

Coversheet: Options to strengthen counter terrorism legislation (terrorist financing and terrorism travel offences)

Advising agencies	<i>Ministry of Justice</i>
Decision sought	<i>This analysis has been prepared to inform Cabinet decisions regarding law reform for terrorism travel and terrorist financing offences</i>
Proposing Ministers	<i>Minister of Justice</i>

Summary: Problem and Proposed Approach

<p>Problem Definition</p> <p>What problem or opportunity does this proposal seek to address? Why is Government intervention required?</p>
<p>The Government’s overall goal is to prevent terrorism and protect the safety of New Zealanders. In March 2019, there were mass shootings at two mosques in Christchurch. The risk of successful terrorist attacks presents a threat to peoples’ lives and wellbeing (public safety). Earlier intervention to prevent terrorism support and travel is expected to lessen the risk of harm from terrorism. Disrupting the precursors that facilitate terrorist activity is part of a package the government is planning to inhibit terrorist acts from being successfully planned and carried out.</p> <p>Currently the state does not have the right mix of tools to enable it to deal effectively with terrorism at the appropriate time, particularly those tools that allow the New Zealand Police to intervene earlier in the trajectory of a person’s activities of planning to engage in, or facilitating, a terrorist act or group. The Ministry of Justice (the Ministry) has identified two tools that will assist to disrupt and prevent terrorism as part of its review of counter-terrorism legislation.</p> <p><i>Terrorism travel offence</i></p> <p>Some people travel internationally to prepare for, train or participate in terrorist acts. This may include people travelling to, from or via New Zealand. The result can be multiple deaths or injuries, or large-scale damage to property from terrorist acts, either in New Zealand or overseas. People travelling to fight for terrorism purposes is a global problem. These individuals include foreign terrorist fighters (FTFs).¹ We have an obligation as part of the global community to prevent people from travelling for terrorism purposes.</p> <p>While existing law may capture some of this behaviour, there is currently no specific</p>

¹ United Nations in Resolution 2178, “Individuals who travel to a State, other than their States of residence or nationality for the purpose of the perpetration, planning or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, include in connection with armed conflict.”

offence in New Zealand law for travelling to undertake terrorist activities. This is a problem because:

- it limits Police's ability to effectively intervene to prevent a person from travelling for terrorist purposes. State powers to cancel passports or travel documents may not enable intervention in some cases, for example where a person holds a dual or foreign passport. People who are prevented from travelling may become a domestic risk to security because their frustration at being unable to travel could motivate them to act in New Zealand. A criminal offence would enable Police to prosecute these individuals and manage their risk according to the outcome of that prosecution, and
- there may be a perceived gap in New Zealand's implementation of United Nations Security Council Resolution (UNSCR) 2178(6)(a) (2014). Among other things, this binding resolution requires all United Nation Member States to establish serious criminal offences for their nationals travelling or attempting to travel to perpetrate, plan, prepare or participate in terrorist acts or training.²

Terrorism financing offence

Terrorists need resources in the form of funds, property and other types of support to carry out terrorist acts. Cutting off the flow of resources, impacts the ability of terrorists to procure false documents, safe houses, food, training and hinders their ability to recruit, travel and ultimately carry out terrorist attacks.

The Terrorism Suppression Act 2002 (TSA) currently criminalises:

- the provision of funds³ for terrorist acts, terrorist entities and designated terrorist entities, and
- the provision of property and financial services for designated terrorist entities.

However, the TSA does not currently criminalise the full range of material support that people are providing for terrorist acts/to entities that carry out terrorist acts. Such support includes buying/stockpiling resources, lodging accommodation, transport, skills or training and non-financial advice and services. This is a problem because:

- international best practice requires countries to take measures to prevent and suppress the provision of all forms of support to terrorists, and
- the TSA as it is currently written could be improved to better deal with emerging risks such as the exploitation of web-based fundraising tools, foreign terrorist fighters and lone actors.

² UNSCR 2178 (2014) at [6a].

