p> <ul style="list-style-type: none"> <li>The scope of this offence is the broadest of the options presented: it seeks to capture conduct before a terrorist scheme is underway as there is no required link to a terrorist act</li> <li>The lack of required link to a terrorist act is inconsistent with the design of the TSA, and may undermine other existing and proposed offences (particularly planning or preparation, participation in a terrorist group, and material support offence) by seeking to capture some of the same activity but without the same safeguards (namely the need to prove a link to an intended outcome)</li> <li>Although this option provides a very broad means of intervention and de-escalation, it may alienate those on the margins of terrorist activity, which would undermine re-radicalisation and social-cohesion</li> </ul>
<p><b>Uphold democratic and constitutional principles</b> (consistency with our democratic and constitutional)</p>	<p><b>0</b></p> <ul style="list-style-type: none"> <li>Relying on existing and proposed offences to</li> </ul>	<p><b>0</b></p> <ul style="list-style-type: none"> <li>The option would still require a link to a terrorist act, as defined</li> </ul>	<p><b>0</b></p> <ul style="list-style-type: none"> <li>Similar to option 2, but the link to the terrorist act is slightly more</li> </ul>	<p><b>--</b></p> <ul style="list-style-type: none"> <li>This option only requires an individual to meet two out of the three requirements for</li> </ul>

3.3.2 Impact analysis				
	<b>Option 1: maintaining the status quo (noting that the proposed planning or preparation offence, if enacted, would cover aspects of the same behaviour)</b>	<b>Option 2: Introduce a stand-alone offence to criminalise providing or receiving weapons or combat training to carry out a terrorist act</b>	<b>Option 3: Introduce a stand-alone offence to criminalise providing or receiving weapons or combat training to:</b>	<b>Option 4: Introduce a stand-alone offence to criminalise providing or receiving weapons or combat training intending to carry out any act in the future, if it were carried out, would have been done with:</b>
norms; demonstrably justifiable in a free and democratic society; consistency with the principles of and obligations under Te Tiriti o Waitangi.)	capture terrorist weapons and combat training would not add or detract from the criteria of “upholding democratic and constitutional principles”.	in section 5, and would therefore replicate its safeguards (i.e. the need to prove each of the elements of a terrorist act) <ul style="list-style-type: none"> <li>• These safeguards ensure that any infringement on the freedoms provided by NZBORA are reasonable when balanced with the threat of terrorism and the harm it causes</li> <li>• Explicitly criminalising terrorist weapons and combat training, an inherently dangerous type of terrorist training, would better protect other civil and political rights under NZBORA, such as right to life and security of the person for those likely to be targeted by terrorists</li> </ul>	removed in the second limb of this option <ul style="list-style-type: none"> <li>• However, even though the second limb of this option is slightly more removed when compared to option 2, infringements on the freedoms provided by NZBORA are justified when balanced with the threat of terrorism</li> <li>• Similar to option 2, explicitly criminalising terrorist weapons and combat training, an inherently dangerous type of terrorist training, would better protect other civil and political rights under NZBORA, such as right to life and security of the person for those likely to be targeted by terrorists</li> </ul>	meeting the definition of a terrorist act. By removing the link to a terrorist outcome, as defined in section 5 of the TSA, this option would negatively impact the fundamental principle of the criminal law and the rule of law by criminalising conduct before a harmful intention is present, and therefore risking overcriminalisation <ul style="list-style-type: none"> <li>• Whilst similar to option 2 and 3 that explicitly criminalising terrorist weapons and combat training may better protect other civil and political rights under NZBORA, this option risks going beyond the appropriate boundaries of the criminal law, curtailing the freedoms of expression, assembly and association more than what may be considered justifiable in a free and democratic society</li> </ul>
<b>International commitments and standards</b> (consistency with New Zealand’s international commitments, including the international counter-terrorism framework, and international	<b>0</b> <ul style="list-style-type: none"> <li>• The status quo makes no changes to further align New Zealand with its international</li> </ul>	<b>+</b> <ul style="list-style-type: none"> <li>• New Zealand has international obligation under UNSCR 2178 (2014) to explicitly criminalise providing or receiving of terrorist training</li> </ul>	<b>+</b> <ul style="list-style-type: none"> <li>• This approach goes further than option 2 by creating a broader category of criminalised conduct through the second limb of the offence, and therefore would</li> </ul>	<b>0</b> <ul style="list-style-type: none"> <li>• Whilst New Zealand has obligations under UNSCR 2178 (2014) to explicitly criminalise providing or receiving terrorist training, the broad scope of this offence and the risk of overcriminalisation renders it misaligned with</li> </ul>

