

Terrorism Suppression (Control Orders) Bill

Government Bill

As reported from the Foreign Affairs, Defence and Trade Committee

Commentary

Recommendation

The Foreign Affairs, Defence and Trade Committee has examined the Terrorism Suppression (Control Orders) Bill.

We have been unable to reach agreement on whether to recommend that the bill be passed. However, we recommend that the House adopt the amendments set out below if it decides that the bill should proceed, and note that National Party members have supplied their party view.

About this bill

This bill has a three-fold purpose. Most broadly, it seeks to protect the public from the risks posed by people who return to New Zealand after engaging in terrorism-related activities overseas. It would do this by empowering the High Court, on application by the Police, to issue control orders that would impose certain prohibitions, restrictions, or other requirements on such a person. There are likely to be very few control orders, and they could only apply to an adult aged 18 or older. As well as protecting the public, the control orders seek to prevent the person from engaging in terrorism-related activities, and to support their rehabilitation and reintegration into New Zealand society.

The bill gives numerous examples of the prohibitions, restrictions, and other requirements that the High Court might choose to impose under a control order (clause 16). They are based on comparable legislation in Australia, Canada, and the United Kingdom. It is expected that these conditions would be closely tailored to the specific risks and personal circumstances of the person concerned.

Unusual nature of the bill

The bill is unusual because it seeks to apply a civil law regime to circumstances that would normally be covered by the existing criminal law. This is because it responds to an unusual, but very real, situation. It seeks to address the problem of how to manage public safety when a person has, on the balance of probabilities, engaged in terrorism-related activity, but because of difficulties in gathering information from overseas, the evidence does not reach the criminal standard.

Limited time for submissions

We would have appreciated longer to consider the bill, given the significant issues it raises. We regret that we were able to offer only a few days for people to send in submissions. We greatly appreciate the effort made by the individuals and organisations that submitted on the bill.

Concerns about the bill

Most submitters expressed concern to us about the expedited legislative process. Many questioned the need for this legislation. A large number, including the New Zealand Law Society and the Privacy Commissioner, raised concerns about the bill operating in the civil, rather than criminal, jurisdiction. Many submitters also expressed strong concerns about the procedure to be followed with control orders, and whether they would adequately protect New Zealanders' rights and freedoms.

We acknowledge these concerns. All members of the committee consider that legislation is needed because of the unusual circumstances being addressed, where evidence is not likely to be available to meet a criminal standard. However, we are divided over where to strike the balance in designing a civil regime to address this problem. We want to ensure that controls are strong enough to protect New Zealanders from recognised risks, while still protecting the rights and freedoms that are fundamental to New Zealand society and the justice system.

We believe the three amendments outlined below go some way to addressing this balance, and submitters' concerns. The final section of this commentary discusses aspects of the concerns in more detail, and outlines aspects on which we could not agree.

Proposed amendments

We discuss below the three main amendments we recommend to the bill as introduced (in clauses 12 to 14, and 32). We do not discuss minor amendments, which are mainly to clarify the drafting in clauses 5, 11, 26, and 29, and Schedule 2.

We considered the amendments set out in Supplementary Order Paper 397, which the Minister of Justice released on 24 October 2019, just before the bill's first reading. The SOP's three main changes are designed to ensure that the control order regime would maintain appropriate protection of civil liberties. However, we were unable to agree on the amendments in the SOP, so they are not included in the bill as reported

back to the House. Labour Party and Green Party members support the amendments proposed in the SOP. National Party members do not.

Deciding whether someone qualifies for a control order

For the High Court to make a control order, it would need to be satisfied, first, that the application related to a “relevant person”. Then, it must be satisfied that the person poses a risk of engaging in terrorism-related activities, either in New Zealand or a foreign country. These requirements are set out in clause 11.

What constitutes terrorism?

Various submitters were concerned that the control orders regime might cast too wide a net in how it defined terrorism. They feared it might capture people engaged in legitimate protest or dissent. We do not consider such concerns justified. The bill uses the definition of terrorism in existing New Zealand law (section 5(1) of the Terrorism Suppression Act 2002), which makes it clear that protest, advocacy, or dissent do not constitute terrorism.

Similar concern was expressed about clause 7, which states that a person engages in terrorism-related activity if they “facilitate or support the carrying out of terrorism”. We consider this wording appropriate. It is deliberately broad, so that those who knowingly spread terrorist propaganda—whether as part of a recognised terrorist group or less formally—could be considered for a control order. Labour Party and Green Party members were particularly concerned about informal terrorism, and specifically white supremacist terrorism.

Who might be a “relevant person”?

Clause 6 sets out the meaning of “relevant person”. They must be 18 years or older, and have arrived in New Zealand after having engaged in terrorism-related activities in a foreign country, or must meet other criteria of a similar nature set out in clause 6(1).

The age threshold

We considered carefully whether the age threshold of 18 years is appropriate. We note that it aligns with comparable civil orders in New Zealand,¹ and that this threshold (but no lower) would meet New Zealand’s obligations under the United Nations Convention on the Rights of the Child. However, we realise that young people and children can also be radicalised. We were not advised of any specific concern at present about any young New Zealander presenting the risks addressed by the bill. Nevertheless, we consider it vital that the potential risks posed by a younger person be adequately provided for.

¹ The Returning Offenders Orders, Extended Supervision Orders, and Public Protection Orders are only available for adults aged at least 18 years.

We discuss later in this commentary how the risks presented by an under-18 year old would be managed under the Oranga Tamariki Act 1989. National Party members of the committee are concerned that the Oranga Tamariki framework may not be adequate to manage the risk to public safety. These members would prefer to see the control orders regime apply from age 14.

Evidence to be used by the court

Submitters raised concerns that clause 6 of the bill would rely on decision-making by courts and officials in overseas jurisdictions, and that these decisions could be based on defective evidence.

To address these concerns, Labour Party and Green Party members support inserting clause 6A, as proposed in the SOP. This would impose a duty on the court to have regard to the sources of the evidence, and its validity, authenticity, and reliability. This duty would also apply in respect of any evidence about a conviction or other action taken in a foreign country.

Risk of engaging in terrorism-related activities

Labour Party and Green Party members of the committee support the amendments proposed in the SOP that would only allow the court to make someone subject to a control order if it was satisfied that they posed a “real risk” of engaging in terrorism-related activities, rather than merely a “risk”. (This change would affect clauses 11(2)(a), 14, 16, and 19.) Labour and Green members consider that the distinction between a risk and a real risk is a familiar one to the courts, and that they are experienced in interpreting these terms.