³ Funds (as defined in s 4 of the TSA)—

(a) means assets of every kind, whether tangible or intangible, moveable or immoveable, however acquired; and

(b) includes legal documents or instruments (for example, bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts, and letters of credit) in any form (for example, in electronic or digital form) evidencing title to, or an interest in, assets of any kind.

Proposed Approach

How will Government intervention work to bring about the desired change? How is this the best option?

We propose amending the TSA to:

- create a new offence to specifically criminalise a person who travels to, from or via New Zealand with an intention to commit a specified offence in the TSA (this includes attempts to travel);⁴ and
- amend the existing terrorism financing, property and financial services offences to create a broader offence framework that criminalises the provision of material support (in addition to provision of funds and property) to terrorist acts, entities that carry out terrorist acts and designated terrorist entities.

This is the best option as it provides Police the ability to prosecute high-risk individuals whose pattern of behaviour signals an active interest and engagement with terrorist and violent extremist groups. These new offences expand the options available to Police to disrupt a person's pathway to terrorism and their support for terrorism before a terrorist act eventuates. Amending the TSA to target this pre-attack/ facilitation behaviour will allow for earlier intervention and help to manage the risk of a terrorist act occurring, reducing the risk of harm from terrorism. Earlier intervention also makes it easier to de-radicalise and rehabilitate people because it provides an opportunity to disrupt a pattern of behaviour before it escalates into a terrorist act.

Having a specific offence in the TSA for travelling or attempting to travel to perpetrate one of the specified offences in the TSA, would also more clearly implement one aspect of UNSCR 2178(6)(a) (2014) (*see above*).

The proposed amendments to the terrorism financing offence mean that web-based fundraising tools, foreign terrorist fighters and lone actors are more likely to be captured. For example, transportation is covered as a form of material support (and other services FTFs might be providing), and the terrorism financing offences will apply to non-designated entities, which includes lone actors.

The other options considered (discussed below) do not effectively address the problems identified and/or are not a proportionate response, taking into account human rights, international obligations, our country's terrorism threat profile, and core constitutional / justice principles (such as the rule of law and gender implications).

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 the proposed changes will be enhanced public safety by reducing the risk from terrorism occurring in New Zealand and overseas. Civilians, the New Zealand government and international community will be the primary beneficiaries. We expect that the proposals will:

⁴ As per the general law around attempts in s72 of the Crimes Act 1961.

- expand the options available to Police to disrupt the provision of support to terrorist groups / for terrorist acts, or those who are travelling with the intention of committing an offence in the TSA;
- prevent individuals from travelling to commit a specified offence in the TSA or remaining a terrorist risk in the New Zealand community after a thwarted attempt to travel (preventing the export of terrorism and reducing the domestic terrorism risk);
- make it clear to the public what specific conduct is criminalised and provide transparent rules and penalties; and
- give better effect to implementation of our international obligations.

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, ie. securing evidence, surveillance, legal aid, cost of judicial time in dealing with the charges. Corrections will incur the costs of managing any sentence and reintegration. We expect the numbers prosecuted to be low and these costs will be met within departmental baseline budgets.

A broader prohibition on providing funding, property and other material support may incur some regulatory costs to service providers and other organisations to conduct due diligence into the end users/beneficiaries of their services. However, we do not expect this to be too onerous.

There will be costs for people who are prosecuted for these offences, including costs of legal representation, opportunity cost of lost employment and social engagement if they are remanded in custody or sentenced to imprisonment. 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 extend these costs.

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

There are likely to be varying long-term impacts or unintended impacts on individuals who are criminalised under the proposed new / amended offences:

- (a) The main risk is that the offences are ineffective in minimising the longer-term safety risk posed by the convicted individual. 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, being identified and punished or integrated into a prison environment with other serious offenders may cement and enable promulgation of terrorist views.
- (b) If a person has a criminal conviction this may limit the effectiveness of programmes and support aimed at de-radicalising and reintegrating them into the community in the post-sentence phase. A terrorism conviction cannot be clean-slated.