3.3.2 Impact analysis				
	Option 1: maintaining the status quo (noting that the proposed planning or preparation offence, if enacted, would cover aspects of the same behaviour)	Option 2: Introduce a stand-alone offence to criminalise providing or receiving weapons or combat training to carry out a terrorist act	Option 3: Introduce a stand-alone offence to criminalise providing or receiving weapons or combat training to:	Option 4: Introduce a stand-alone offence to criminalise providing or receiving weapons or combat training intending to carry out any act in the future, if it were carried out, would have been done with:
human rights and humanitarian law.)	commitments and standards. <ul style="list-style-type: none"> <li>Aspects of training are currently criminalised (or will be under other proposed new offences), but terrorist weapons and combat training is not explicitly criminalised under the TSA</li> </ul>		capture a broader scope of harmful behaviour	international human rights and humanitarian law
<b>Overall assessment</b>	<b>0</b>	<b>+</b>	<b>+</b>	<b>--</b>

- ++** 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

### **3.3.3 What is the preferred option?**

The Ministry of Justice does not have a preferred option.

Option 3 is the option proposed in the Cabinet paper.

The Cabinet paper proposes a maximum penalty of 7 years' imprisonment for option 3. We consider a maximum penalty of up to 7 years' imprisonment is appropriate for this option because it is aligned with the penalty for the proposed offence for planning or preparation to carry out a terrorist act, which captures similar behaviour.

## Section 4: Conclusions

### 4.1 What option, or combination of options is likely to best address the problem, meet the policy objectives and deliver the highest net benefits?

#### Preferred options

As informed by the overall objective and the identified criteria, the preferred options are:

1. Making targeted amendments to the “terrorist act” definition to improve the clarity of the law by:
  - Ensuring that cases where there is more than one motivation are covered;
  - Changing the level of concern that should be intended from “terror” to “fear”;
  - Remove “civilian” from the population that the offender intends to impact so that military and police are not inadvertently omitted;
  - Replacing “unduly compel” the government with “coerce”;
  - Make amendments to recognise that modern infrastructure is about more than facilities; and
  - Replacing “devastate a national economy” with “cause major damage to a national economy” in the element of introduction or release of a disease-bearing organism.
2. Introducing a new offence to criminalise planning or preparation for a terrorist act to enable early intervention and de-escalation at the most appropriate stage.

For terrorist training, the option proposed in the Cabinet paper is to criminalise providing or receiving weapons or combat training to:

- Carry out a terrorist act; OR
- Enhance the ability of an entity (including an individual, designated terrorist entity or non-designated entity) to carry out a terrorist act.

We have used evidence provided by agencies, research into legislation in comparable jurisdictions and New Zealand’s international obligations in our analysis. We are confident that the proposals will meet the individual objectives identified as well as contribute to the overall objective for the counter-terrorism legislation review.

#### Consultation and stakeholders’ views

As discussed in section 1.2, due to the restrictive nature of the counter-terrorism work programme, particularly as *R v Tarrant* was before the court at the time we undertook this review, we were only able to conduct a targeted consultation with 15 independent external experts (academics and legal practitioners) on the terrorist act definition. Public consultation will take place at the select committee stage.

In general, there is support among agencies for our proposals. More specifically, agencies were in agreement about the training proposal and planning or preparation proposal. Agencies and external experts had some differing views for particular words the definition but were broadly aligned on the direction.

#### Te Tiriti o Waitangi Implications

As a Treaty partner, the Crown should follow the principles of partnership and participation, however the lack of consultation outside government agencies means that the views of Māori have not been considered in developing these options.