National Party members consider that “risk” is a better test as far as public safety is concerned as it would set a lower threshold than “real risk”.

Terms of a control order

Clause 12 sets out what information must be in a control order. In particular, the order would need to state the restrictions that it imposed, and the order’s duration. We recommend amending clauses 12(3) and 13(4) to make it clear that the court could make control orders on any terms and conditions it considered appropriate, and state these in the order. We envisage that the terms and conditions could include reference to the person’s entitlement under clause 26 to apply for the order (whether interim or final) to be amended or rescinded. We consider this appropriate in the interests of due process and natural justice.

National Party members consider that the terms of control orders should have requirements for mandatory reporting to the Police on a very regular basis and restrictions on the location of the relevant person.

Procedure for an interim control order

Clause 14 would allow an interim control order to be issued. Because this would normally be done before the person arrived in New Zealand, the bill provides for the Commissioner of Police to apply for the order to be made without notice to the person

concerned. The person would have the right to challenge the order, and a final order would need to be applied for within 3 months.

As a point of clarification, we recommend amending clause 14(2) to make it clear that, if the application was made without notifying the person concerned, the court must also hear and determine the subsequent hearing without them. This is designed to avoid possible confusion and delay in obtaining an order.

Natural justice and provision for a special advocate

A number of submitters expressed strong concern about the natural justice implications of an application being heard without the person being present.

We considered amending clause 14 to allow the Commissioner of Police to make an interim application on-notice under certain circumstances to a relevant person who is overseas, where it is safe and appropriate to do so. This would allow the person to respond to the application, for example by seeking legal representation. Labour Party and Green Party members support a discretionary power being given to the Commissioner of Police to make interim applications on-notice. National Party members are concerned that this could become more common practice and set a precedent for courts to consider when the application is made.

Submitters also expressed concern that the bill provides that the court may rely on information in a proceeding that it rules to be not disclosable to the relevant person (as is likely with national security information). Submitters noted the fundamental principles of New Zealand's court system: that justice is normally open (that is, done in public), and that a person should know, and have an opportunity to answer, all information likely to be taken into account against them.

The Chief Justice, in her written submission, stressed that any incursions into these principles should be clearly set out in legislation. We note that the bill does not provide statutory authority for a "closed material procedure" that would allow confidential evidence to be admitted in support of an application for a control order. Instead, the bill envisages that the court would have an inherent power to rule that information supporting an application is non-disclosable to the relevant person.

We have been advised that the court would be unlikely to hold a closed process in order to consider evidence that is non-disclosable. This means that classified national security information is unlikely to be relied on as evidence in support of a control order. National Party members consider this a most undesirable situation.

Labour Party and Green Party members support the proposal in the SOP to insert clause 35 into the bill. This would respond to the natural justice concerns should the court rule that information supporting an application is non-disclosable.

New clause 35 would ensure that a special advocate could be appointed to act in the interests of the person who would be the subject of the control order. The special advocate would have access to all the information supporting the application, and could present arguments about the reliability and relevance of any non-disclosable supporting information.

Several submitters—including the Chief Justice—expressed concern that clause 35 as proposed in the SOP provides for the Solicitor-General, rather than the court, to appoint the special advocate. We discussed possible changes to clause 35 to provide for the court to appoint the special advocate, but were unable to agree. Labour Party and Green Party members consider that it would be more appropriate for the court to appoint the special advocate to ensure the independence of the appointment. National Party members do not consider this necessary in the interests of national security and public safety.

When name suppression could be lifted

Clause 32 provides for automatic suppression of the identity of a relevant person if a control order, or an application for one, was made. This is designed to protect the person and support their reintegration and rehabilitation. However, if the person asked for the suppression to be lifted, the court would be required to do so as long as it was satisfied that the person understood the effect of allowing their identity to be published.

We can envisage a situation where such a person wanted notoriety, and sought to have suppression lifted so they could publicise their views. In such a situation, we believe it is in the interests of public safety to allow the court to refuse the person's request to lift name suppression.

We therefore recommend amending clause 32 to make it clear that the purposes of this provision include protecting the public from terrorism, as well as protecting and supporting the relevant person. Our amendment to clause 32(4) would require the court to consider whether lifting the suppression would promote or encourage hostility, criminal acts, or terrorism.

Other matters we considered

Consistency with the New Zealand Bill of Rights Act

We note that the Crown Law Office vetted the bill against the New Zealand Bill of Rights Act 1990 (NZBORA). Crown Law commented that the bill's ability to impose restrictions on liberty, expression, and association is "problematic from a human rights perspective; such restrictions may generally only be imposed pursuant to criminal conviction". However, it considered that there are sufficient safeguards to overcome these concerns. Crown Law concluded that the bill is not inconsistent with the rights and freedoms protected in NZBORA.

Addressing the potential risks posed by young returnees

As introduced, the bill would apply only to people aged 18 or older. The Oranga Tamariki Act would apply to a younger person aged 14 or more, but under 18 years. Depending on the extent of evidence about their involvement in terrorist-related acts, they would be subject to the youth justice system or to the care and protection powers of Oranga Tamariki.

We questioned Oranga Tamariki closely about how the potential risks would be managed in relation to an under-18 year old who was suspected of having engaged in terrorist activities overseas. We sought an assurance that the process for managing the risk would be as strong as that envisaged under the control orders regime.

We were assured by Oranga Tamariki that it is satisfied it can manage the risk. While its focus is on the care and protection of young people, its mandate also takes into account the impact of young people's actions on the community. Oranga Tamariki pointed out that it could apply to the court for a custody or guardianship order.² This would place the young person into its care, or the care of another appropriate person. It considered that this could have the same effect as a control order, and might even be more effective, since a control order would not entail taking a person into custody.

National Party members of the committee remain of the view that the control orders regime under this bill should apply to young people of or over the age of 14. These members do not believe the provisions of the Oranga Tamariki Act would be adequate to manage the risk from a young returning terrorist. They note that Oranga Tamariki would need evidence on which to base an application for a custody or guardianship order. They are concerned that this evidence might not be available, and even if it was, it would take time to get the arrangements set up.

Provision for review or expiry of the legislation

Several submitters (including the Human Rights Commission, the Law Commission, and the Privacy Commissioner) suggested that the legislation should be subject to review after a certain period. They also suggested a sunset clause, so the legislation would automatically be revoked, say after 5 years. Submitters considered such provisions particularly appropriate in view of the expedited process for the bill's development and scrutiny.