Within the current and proposed legislative framework, there are safeguards built into the TSA (protections for advocacy, protests and strikes in s 5(5) and the

“without reasonable excuse” defence in the proposed material support offence) and the evidential threshold and public interest test in the Solicitor-General’s Prosecution Guidelines.

- (c) The enforcement of new / amended offences could undermine government goals of social inclusion to minimise terrorism risk if they are perceived to be disproportionately targeting particular groups or communities. This perception could result in alienating and radicalising members of these groups.

This risk is mitigated by targeting the terrorism travel offence to people who travel with an intention to commit various offences under the TSA rather than creating a blanket travel ban on current conflict zones, which may disproportionately impact Muslim communities.

- (d) Unintended impacts of the terrorism finance offence framework could be:
- dissuading legitimate aid organisations from providing aid to those in crisis zones where there is terrorist activity or fighting;
 - dissuading New Zealanders from making legitimate donations to aid organisations and disaster relief because they fear it may be associated with potential terrorism;
 - criminalisation of people inadvertently supporting an organisation without being aware it is involved in terrorism activities; and
 - the possibility that the mens rea standard of recklessness for the new offence could have a chilling impact on freedom of speech due to regulators pre-emptively placing restrictions on their platforms to ensure compliance.

This risk is mitigated by including a “lawful justification or reasonable excuse” safeguard in the offence (a reasonable excuse could include, for example, the provision of food that does no more than satisfy essential human needs).

- (e) Enforcement agencies may not be able to successfully prosecute the offences.

Identify any significant incompatibility with the Government’s ‘Expectations for the design of regulatory systems’.

There is no significant incompatibility with the Government’s ‘Expectations for the design of regulatory systems’.

The proposal conforms to established legal and constitutional principles and supports compliance with New Zealand’s international obligations and is not inconsistent with Treaty of Waitangi obligations.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?

Our evidence certainty is rated medium.

Terrorists need funds, property and other material support (resources) to commit terrorist

acts. According to the Financial Action Task Force (FATF), material support such as support associated with foreign terrorist fighters is one of the five greatest sources of Islamic State of Isis and Levant (ISIL) revenue. Material support and similar provisions exist and have been successfully prosecuted in various comparable jurisdictions (particularly the United States).⁵

International obligations and best practice have reiterated the need to cut off all resources from terrorist acts and organisations, for example UNSCR 2462 which states that all States shall prevent and suppress the financing of terrorist acts and refrain from providing any form of support, active or passive, to entities or persons involved in terrorists acts, even in the absence of a link to a specific terrorist act.

Individuals have been stopped from travelling to terrorist conflict zones and there are examples of specific terrorism travel offences in other overseas jurisdictions. We have reviewed international guidance and jurisdiction-specific commentary of travel offences in comparable jurisdictions and consider that the proposals meet the best practice guidelines and UNSCR issued by the United Nations, including compliance with international human rights law, international humanitarian law, and refugee law.

In relation to the TSA more broadly, until recently, no prosecutions had been taken under the TSA. Therefore, the TSA (including the definition of “terrorist act” which is part of the proposed offences) remains untested in New Zealand.

⁵ Similar provisions exist in the US, UK and Australia.

To be completed by quality assurers:

Quality Assurance Reviewing Agency:
Ministry of Justice
Quality Assurance Assessment:
The Ministry of Justice's Regulatory Impact Assessment quality assurance panel has reviewed the <i>RIA: Options to strengthen counter terrorism legislation (terrorist financing and terrorism travel offences)</i> prepared by the Ministry of Justice and considers that the information and analysis summarised in the RIA partially meets the quality assurance criteria.
Reviewer Comments and Recommendations:
As noted in the analysis, there is limited information on the effectiveness of similar offences in overseas jurisdictions, and the analysis has been constrained by the Government's timeframe and limited opportunities for consultation. It is also difficult to assess the impact and effectiveness of the proposed measures in isolation from other elements of the Government's counter terrorism package. However, the analysis is as good as can be expected given these constraints and should not materially impair Cabinet in its decision-making.