Feedback we received from government agencies and from the external experts on the definition noted the importance of ensuring that Māori are not perceived to be unfairly targeted by the law. Analysis on each of the key proposals has involved consideration of whether the proposals are unduly prejudicial to Māori. We do not consider the proposals will disproportionately impact Māori and consider that the safeguards built into the definition of “terrorist act” and the offences themselves should preserve the ability of Māori to peacefully assert their right to legitimate self-determination.

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. Therefore, we do not consider that the proposals in this paper will disproportionately impact Māori. To the extent that Māori may be the target of terrorist acts, the proposals aim to improve the safety of all New Zealanders.

There is also the possibility that Māori may be targeted by terrorist activity. We consider the proposals will increase public safety and the safety and freedoms of those who could be targeted in the future. The proposals will allow the Crown to carry out its duty of protection towards Māori as a Treaty partner.

#### 4.2 Summary table of costs and benefits of the preferred approach

Affected parties (identify)	Comment <i>Nature of cost or benefit (eg, ongoing, one-off), evidence and assumption (eg, compliance rates), risks</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts</i>	Evidence certainty (High, medium or low)
<b>Additional costs of proposed approach compared to taking no action</b>			
New Zealand Police	Costs to investigate	Low, will be met within departmental baseline	Medium
Crown Law Office	Costs of prosecution.	Crown solicitors: \$1m per case  Crown Law Office: significant costs; cannot be absorbed through departmental baseline, and will need to seek tagged contingency funds in an event of a prosecution	Medium
Department of Corrections	Cost per person in prison (includes sentence)	\$124,000 per person per year	Low-Medium

	management and rehabilitation programmes)	May seek funding if volumes are greater than expected	
Ministry of Justice (courts)	Cost based on average cost of High Court Criminal case (based on 1 case per year)	\$36,330 per year	Low-Medium  [to be confirmed with OSD]
Ministry of Justice (legal aid)	Costs estimated average, based on 1 case per year	\$16,000 per year	Low-Medium
<b>Total Monetised</b>		\$ 1,176,330 (based on the assumption that one case/person a year would be prosecuted and convicted)	Low-Medium
<b>Non-monetised costs</b>		Low	Medium
<b>Expected benefits of proposed approach compared to taking no action</b>			
Wider public	Better protection from terrorism; increased clarity of the law	Medium	Medium
New Zealand Police	Enhanced ability for early intervention to disrupt and deter terrorist activity	Medium	High
International community	Strengthened global prevention of terrorism	Low	Medium
<b>Total Monetised Benefit</b>		NA	NA
<b>Non-monetised benefits</b>		Medium	Medium
<b>Assumptions for table above</b>			
<p>As with the rest of the counter-terrorism package, the key assumption underpinning this impact analysis is that these proposed amendments would improve the workability of the TSA, better facilitate earlier intervention by relevant agencies to prevent terrorist attack. These benefits are, by nature, difficult to quantify. We have therefore not conducted a full Cost/Benefit Analysis to quantify, in dollar terms, the Net Present Value of the proposals. Costs and/or benefits have been identified but only estimated in general terms.</p> <p>Estimates provided by Police predicted that cumulatively, the number of cases for the two proposed offences would likely be between 0-10 over a 5-year period.</p> <p>This estimate is based on New Zealand's threat environment, and that the proposed weapons and combat training offence overlaps with the proposed planning or preparation</p>			

offence, proposed material support offence, and the existing participating in terrorist groups offence.

These cases are expected to be rare, but any change in the environment and any flare up could have a significant impact on numbers as these are not volume crimes.

The estimates are subject to a range of variables. Police noted that many factors will determine the actual number of cases, including the highly variable individual circumstances found in terrorism cases; whether more appropriate charges or forms of resolution are available; and international trends and events affecting major sources of extremist ideology and inspiration internationally.

Estimates for the Department of Corrections are based on standard costs. It is possible that actual costs could be higher as special arrangements may be required for these prisoners; and if the volume of prosecutions turn out to be higher than expected.

Special arrangements include arrangements such as extra custodial officers for example, or arrangements to keep individuals convicted of these two proposed offences separate from the general prison population and possibly from one another. Any special arrangements will have a much greater cost. In the absence of more detailed information, as the actual volume of cases depends on various factors and is difficult to quantify or ascertain, this estimate has taken a standard costs approach.