We considered carefully the idea of a statutory review of the legislation, but were unable to agree. Labour Party and Green Party members of the committee would support including a requirement for the Minister of Justice to initiate a review of this legislation after 2 years. National Party members would prefer to allow the Minister of Justice the freedom to consider this legislation at any point, and do not support any provision for the legislation to be reviewed or repealed automatically.

We would expect this legislation to be covered by the wider review of the Terrorism Suppression Act 2002 that is already under way. Consequently, we do not support the inclusion of a sunset clause, as we see a risk that the legislation could lapse for a period, even if it were Parliament's intention to retain it.

² Under sections 101 or 110 of the Oranga Tamariki Act 1989, or sections 30 to 35 of the Care of Children Act 2004.

Access to legal aid

We considered the question of legal aid for a person who was the subject of a control order hearing. We heard concerns that they might find it hard to access effective representation through the civil legal aid system, whereas the criminal jurisdiction has an established system for legal aid.

We have been unable to agree on this matter. Labour Party and Green Party members of the committee would support an amendment to the definition of “specified application” in section 4(1) of the Legal Services Act 2011 to include control order proceedings. This would ensure that a person going through a control order hearing would be granted legal aid more readily than for standard civil proceedings if they were of limited means. National Party members do not support the greater use or accessibility of taxpayer funds for a person who is strongly suspected of engaging in terrorism-related activities.

Provision for detention at the border

National Party members are concerned that the bill would not adequately address a situation where a person who posed a real risk of terrorism was detected only just before, or upon, their arrival in the country. These members note that New Zealand Customs can only detain a person for a maximum of 4 hours for the law enforcement purposes specified in section 208 of the Customs and Excise Act 2018. They consider that this might be insufficient time for the Police to obtain an interim order. National Party members would prefer to provide for a longer detention period of up to 72 hours. This would be for the purpose of obtaining and serving an interim order, if there is reasonable cause to suspect that one is, or may be, required.

Labour Party and Green Party members do not consider it necessary or appropriate to provide for a longer period of detention without charge and for these purposes.

We were advised that, given the various channels for intelligence gathering, it is unlikely that a relevant person could arrive unexpectedly. In the event of a relevant person (previously known or unknown) suddenly arriving, the bill makes provision for urgent action on interim control order applications. If a relevant person was in the community while an interim control application was being considered, the Police and other agencies have a range of actions available to manage and monitor risks.

National Party view

The National Party does not support the Terrorism Suppression (Control Orders) Bill, as we do not believe it is strong enough to meet its desired purpose. This law is supposed to be about protecting New Zealanders from terrorists and known terrorist associates who return to this country. However, it is nowhere near as strong as it ought to be. In our opinion, the Government had the opportunity to work with National to strengthen this bill, both before its introduction to the House, and through this select committee process. However, it has failed to do so.

The National Party takes national security incredibly seriously, and as such, has raised at both the bill’s first reading and at the select committee process a number of

changes we believe would strengthen the bill, so the overarching intent of the law is clear: terrorism will not be tolerated in New Zealand, and we need to protect our communities at all costs. These changes will do that.

We believe the age limits for those to whom a control order can apply should be lowered to age 14. There is every risk that young people can be subject to radicalisation and share similar high-risk ideologies captured by adults. Lowering the age to 14 would be aligned with the Australian approach, which reduced the age threshold for returnees to 14 years due a case of a 15 year old being radicalised.

National believes the duration of a control order should be greater, to reflect the significant risk that returnees pose to the New Zealand public. This is because terrorism and high-risk ideologies do not abide by legislative timelines, and do not automatically disappear after a six-year period. We would emphasise that this decision would be at the discretion of the court, and does not mean an individual would be monitored for the rest of their lives. However, it would leave the option available to the court, should it be needed.

We believe the punitive offence in this legislation, of a monetary fine and a short term of imprisonment, does not reflect the seriousness of the potential crime committed and harm caused, in the event of a breach of the requirements of a control order. We believe the term of imprisonment should be greater, to better reflect the harm caused by a breach.

The bill as introduced has an example of a requirement that the relevant person allow themselves to be photographed and have impressions made of their fingerprints. This has the potential to be interpreted in a limited manner, and does not align with other New Zealand legislation. The reference to taking fingerprints should be replaced with a requirement to provide “identifying particulars”, with the same meaning as in section 32(5) of the Policing Act 2008.

The bill as introduced contains examples of prohibitions or restrictions the court may impose as part of a control order. National believes the language around examples of requirements should be stronger to better reflect the intent of Parliament in passing this law, and as such, believes they should be split into discretionary and mandatory requirements. The obligations on returnees subject to a control order need to be stronger, as the point of a control order is to monitor those who pose a dangerous risk to the safety of New Zealanders, and if the returnee can be excused from the most basic of monitoring, it defeats the purpose of having them in place.

We believe the Police should be able to detain returnees upon arrival at the New Zealand border for a duration, to ensure the returnee is managed from the time they arrive in the country. This means the Police would be able to serve the control order and ensure any requirements are complied with, but also would allow the Police to detain a returnee if a control order is not in place. This would allow the responsible person to apply for a control order and have the conditions set while the returnee is in custody.

This bill can, and should, be stronger.

Appendix

Committee process

The Terrorism Suppression (Control Orders) Bill was introduced on 16 October 2019 and had its first reading on 24 October 2019. It was referred to the committee on 5 November 2019, and we called for submissions with a closing date of 10 November 2019. We received and considered 101 submissions from interested groups and individuals, and heard oral evidence from 18 submitters.

The Minister of Justice released Supplementary Order Paper No 397 on 24 October 2019 for the committee's consideration alongside the bill.

We received advice from the Ministry of Justice, the New Zealand Police, the New Zealand Customs Service, the New Zealand Security Intelligence Service, and Oranga Tamariki - Ministry for Children. The Parliamentary Counsel Office provided legal drafting services.

Committee membership

Simon O'Connor (Chairperson)

Hon Gerry Brownlee

Paulo Garcia

Golriz Ghahraman

Hon Todd McClay

Priyanca Radhakrishnan

Hon Aupito William Sio

Louisa Wall

Terrorism Suppression (Control Orders) Bill

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon Andrew Little

Terrorism Suppression (Control Orders) Bill

Government Bill

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The Parliament of New Zealand enacts as follows:

1 Title

This Act is the Terrorism Suppression (Control Orders) Act **2019**.