Impact Statement: Options to strengthen counter terrorism legislation (terrorist financing and terrorism travel offences)

Section 1: General information

Purpose

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

Key Limitations or Constraints on Analysis

Limitations and constraints on the analysis in this document include:

- There is limited information on the effectiveness of specific terrorism travel and broad material support offences as they have been used relatively infrequently in comparable overseas jurisdictions.⁶
- The assumptions underpinning the impact analysis is that the new offences may only apply to a very small number of individuals and that the legislation is likely to go to Select Committee by June 2020. Given the low numbers in overseas jurisdictions, the Ministry anticipates that the number of offences will be low.⁷ Police indicates approximate numbers of up to ten people over five years for the proposed travel offence and up to 15 people over five years for the proposed terrorism financing offence. However, the uncertainty of the international and domestic terrorist environment over the next five years makes it difficult to estimate numbers. Police estimates are based on activity over the previous five years.
- The Ministry consulted with relevant agencies and the government only-members of the Legislation Design Advisory Committee. The Ministry has not been able to undertake targeted consultation with the public, including non-government organisations, interest groups and iwi/Māori given the time constraints and sensitive and restricted nature of the subject matter. Consultation will be ongoing as the proposal and implementation plan develops.
- There is a timing constraint as the Minister has directed us to report back to ERS on 19 November 2019 and Cabinet by 25 November 2019.
- The Royal Commission of Inquiry into the Attack on Christchurch Mosques on 15 March 2019 is ongoing. We do not have the benefit of the Royal Commission's report and recommendations to inform these proposals.
- We are mindful of our international obligations and best practice to create a package

⁶ Ten people have been convicted for terrorism-financing offences in Australia and further three are currently before the courts (quoted in Countering terrorism financing: An Australian case study, Simon Norton, in ASPI Counterterrorism Yearbook 2019, p 126).

⁷ In the year ending 30 June 2019 there were 63 charges for terrorism-related offences in Great Britain. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/832950/police-powers-terrorism-jun2019-hosb1819.pdf

of reforms that is consistent with our international legal obligations.

Responsible Manager (signature and date):

s9(2)(a)

Policy Manager, Criminal Law
Ministry of Justice

13 November 2019

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

Our counter-terrorism legislative settings were primarily developed to:

- respond to international experience, particularly Islamist extremist terror events which took place during early to mid-2000s (such as 9/11, the Bali bombings in 2002 and the London underground bombings in July 2005), and
- to give effect to New Zealand’s international legal obligations (including international terrorism conventions and United Nations Security Council Resolutions).

On 15 March 2019 mass shootings took place at two mosques in Christchurch, in which 51 people were killed and many more injured. This event is our country’s most serious terrorist attack. Propaganda and online material associated with the Christchurch attack could play at least a partial role in inspiring individuals to consider engaging in ideologically motivated acts of violence in New Zealand or elsewhere in the medium to long term.

From an early intervention perspective, people engaging in terrorism-related or violent extremist activity present a unique challenge to enforcement agencies. There is often incomplete evidence of terrorist intent which, alongside a small intervention window, can make prevention and disruption of terrorism difficult. While it is impossible to detect and prevent all acts of terrorism, enforcement agencies need the appropriate statutory tools to intervene early to avert escalation to a terrorist act.

These challenges are heightened with the changing nature of terrorism. International experience, and the mosque attacks in March 2019, show a growing number of terrorist attacks that involve “low-sophistication”. These include items that can be lawfully obtained and used as weapons (e.g. cars, trucks, firearms, or knives); and individuals who are either more loosely networked than under a formal group structure, or are operating independently to plan and perpetrate terrorist acts. The international security environment is also complex and evolving.

Review

The review of counter-terrorism legislation has therefore focused on assessing how the TSA could be strengthened and improved to respond to early terrorist-related behaviours that can lead to an unlawful and harmful act and ensure effective implementation of international obligations.