The estimates also assume an average sentence of 5 years with an average of 85% served.

#### **4.3 What other impacts is this approach likely to have?**

These proposals will also:

- achieve clearer denouncement of weapons and combat terrorist training;
- provide greater freedoms and comfort to the public.

Additionally, the two proposed offences, if agreed by Cabinet, will better align New Zealand with its international obligations to explicitly criminalise planning or preparation for a terrorist act and providing or receiving terrorist training.

There may be an unintended impact of further radicalisation for some offenders. For some people, being detected and convicted for an offence will disrupt their pattern of behaviour before it escalates to more serious crime/harm and allow for the individual to be supported in a programme to disrupt behaviour. For others, however, being identified and punished or integrated into a prison environment with other serious offenders may cement and provide an avenue for them to disseminate terrorist views.

We think it is difficult to estimate the likelihood of this occurring, because it varies on a case-by-case basis. While the Department of Corrections does not provide programmes focused on mitigating the risk of radicalisation, it applies management strategies, including segregation, where radicalisation is a concern.

Lastly, introducing more TSA offences may make the public feel as if there is an increase in terrorism in New Zealand, and the public may become more fearful even without an actual terrorist act occurring. However, it is still better to give agencies the ability to intervene early and protect the public from an actual terrorist act.

Furthermore, clarifying the law will give the public more certainty that terrorism is not tolerated in New Zealand. If it is not clear that terrorist weapons and combat training and planning and preparation to carry out a terrorist act are unlawful, it may exacerbate the public's fear of terrorism.

## Section 5: Implementation and operation

### 5.1 How will the new arrangements work in practice?

The preferred options require legislation to amend the TSA. The proposed amendments would be included in the Counter-Terrorism Legislation Bill.

Enactment and commencement of the arrangements will depend on the Government's and Parliament's priorities.

The amended legislation will mainly impact on central government agencies. The agencies with key roles are:

- The Police will be responsible for gathering evidence and undertaking investigations.
- The Crown Law Office will be responsible for prosecutions under the TSA.
- The Department of Corrections will be the agency responsible for managing any incarceration and/or rehabilitation and reintegration programmes.
- The Ministry of Justice will be responsible for running the courts for hearings under the TSA and administering legal aid.
- The Ministry of Justice and the Ministry of Foreign Affairs and Trade jointly administer the TSA. The Ministry of Justice has stewardship for the criminal justice policy, and therefore counter-terrorism policy.

These agencies are already carrying out these roles under the current TSA, and will continue to do so. The roles should not differ with the amended legislation, but as outlined in the impacts table there may be an increase in resources required.

### 5.2 What are the implementation risks?

As discussed previously in Section B, the implementation risks include:

#### **Risks associated with criminalising preparatory type terrorist behaviour**

The two proposed new offences, if enacted, will capture early terrorism-related behaviours. While this would enable early intervention, and therefore prevention of terrorist acts, and increased public safety, there may be some unintended consequences of capturing this early behaviour.

There are existing offences in the TSA that criminalise preparatory type behaviour, including providing financial support to a terrorist group, and participating in a terrorist group. The risks identified here exist with current TSA offences, however they are increased with wider scope of preparatory behaviour proposed to be criminalised.

There is a risk that the government is perceived to be criminalising behaviour that should not be criminalised. We consider this risk is low and is mitigated by both new offences requiring a link to an intention for a future terrorist act. This link to a future terrorist act is what makes the behaviour criminal. In addition, the Attorney-General's consent is required for prosecuting these offences (as with all other substantive terrorism-related offences) to prevent any overuse or misuse of these offences.

Widening the scope of behaviours that could be captured by offences under the TSA also creates a risk that particular groups are disproportionately targeted or perceived to be targeted by activities such as surveillance and searches used in enforcing those offences.

#### **Risks resulting from duplication of offences for similar conduct**

Duplication of offences happens when a particular behaviour is criminalised by more than one offence. The proposed weapons and combat training offence overlaps with a number of other existing and other proposed TSA offences (see detail of the overlaps in section 2.3) thus creating duplicative offences for the same behaviour.