2 Commencement

This Act comes into force on the day after the date of Royal assent.

Part 1

Preliminary provisions

3 Purpose of this Act

The purpose of this Act is to allow requirements to be imposed on a relevant person by a control order for the following purposes:

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Main purposes

- (a) to protect the public from terrorism:
- (b) to prevent engagement in terrorism-related activities in a country:

Incidental purposes

- (c) to support the relevant person's reintegration into New Zealand or rehabilitation, or both.

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Compare: Criminal Code Act 1995 s 104.1 (Australia)

4 Overview of decisions in making control order

- (1) A diagrammatic overview of decisions in making a control order is set out in **Schedule 2**.

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- (2) The diagram is intended as a guide only.

Compare: 2004 No 38 s 3; 2006 No 84 s 5; 2007 No 97 s AA 2(1); 2008 No 28 s 5; 2008 No 38 s 3

5 Interpretation

In this Act, unless the context otherwise requires,—

accessory after the fact, in relation to terrorism, means a person (**A**) who, knowing any other person (**B**) to have been a party to the terrorism, receives, comforts, or assists B or tampers with or actively suppresses any evidence against B, in order to enable B to escape after arrest or to avoid arrest or conviction

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Commissioner means a person who is—

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- (a) the Commissioner of Police holding office under section 12 of the Policing Act 2008; or
- (b) an acting Commissioner of Police appointed or deemed to be appointed under section 15 of that Act

constable has the meaning in section 4 of the Policing Act 2008

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control order means an interim control order or a final control order made under **section 11(1)**

country includes any State, territory, province, or other part of a country

court means the High Court

designated terrorist entity has the meaning in section 4(1) of the Terrorism Suppression Act 2002

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disclosable supporting information, for an application for, or for the renewal, variation, or discharge of, a control order, means all information supporting the application that can be disclosed in accordance with all current directions, orders, or other relevant decisions, if any, of the court

engages in terrorism-related activities has the meaning in **section 7(1)** 5

foreign country means a country other than New Zealand

long-term sentence has the meaning in section 4(1) of the Parole Act 2002

other party, in relation to terrorism, means a person who is not a or the principal party but who—

(a) does or omits an act for the purpose of aiding any person to commit the terrorism; or 10

(b) abets any person in the commission of the terrorism; or

(c) incites, counsels, or procures any person to commit the terrorism

principal party, in relation to terrorism, means a person who (alone or with any other person or other people) actually commits the terrorism 15

prison has the meaning in section 3(1) of the Corrections Act 2004

relevant person has the meaning in **section 6**

requirements, of a control order, means the prohibitions, restrictions, or other requirements that the order imposes, in accordance with this Act, on the relevant person in respect of whom the order is made 20

short-term sentence has the meaning in section 4(1) of the Parole Act 2002

terrorism means a terrorist act as defined in section 5(1) of the Terrorism Suppression Act 2002.

6 Meaning of relevant person

(1) A **relevant person** is a person who is 18 years old or older, who is or may be coming to New Zealand or has arrived in New Zealand, and who before their arrival in New Zealand— 25

(a) engaged in terrorism-related activities (*see section 7(1)*) in a foreign country; or

(b) travelled, or attempted to travel, to a foreign country to engage in terrorism-related activities in a foreign country; or 30

(c) was convicted in a foreign country of an offence because of conduct that is or includes engaging in terrorism-related activities in a foreign country; or

(d) was deported from, had a visa cancelled by, or had any passport, citizenship, or nationality revoked by, a foreign country for reasons that are or include a security risk related to conduct that is or includes engaging in terrorism-related activities in a foreign country; or 35

- (e) is or was the subject of any control order regime, or other analogous supervisory regime, in a foreign country, because of conduct that is or includes engaging in terrorism-related activities in a foreign country.
- (2) **Subsection (1)** applies whether or not the person is, or is connected to, a designated terrorist entity because of conduct that is or includes those activities. 5
- (3) **Subsection (1)** (except **subsection (1)(c)**) applies even if the person has been prosecuted in a foreign country for, but was not convicted in a foreign country of, an offence because of conduct that is or includes those activities or, as the case requires, that is or includes travelling, or attempting to travel, to a foreign country to engage in those activities in a foreign country. 10
- (4) **Subsection (1)** applies even if the person is, or may be, a returning offender, or returning prisoner, who is subject to all or any of the Returning Offenders (Management and Information) Act 2015.
- 7 Meaning of engagement in terrorism-related activities**
- Definition* 15
- (1) A person **engages in terrorism-related activities** in a country if the person does all or any of the following in that country:
- (a) carries out terrorism (whether as a or the principal party, any other party, or an accessory after the fact):
- (b) facilitates or supports the carrying out of terrorism. 20
- Carrying out includes preparations, credible threats, and attempts*
- (2) For the purposes of this Act, terrorism is **carried out** if any 1 or more of the following occurs:
- (a) planning or other preparations to carry out the terrorism, whether it is actually carried out or not: 25
- (b) a credible threat to carry out the terrorism, whether it is actually carried out or not:
- (c) an attempt to carry out the terrorism:
- (d) the carrying out of the terrorism.
- Facilitation or support requires some actual or constructive knowledge* 30
- (3) For the purposes of this Act, terrorism is **facilitated or supported** only if the facilitator or supporter knows, or ought reasonably to know, that terrorism is facilitated or supported, but this does not require that—
- (a) the facilitator or supporter knows, or ought reasonably to know, that any specific terrorism is facilitated or supported: 35
- (b) any specific terrorism was foreseen or planned at the time it was facilitated or supported:

(c) any terrorism was actually carried out.

Compare: 1961 No 43 ss 66, 70, 71, 72, 312; 2002 No 34 s 25

8 Status of examples

(1) An example used in this Act is only illustrative of the provisions to which it relates. It does not limit those provisions. 5

(2) If an example and a provision to which it relates are inconsistent, the provision prevails.

Compare: 2015 No 70 s 26; 2016 No 16 s 6; 2017 No 5 s 7; 2018 No 32 s 14

9 Transitional, savings, and related provisions

The transitional, savings, and related provisions set out in **Schedule 1** have effect according to their terms. 10

10 Act binds the Crown

This Act binds the Crown.

Part 2

Control orders

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Making and content

11 Power to make

(1) The court may make an order—

(a) in respect of a person who the court is satisfied is a relevant person (*see sections 6 and 7*); and 20

(b) imposing requirements on the relevant person for the purposes stated in **section 3(a) to (c)**.