The Government is seeking better ways to intervene early with people who are a risk of committing terrorist-related offences and maintain public safety. The focus on prevention is important because it is not enough to have offences that react to an event. Where possible, agencies with the responsibility for national security and public safety need tools to intervene or catch and disrupt events before they occur.

If there is no change to current settings:

- Some people will continue to travel internationally to prepare for, train or participate in terrorist acts without being criminalised or, in some cases, able to be stopped at the New Zealand border. The potential ambiguity in our legislative framework potentially contributes to the export of terrorism. It also presents a domestic terrorist risk where people are stopped but there is no further sanction or control on the person in New

Zealand.

- We miss an opportunity to enhance our international obligations under UNSCR 2178(6a) and are likely to continue to be criticised by the international community and United Nations for failing to do so. This has an impact on New Zealand's international reputation and may have an impact on our international security relationships over time.
- Prosecution for the provision of support other than financial support for terrorist acts, entities that carry out terrorist acts, and designated entities will be limited.
- Some people could continue to provide material support which makes terrorist attacks more likely by increasing the number of people aware of and sympathetic to such causes, and by increasing the skills of such people (in organising, planning, sustaining, and carrying out operations).
- Terrorism also poses a threat to the fabric of a just society including concepts of democracy and inclusion, which New Zealand must safeguard. Without intervention, and the right tools to disrupt and intervene in terrorist activity, the safety of the public, and New Zealanders' trust in that safety would erode.

2.2 What regulatory system, or systems, are already in place?

The key piece of existing legislation that sets out the criminal justice counter terrorism framework is the Terrorism Suppression Act 2002 (TSA). The TSA contains offences relating to the commission of specific terrorist acts and offences that criminalise the support of terrorism. There are also offences available under the Crimes Act 1961 that could be used to prosecute individuals exhibiting certain types of behaviour.

Terrorist travel

There are some existing offences that may capture conduct that occurs prior to travelling. These include the definition of terrorist act s25(1) and offences linked to this definition, financing of terrorism (s8), attempt to undertake a terrorist act (s6A), attempt to participate in a terrorist group (s13) in the TSA and conspiracy in s310 of the Crimes Act 1961.

Terrorism financing and other forms of material support

Sections 8 and 10 of the TSA set out the existing financing provision offences. These are summarised below along with their corresponding penalty.

Section 8: wilfully providing or collecting funds intending or knowing that they are to be used for a terrorist act or by an entity that carries out terrorist acts (14 years imprisonment).

Section 8(2A): wilfully providing or collecting funds intending or knowing that they will benefit an entity that the person knows is any entity that carries out terrorist acts (14 years imprisonment).

Section 10: prohibition on knowingly making property or financial services available to a designated terrorist entity (7 years imprisonment).

A Terrorism Suppression (Control Orders) Bill was introduced to the House in mid-October

and is currently going through the Select Committee stage. This Bill establishes a limited control order regime which will apply to New Zealanders arriving in New Zealand after being involved in terrorist or violent extremist activity offshore.

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 constraints on human rights.

Non-legislative measures will not address the problem or give effect to our international commitments.

The key agencies with a substantive interest in the counter terrorism framework include Ministry of Justice, Ministry of Foreign Affairs and Trade (MFAT), Department of Prime Minister and Cabinet (DPMC) (National Security Group), New Zealand Police, New Zealand security agencies (the New Zealand Security and Intelligence Service (NZSIS) and 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 positive obligations on reporting entities (identified as at-risk of money laundering and terrorist financing) to put measures in place to detect terrorist financing.

There is likely to be public interest in the legislation, given the scope and value of the interests that are impacted by terrorist acts, the human rights interests at play, and criminal offences and powers that effectively impose requirements on donors and providers to understand who their end users/beneficiaries are where they perceive a risk of use for terrorist acts/by entities that carry out terrorist acts (for example Internet Service Providers such as social media providers) and charitable organisations (in relation to the provision of humanitarian aid).

There is ongoing policy analysis on the workability of the TSA (with a focus on preparation and planning, and the core definition of “terrorist act”).