However, the practical impact of these overlaps on offenders is minimal. The right against double jeopardy as guaranteed by NZBORA means that in practice, no one can be charged for more than one offence for the same conduct.

The existing and proposed offences that cover aspects of terrorist training are much broader in scope than the proposed terrorist weapons and combat training offence. There is a risk that this could unintentionally narrow the scope of “terrorist training” captured by the wider offences to only this particular form of terrorist training, and the penalties of wider offences that criminalise terrorist training may be read down by the courts.

This risk is mitigated by the clear policy intent behind the proposed terrorist weapons and combat training offence, which is to complement the other more broadly cast offences to clearly denounce weapons and combat training, and to provide clarity of the law to the public. The United Kingdom also uses this approach to criminalise terrorist training.

### **Uncertainty due to lack of consultation on the two proposed offences**

As discussed in section 2.1 and 4.1, we were unable to undertake public consultation for the two proposed new offences. This is because any public consultation may expose potential gaps (or uncertainties) in the current legislative framework and risk these existing vulnerabilities being abused. However, this causes uncertainties around what the concerns the wider public as stakeholders might have and how we can address those concerns. There are also risks that the proposed new offences may have unintended consequences that could have been highlighted by wider consultation. This risk can be mitigated by public consultation during the select committee process.

## Section 6: Monitoring, evaluation and review

### 6.1 How will the impact of the new arrangements be monitored?

The Ministry of Justice and MFAT will be responsible for administering the legislation.

This review is part of the wider counter-terrorism work programme taking the actions required to strengthen our counter-terrorism system and deliver on the Counter-Terrorism Strategy. This work programme is overseen by the Counter-Terrorism Coordination Committee (CTCC), governed by the Security and Intelligence Board<sup>13</sup> of the Officials Committee for Domestic and External Security Coordination.

As we are anticipating only a small number of people to be within scope of these new proposals, evidence will come from a small number of case studies, and from the experience of relevant government agencies, such as New Zealand Police, DPMC, NZSIS, as well as the Crown Law Office and the courts.

In addition, we will also look at whether unsuccessful prosecutions are due to difficulties in using the terrorist act definition, or whether agencies were unable to intervene in certain scenarios because they did not have the right legislative tools.

Police is required, via its annual report, to produce all the statistics on the frequency of use of warrantless searches under various powers. This includes the new proposed planning or preparation offence, if enacted. This reassures the public that warrantless searches are not misused or overused. Additionally, the Independent Police Conduct Authority reviews the use of warrantless powers and their findings are publicly available.

### 6.2 When and how will the new arrangements be reviewed?

As is currently the case with the TSA (and other criminal law), the Ministry of Justice receives information on whether there are any issues with the legislation from relevant agencies and cases that occur. Due to the low numbers of people affected by the TSA, it does not make sense to set a review at a certain time.

However, the Ministry will continue to keep a watching brief over the implementation and use of the legislation, as well as experiences internationally, and initiate a review should this be required. The Ministry will also review the proposals periodically in the context of the general oversight of counter-terrorism legislation, emerging terrorism threats and international obligations.

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13 The Security and Intelligence Board is one of two boards responsible for governing the national security system. The Security and Intelligence Board deals with external threats and intelligence issues, and is comprised of the Chief Executives of the DPMC, GCSB, NZSIS, MFAT, Ministry of Defence, Customs, and New Zealand Defence Force and the Police.

## Appendix A: “terrorist act” definition, section 5 of the TSA

### 5 Terrorist act defined

(1) An act is a terrorist act for the purposes of this Act if—

(a) the act falls within subsection (2); or

(b) the act is an act against a specified terrorism convention (as defined in section 4(1)); or

(c) the act is a terrorist act in armed conflict (as defined in section 4(1)).

(2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:

(a) to induce terror in a civilian population; or

(b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.

(3) The outcomes referred to in subsection (2) are—

(a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act):

(b) a serious risk to the health or safety of a population:

(c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):

(d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:

(e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

(4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person—

(a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or

(b) intends to cause an outcome specified in subsection (3).