(2) The court may make a control order only if satisfied that—

(a) the relevant person poses a risk of engaging in terrorism-related activities in a country; and 25

(b) the requirements the order imposes for the main purposes stated in **section 3(a) and (b)** are necessary and appropriate, and are only those necessary and appropriate,—

(i) to protect the public from terrorism; and

(ii) to prevent engagement in terrorism-related activities in a country; and 30

(c) any requirements the order imposes for 1 or both of the incidental purposes stated in **section 3(c)** are necessary and appropriate, and are only those necessary and appropriate, to support the relevant person's reintegration into New Zealand or rehabilitation, or both. 35

- (3) In determining any requirements imposed, the court must also—
- (a) consider how requirements, if imposed, will or may affect the person's financial, health, and other personal circumstances (for example, financial position, health, and privacy); and
 - (b) ~~consider any other matters the court thinks relevant (for example,~~ 5
whether requirements are justified limits on rights and freedoms in the New Zealand Bill of Rights Act 1990), and consider any other matters the court thinks relevant; and
 - (c) comply with the limits in **sections 17, 18, and 19**.
- 12 Required content** 10
- (1) A control order must state whether it is an interim control order or a final control order.
 - (2) A final control order that replaces an interim control order must identify that interim control order.
 - (3) A control order must also state the terms, and any conditions, of— 15
 - (a) the requirements the order imposes for the main purposes stated in **section 3(a) and (b)**; and
 - (b) any requirements the order imposes for 1 or both of the incidental purposes stated in **section 3(c)**.
 - (4) A control order must also state the duration of the order (subject to earlier variation, discharge, or expiry of the order or its requirements) (*see also section 24*). 20

Application

- 13 Application required**
- (1) The court may make a control order only on an application for the purpose 25
made by the Commissioner under this Act.
 - (2) The application must—
 - (a) state whether the order sought by the Commissioner is an interim control order or a final control order; and
 - (b) if it is made, and to be heard and determined by the court, without notice 30
to the relevant person, make clear how the application complies with **section 14(2)(a) or (b)**.
 - (3) The application must also state whether any final control order sought replaces an interim control order.
 - (4) The application must also state the terms, and any conditions, of the require- 35
ments of the order sought by the Commissioner, indicating whether they are—
 - (a) the requirements the order would impose for the main purposes stated in **section 3(a) and (b)**; or (if applicable)

- (b) any requirements the order would impose for 1 or both of the incidental purposes stated in **section 3(c)**.

14 Application for interim control order

- (1) The Commissioner may make an application for an interim control order in respect of a relevant person only if— 5
 - (a) the application is made—
 - (i) before the relevant person arrives in New Zealand; or
 - (ii) within 12 months after the relevant person arrives in New Zealand; and
 - (b) the Commissioner believes on reasonable grounds that it is necessary and appropriate that the interim control order is made as soon as practicable in order to manage the risks posed by the relevant person of engagement in terrorism-related activities in a country. 10
- (2) The application for the interim control order—
 - (a) must be made, and must be heard and determined by the court, without notice to the relevant person if the application is made before the relevant person arrives in New Zealand; and 15
 - (b) may be made, and must be heard and determined by the court, without notice to the relevant person if—
 - (i) the application is made after the relevant person arrives in New Zealand; and 20
 - (ii) the Commissioner believes on reasonable grounds that it is necessary and appropriate to make the application, and for it to be heard and determined, without notice in order to manage the risks posed by the relevant person of engagement in terrorism-related activities in a country. 25
- (3) If the application for the interim control order is made on notice to the relevant person, the documents to be served must exclude any information supporting the application that is not disclosable supporting information.
- (4) The application for the interim control order must be— 30
 - (a) set down for hearing, and heard, as soon as practicable; and
 - (b) determined as soon as practicable.
- (5) On or after making an interim control order in respect of a relevant person, the court must consider whether to direct under **section 15(1)(b)** a period (longer or shorter than 3 months after the date on which the interim order was served on the relevant person) as the period within which the Commissioner may make an application for a final control order in respect of the relevant person. 35

15 Application for final control order

- (1) The Commissioner may make an application for a final control order in respect of a relevant person only if—
- (a) no interim control order in respect of the relevant person has been applied for, and the application for the final control order is made after, and within 12 months after, the relevant person arrives in New Zealand; or 5
 - (b) an interim control order in respect of the relevant person was applied for and made, and the application for the final control order is made after the relevant person arrives in New Zealand and— 10
 - (i) within 3 months after the date on which the interim order was served on the relevant person; or
 - (ii) within any longer or shorter period the court directs (on its own initiative or on an application for the purpose made) on or after making the interim order and during that 3-month period; or 15
 - (c) an interim control order in respect of the relevant person was applied for and declined, and the application for the final control order is made after, and within 12 months after, the relevant person arrives in New Zealand, and is made because of a material change in circumstances since the interim control order was declined. 20
- (2) The application for the final control order must be—
- (a) made on notice to the relevant person; and
 - (b) set down for hearing, and heard, as soon as practicable; and
 - (c) determined as soon as practicable.
- (3) Because the application for the final control order is made on notice to the relevant person, the documents to be served must exclude any information supporting the application that is not disclosable supporting information. 25

*Examples of requirements***16 Examples of requirements**

Requirements that a control order imposes on a relevant person may— 30

Examples of prohibitions or restrictions

- (a) prohibit or restrict the relevant person from being in or at specified areas or places (for example, international ports, gun clubs, or specified residences) without Police escort:
- (b) prohibit or restrict the relevant person from leaving New Zealand or possessing passports, or other international travel documents of any kind, issued by any country: 35