2.3 What is the policy problem or opportunity?

The Government is responsible for putting in place appropriate systems to maintain public safety in New Zealand. It is also responsible for ensuring the rights of individuals are protected. Any proposed response must consider security and human rights. Without adequate systems in place there is an increased risk that someone who poses a terrorism related public safety risk will engage in or support terrorism activities in New Zealand and overseas. Alongside the existing offences and powers in the TSA and other statutes, Police is reliant on monitoring and surveillance powers, which is resource intensive and limits its ability to intervene quickly.

Terrorism Travel

Some people travel internationally to prepare for, train or participate in terrorist acts. Travelling for terrorism purposes could create more casualties, more recruitment for terrorism groups and lead to more people committing a terrorist act causing further harm. Precluding people from travelling will prevent them committing further offences at their destination (such as participation in a terrorist group or committing a terrorist act).

Individuals travel to, from or via New Zealand to undertake terrorist activities. While existing law may capture some of this behaviour, there is currently no specific offence in New Zealand law for travelling to undertake terrorist activities. This is a problem because:

- it limits Police's ability to effectively intervene to prevent a person from travelling for terrorist purposes. State powers to cancel passports or travel documents may not enable intervention in some cases, for example where a person holds a dual or foreign passport. People who are prevented from leaving may become a domestic risk to security because their frustration at being unable to travel could motivate them to act in New Zealand. A criminal offence would enable Police to prosecute these individuals and manage their risk according to the outcome of that prosecution.
- there may be a perceived gap in New Zealand's implementation of UNSCR 2178(6)(a) (2014). Among other things, this binding resolution requires all United Nation Member States to establish criminal offences for their nationals travelling or attempting to travel to perpetrate, plan, prepare or participate in terrorist acts or training.⁸ The United Nations Counter-terrorism Executive Directorate, has: "... urge[d] New Zealand to continue to amend its legislation to fully criminalise terrorist-related activities [including terrorist travel] in accordance with the relevant [UN Security] Council resolutions, international commitments, and international human rights law, in particular, the principle of legality."⁹ A specific offence will definitively meet these obligations.

Terrorism Financing

As set out above, the TSA does not criminalise the full range of material support that people are providing for terrorist acts and/or to entities that carry out terrorist acts. Such support includes buying and/or stockpiling resources, accommodation, transport, skills or training and non-financial advice and services. This is a problem because:

- international best practice requires countries to take measures to prevent and suppress the provision of all forms of support to terrorists, and
- the TSA as it is currently written could be improved to better deal with emerging risks such as the exploitation of web-based fundraising tools, foreign terrorist fighters and lone actors.

Terrorists need resources, not only to fund attacks but also to resource the travel, false documents, safe houses, food, bribery, training and recruitment, which individual terrorists and terrorist organisations need to function.

The trail of resources provided to terrorist acts/entities provides valuable information to investigators and often allows them to identify those involved in the terrorist attacks. More importantly, identifying terrorists' resource flows and depriving them of such resources is a crucial tool in disrupting terrorist attacks before they even occur.

⁸ UNSCR 2178 (2014) at [6a].

⁹ Draft report on the focused visit of the Counter-Terrorism Committee to New Zealand (11-13 July 2018), Paragraph 18, page 9.

2.4 Are there any constraints on the scope for decision making?

There are some interdependencies with the National Security Information policy work. There is also some interdependency with the Terrorism Suppression (Control Orders) Bill that is currently going through Select Committee. The proposals analysed in this RIA are part of the broader Government response to the Christchurch mosque attacks.

The outcome of the current court case and decision relating to the Christchurch mosque attacks is not yet known. The case is likely to provide clarity around the meaning of the TSA definition of terrorist act, which is relevant for both offences.

There is a relationship between this work and the Royal Commission of Inquiry into the Attack on Christchurch Mosques. However, we will not have the benefit of the insights from the Royal Commission's report to inform these proposals.

There is a timing constraint for us to report back to ERS by 19 November 2019.