- (c) prohibit or restrict the relevant person from communicating or associating with specified individuals, or a specified class of individuals (for example, individuals identified as being at risk of radicalisation, or individuals identified as posing a risk of further radicalising the relevant person): 5
 - (d) prohibit or restrict the relevant person from disclosing or receiving specified information or otherwise dealing with specified classes of information (for example, means or methods of carrying out terrorism):
 - (e) prohibit or restrict the relevant person from accessing or using, in any setting (for example, in a place of paid or voluntary work or of study), specified forms of telecommunication or other technology (whether the devices or facilities concerned are public or private) including the Internet (for example, prohibiting the relevant person from accessing the Internet except on devices known to the Police): 10
 - (f) prohibit or restrict the relevant person from possessing or using specified articles or substances (for example, possessing terrorist propaganda material or possessing domestic chemicals above a certain quantity): 15
 - (g) prohibit or restrict the relevant person from carrying out specified activities, including in respect of their work, occupation, or recreational activities: 20
 - (h) prohibit or restrict the relevant person from holding accounts, possessing certain financial instruments, or using specified financial services:
 - (i) prohibit or restrict the relevant person from transacting in property (for example, property over a certain value or transactions involving certain people): 25
- Examples of other requirements*
- (j) require the relevant person to reside at a specified address agreed between the relevant person and the Police (or as otherwise specified by the court) and to remain at that address between specified times each day, or on specified days (*see also section 17*): 30
 - (k) require the relevant person to report to specified constables at specified times and places (for example, meeting a constable twice a week):
 - (l) require the relevant person to facilitate reasonable access by the Police or their agents to premises, equipment, or information if that access is necessary for monitoring compliance with the requirements stated in the order (for example, facilitating access to search the relevant person's residence, electronic devices, or financial accounts): 35
 - (m) require that the relevant person allow themselves to be photographed and impressions made of their fingerprints:
 - (n) require that the relevant person submits to electronic monitoring of compliance with the requirements of the control order concerned and does 40

not tamper with, or damage, or do anything to interfere with the functioning of the electronic monitoring device (*see also* **section 18**):

- (o) require that the relevant person undertake alcohol and drug assessments, and rehabilitative or reintegrative needs assessments:
- (p) require that the relevant person, if they have given and not withdrawn their informed consent to do so, engage with specified rehabilitative services (for example, alcohol and drug treatment services) (*see also* **section 19**). 5

Limits on requirements

17 Limit on requiring relevant person to remain at specified address 10

No requirement of the kind stated in **section 16(j)** can require the relevant person to remain at a specified address for more than 12 hours in any 24-hour period.

18 Limit on requiring electronic monitoring

The court must not impose a requirement of the kind stated in **section 16(n)** if the court considers that a less restrictive requirement or combination of requirements would be sufficient to achieve the main purposes stated in **section 3(a) and (b)** and (if applicable) 1 or both of the incidental purposes stated in **section 3(c)**. 15

Compare: 2000 No 38 s 30C 20

19 Limit on requiring relevant person to engage with specified rehabilitative services

- (1) No relevant person may be made, or may remain, subject to a requirement of the kind stated in **section 16(p)** unless the relevant person—
 - (a) has been fully advised, by a person who is qualified to prescribe or provide the specified rehabilitative services, about their nature and their intended and likely effects and any known risks of engaging with them; and 25
 - (b) is competent to make an informed choice and give informed consent to engaging with them; and 30
 - (c) gives, and has not withdrawn, informed consent to engaging with them.
- (2) Informed consent of that kind can be given, withheld, or withdrawn by words or conduct.
- (3) No particular conduct, or form of words, is required to give, withhold, or withdraw informed consent of that kind. 35

- (4) A relevant person who withholds, or withdraws, informed consent of that kind does not breach the relevant requirement for the purposes of **section 31** (offence to breach requirements).

Compare: 2000 No 38 ss 30(4), (4A), 30AA; 2002 No 10 s 15(4), (5)

Service

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20 Service of control order

- (1) The Commissioner must serve on a relevant person (**P**) a control order made in respect of the relevant person.
- (2) The control order must be served,—
- (a) if practicable, on P's arrival in New Zealand; or 10
 - (b) if service on P's arrival in New Zealand is not practicable, as soon as is reasonably practicable after P's arrival in New Zealand; but
 - (c) in any event, not later than 12 months after the control order is made.
- (3) The control order and its requirements expire if the control order is not served within that 12-month period, but its expiry does not prevent another control order being applied for and made in respect of the same relevant person based on engagement in 1 or both of the following: 15
- (a) the same terrorism-related activities in a foreign country:
 - (b) later and different terrorism-related activities in a foreign country.

21 Information to be served with interim control order made without notice 20

The Commissioner must prepare, and serve with an interim control order made without notice to, and served on, the relevant person, the following information:

- (a) the name of the relevant person who is subject to the order; and
- (b) that the relevant person is subject to an interim control order made by the High Court under this Act; and 25
- (c) a summary of the court's reasons for making the order, and of the reasons why the court considered that the requirements of the order comply with **section 11(2)(b) and (c)**; and
- (d) a general explanation of the effect of the order and its requirements; and 30
- (e) that the order and its requirements take effect when they are served on the relevant person; and
- (f) the maximum duration of the order and its requirements (*see section 24(1)*); and
- (g) any other information necessary to enable or help the relevant person to comply with all of the requirements of the order; and 35
- (h) a copy of the disclosable supporting information; and

- (i) how the relevant person can challenge the order, its requirements, or both—
 - (i) by applying to the High Court under this Act to vary or discharge the order, its requirements, or both:
 - (ii) by opposing an application made (no later than the date stated in or directed under **section 15(1)(b))** by the Commissioner to the High Court for a final control order in respect of the relevant person and to replace the interim order: 5
 - (iii) by appealing under the Senior Courts Act 2016 to the Court of Appeal, or the Supreme Court, or both against the order, its requirements, or both (or, if the order is replaced by a final control order, against the final control order, its requirements, or both); and 10
 - (j) an explanation of the relevant person's related rights to legal advice and representation; and 15
 - (k) an explanation of the relevant person's related rights to apply for legal aid; and
 - (l) a general explanation of the effect of automatic suppression under this Act of the identity of the relevant person.
- 22 Entry to premises to serve control order** 20
- (1) The court may issue a warrant authorising entry—
 - (a) to any premises where the Police believe on reasonable grounds that a relevant person is present; and
 - (b) in order to enable service on the relevant person of a control order.
 - (2) The court may issue the warrant— 25
 - (a) only on an application for the purpose made by the Commissioner; and
 - (b) only if satisfied that a person has refused or refuses to allow the Police to enter those or any other premises in order to prevent or avoid service on the relevant person of a control order.
- Compare: 2015 No 112 s 21 30

Taking effect, duration, and renewal

- 23 Taking effect**
- (1) A control order takes effect when it is served on the relevant person.
 - (2) This section does not alter the operation of any requirements expressed to take effect only at a later time or times. 35

24 Duration

- (1) The duration of an interim control order made in respect of a relevant person is (subject to earlier variation, discharge, or expiry of the order or its requirements, and *see also* **section 12(4)**) from when the order is served on the relevant person until the order expires when— 5
 - (a) a final control order that replaces the order is made by the court and served on the relevant person; or
 - (b) no application for a final control order that replaces the order is made within the applicable period (*see* **section 15(1)(b)**); or
 - (c) an application of that kind made within that period is withdrawn, or is finally determined by the court refusing a final control order. 10
- (2) The duration of a final control order must be not longer than the court considers necessary having regard to the purposes stated in **section 3(a) to (c)** (*see also* **section 12(4)**). 15
- (3) But that duration must also be not longer than 2 years after the final control order is served on the relevant person in respect of whom the order is made. 15
- (4) Those 2 years include, for a final control order that replaces an interim control order, the period the interim control order has effect.
- (5) Those 2 years exclude, for a final control order, any period during which both the order and its requirements are wholly suspended under **section 27**. 20
- (6) A final control order expires (subject to earlier variation, discharge, or expiry of the order or its requirements and to **section 25(2)**) at the end of its duration, but its expiry does not prevent another control order being applied for and made in respect of the same relevant person but based on engagement in later and different terrorism-related activities in a foreign country. 25

25 Renewal

- (1) The court may renew a final control order on an application for the purpose made by the Commissioner within its duration.
- (2) If an application for renewal of a final control order is made, the order has effect until the application is withdrawn or finally determined. 30
- (3) No final control order can be renewed more than twice.
- (4) No control order that has expired under **section 28** (expiry if relevant person sentenced to long-term sentence) can be renewed.
- (5) In deciding the application, the court must apply the provisions of this Act about making, and the requirements of, a final control order. 35
- (6) In particular, because the application is made on notice, the documents to be served must exclude any information supporting the application that is not disclosable supporting information.
- (7) However, **sections 13(1) to (3) and 15(1)** do not apply to the application.

- (8) A renewed final control order takes effect and expires, and is varied, suspended, or discharged, in the same way as one that has not been renewed.

*Variation or discharge, and suspension or expiry,
of control order and requirements*

- 26 Variation or discharge** 5
- (1) The court may, on an application made for the purpose by the Commissioner or the relevant person, vary or discharge a control order (whether an interim control order or a final control order) or its requirements or both.
- (2) In deciding the application, the court must apply the provisions of this Act about making, and the requirements of, a final control order. 10
- (3) In particular, because the application is made on notice, the documents to be served must exclude any information supporting the application that is not disclosable supporting information.
- (4) However, **sections 13(1) to (3) and 15(1)** do not apply to the application.
- (5) No variation of a control order can extend the duration of the control order under **section 24**. 15
- (6) A varied control order takes effect and expires, and is renewed, varied, suspended, or discharged, in the same way as one that has not been varied.
- 27 Suspension**
- (1) This section applies if, while a relevant person is subject to a control order, the relevant person is detained— 20
- (a) in a prison on remand; or
- (b) in a prison while serving a short-term sentence; or
- (c) in a hospital under the Mental Health (Compulsory Assessment and Treatment) Act 1992; or 25
- (d) in a facility under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.
- (2) The control order and its requirements, to the extent (if any) that they cannot be complied with during that detention, are suspended until the relevant person is no longer detained in the prison, hospital, or facility. 30
- Compare: 2014 No 68 s 139
- 28 Expiry if relevant person sentenced to long-term sentence**
- (1) This section applies if, while a relevant person is subject to a control order, the relevant person is sentenced to a long-term sentence.
- (2) The control order and its requirements expire, and the control order cannot be replaced by a final control order or renewed, but its expiry does not prevent another control order being applied for and made in respect of the same rele- 35

vant person but based on engagement in later and different terrorism-related activities in a foreign country.

Appeals

29 General effect of appeals

~~This Act does not affect any rules of court under which any appeal, application for leave to appeal, or giving of leave to appeal does not operate as a stay of any proceeding in which a decision was given to make, renew, vary, or discharge a control order imposing any requirement, or a stay of execution of that decision, unless the court appealed from or the appeal court orders, or grants any interim relief, to the contrary.~~ 5 10

- (1) This section applies if, in a proceeding, a decision is given to make, renew, vary, or discharge a control order imposing a requirement.
- (2) This Act does not affect the application to the proceeding, or to the decision, of rules of court on the general effect of appeals.
- (3) An example is rules of court under which any appeal, application for leave to appeal, or giving of leave to appeal, does not operate as a stay of the proceeding, or a stay of execution of the decision, unless the court appealed from or the appeal court orders, or grants interim relief, to the contrary. 15

Compare: SR 2004/199 r 30; SR 2005/69 r 12

Other matters 20

30 Standard of proof

- (1) This section applies to a question of fact arising in a proceeding—
 - (a) that is a proceeding under this Act; and
 - (b) that is not a proceeding for an offence against this Act.
- (2) The question must be decided on the balance of probabilities. 25

31 Offence to breach requirements

- (1) A person commits an offence if the person—
 - (a) is a relevant person in respect of whom the court has made a control order; and
 - (b) breaches, without reasonable excuse, a requirement of the control order. 30
- (2) A person who commits an offence under this section is liable on conviction to—
 - (a) imprisonment for a term not exceeding 1 year; or
 - (b) a fine not exceeding \$2,000.

Compare: 2002 No 10 s 71; 2015 No 112 s 31 35

32 Automatic suppression of identity of relevant person

- (1) This section applies to a person if—
- (a) an application for, or for the renewal, variation, or discharge of, a control order in respect of the person has been made and has not been withdrawn or finally determined; or (as the case requires) 5
 - (b) a control order has been made, renewed, varied, or discharged in respect of the person.
- (2) ~~The purpose of this section is to protect the person and to support the person's reintegration into New Zealand or rehabilitation, or both.~~
- (2) The purposes of this section are— 10
- (a) to protect the public from terrorism;
 - (b) to prevent engagement in terrorism-related activities in a country;
 - (c) to protect the person and to support the person's reintegration into New Zealand or rehabilitation, or both.
- (3) No person may publish, in any report or account of the proceeding in which the court considers and determines the application or (as the case requires) makes, renews, varies, or discharges the control order, the person's name, address, or occupation, unless the court, by order, permits the publication. 15
- (4) ~~The court must make an order that permits the publication if—~~
- (a) ~~the person applies to the court for such an order; and~~ 20
 - (b) ~~the court is satisfied that the person understands the nature and effect of their decision to apply for the order.~~
- (4) The court may make an order that permits the publication (for example, if the person applies to the court for such an order and the court is satisfied that the person understands the nature and effect of their decision to apply for the order) only if satisfied that permitting the publication is consistent with the purposes of this section. 25
- (4A) In particular, before making an order that permits the publication, the court must consider whether the order will or may lead to the publicising of views that do either or both of the following: 30
- (a) promote or encourage hostility towards any group of persons on 1 or more of the grounds specified in section 21 of the Human Rights Act 1993;
 - (b) promote or encourage criminal acts or terrorism.
- (4B) An order under this section that permits the publication does not limit any power to clear the court, or to forbid publication, that a court has under any other law. 35
- (5) Nothing in this section applies to or prevents communication, by or on behalf of the Commissioner or another person performing official duties or functions,

of information if the communication is necessary or desirable for the administration or enforcement of this Act.

- (6) In this section, **name**, in relation to a person, means the person's name and any particulars likely to lead to the person's identification.

Compare: 2011 No 81 ss 194, 195, 201

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33 Offence to breach automatic suppression of identity

Knowing or reckless publication

- (1) A person commits an offence if the person knowingly or recklessly publishes any name, address, occupation, or other information in breach of **section 32**.

- (2) A person who commits an offence against **subsection (1)** is liable on conviction,— 10

(a) in the case of an individual, to a term of imprisonment not exceeding 6 months:

(b) in the case of a body corporate, to a fine not exceeding \$100,000.

Other publication

15

- (3) A person commits an offence if the person publishes any name, address, occupation, or other information in breach of **section 32**.

- (4) In a prosecution for an offence against **subsection (3)**, it is not necessary for the prosecution to prove that the defendant intended to commit an offence.

- (5) **Subsection (3)** does not apply to a person who hosts material on websites or other electronic retrieval systems that can be accessed by a user unless the specific information has been placed or entered on the site or system by that person. 20

- (6) A person who commits an offence against **subsection (3)** is liable on conviction,— 25

(a) in the case of an individual, to a fine not exceeding \$25,000:

(b) in the case of a body corporate, to a fine not exceeding \$50,000.

Compare: 2011 No 81 s 211

34 Returning Offenders (Management and Information) Act 2015

This Act does not limit or affect the application or operation of the Returning Offenders (Management and Information) Act 2015. 30

Schedule 1
Transitional, savings, and related provisions

s 9

Part 1
Provisions relating to this Act as enacted

5

1 Decisions may be based on pre-commencement conduct

A person's conduct before the commencement of this Act may be relied on (with or without any later conduct of the person) in making decisions—

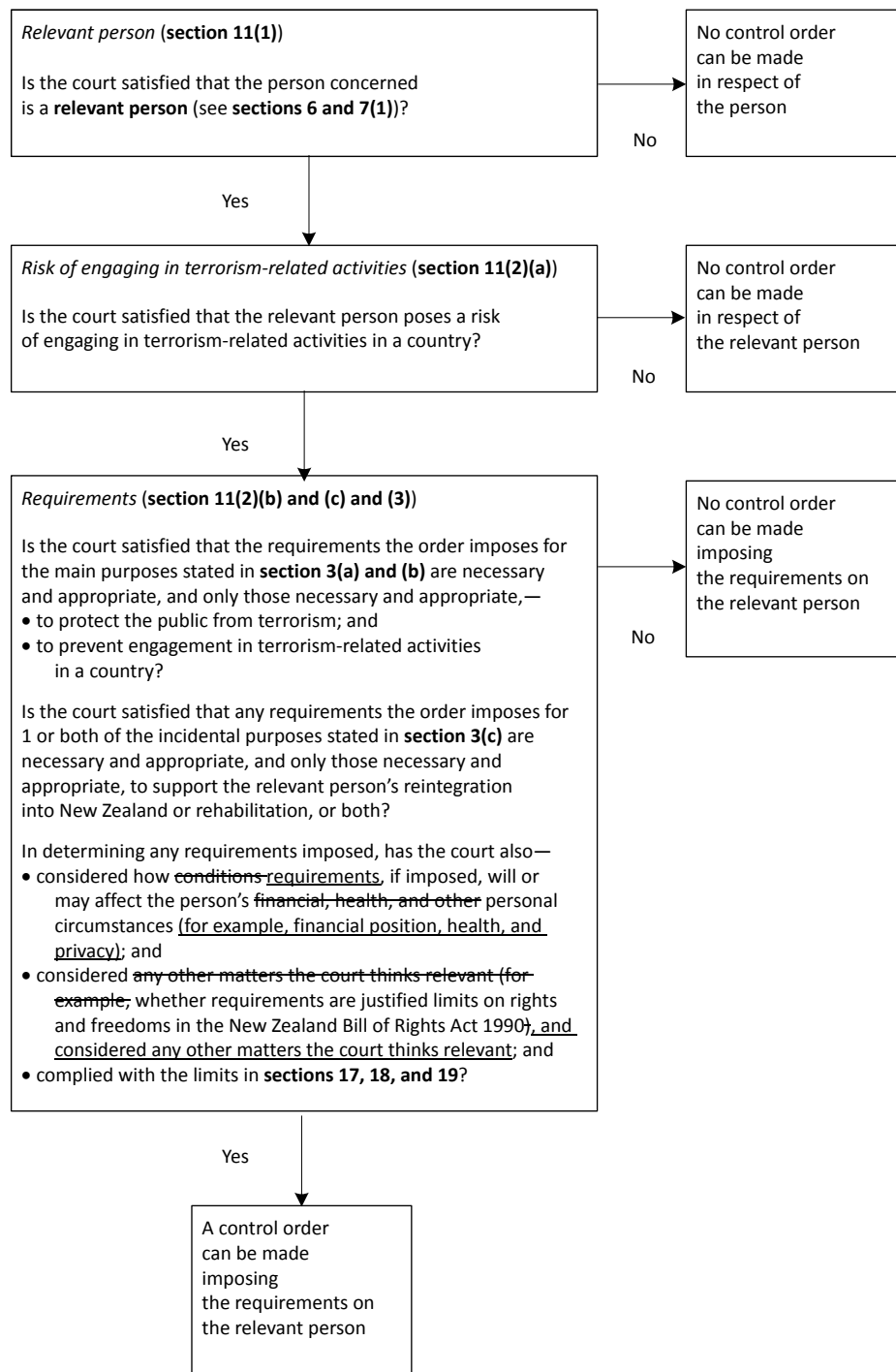
- (a) under this Act; and
- (b) after that commencement.

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Schedule 2

Overview of decisions in making control order

s 4



Terrorism Suppression (Control Orders) Bill

Legislative history

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24 October 2019

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