Decisions made must take into account our human rights obligations and ensure we meet our international commitments.

2.5 What do stakeholders think?

While we haven't had the opportunity to consult Māori directly we have considered the impact of the proposals on our Te Tiriti o Waitangi obligations. The constitutional significance of the counter-terrorism regime and the fundamental rights involved necessarily impacts on the relationship between the Crown and Māori. While the provision and travel offences have the potential to disproportionately impact Māori, we have assessed the proposals against Treaty principles and, on balance, consider the proposed safeguards sufficiently mitigate risk. For example, we have considered whether support for self-determination or indigenous rights movements are likely to be captured by the proposed offences. We consider that protections built into the legislation help ensure peaceful advocacy is not criminalised. Section 5(5) of the TSA states that if a person engages in any protest, advocacy, dissent, strike, lockout, or other industrial action, it is not, by itself, a sufficient basis for inferring that the person is conducting terrorist activity.¹⁰

Since 15 March 2019, counter-terrorism work has become an increased priority for the Government, which has created a time pressure for developing these proposals. The timeframes, coupled with the sensitive nature of this work, limited our ability to engage with the wider public, iwi and Māori, and non-Crown organisations who may have an interest in this policy (for example, civil liberties groups and digital technology companies). There is no specific public consultation planned prior to introduction of a bill. The public will have the opportunity to make submissions as part of the standard Select Committee consideration of any legislative amendment.

Consultation has been limited to government officials, and the government-only members of the Legislation Design Advisory Committee. The following departments have been involved in the review of counter-terrorism legislation and consulted in the preparation of this paper: DPMC (National Security Group), MFAT, NZ Police and security agencies, DIA, New

¹⁰ Prosecutors are also required to seek the Attorney-General's consent before any prosecutions are taken under the TSA, and to meet the public interest test.

Customs, MBIE (Immigration), Crown Law, the Office of Film and Literature Classification, and the Ministry for Women. The Department of the Prime Minister and Cabinet (Policy Advisory Group) was informed.

We are currently undergoing an assessment by FATF including on the terrorism financing offences. FATF will have an interest in these proposals.

In general, there is support for the proposals. However, NZ Police would prefer Option Three in addition to Option Two in relation to the travel offences (see A4.2 below).

Section 3: Criteria identification

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

- **Effectiveness:** to what extent does the option achieve the system's objectives, ie. 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
 - a proportionate response
- **Uphold democratic and constitutional principles:** is the option consistent with our democratic and constitutional norms; to what extent is the option demonstrably justifiable in a free and democratic society; and is it consistent with the principles of Te Tiriti o Waitangi.
- **International commitments and standards:** is the option consistent with New Zealand's international commitments and international human rights and humanitarian law. International obligations include those set out in United Nations Security Council Resolutions (UNSCR).

For this policy, achieving an enhanced public safety outcome has required careful consideration of public safety and upholding democratic and constitutional principles. We consider the policy objective of preventing a person from travelling to commit terrorist acts and cutting off the supply of material support is a sufficiently important objective to warrant some limitations on the rights and freedoms of individuals.

Section 4: Specific Problem Definition, Option Identification and Impact Analysis

A. Travel offence

A4.1 What is the specific problem?

As above, some people travel internationally to prepare for, train or participate in terrorist acts. This may include people travelling to, from or via New Zealand to undertake terrorist activities. While existing law may capture some of this behaviour, there is currently no specific offence in New Zealand law for travelling to undertake terrorist activities. This is a problem because:

- it limits Police’s ability to effectively intervene to prevent a person from travelling for terrorist purposes. State powers to cancel passports or travel documents may not enable intervention in some cases, for example where a person holds a dual or foreign passport. People who are prevented from leaving may become a domestic risk to security because their frustration at being unable to travel could motivate them to act in New Zealand. Without an offence, Police are unable to prosecute these individuals and manage their risk according to the outcome of that prosecution.
- there may be a perceived gap in New Zealand’s implementation of UNSCR 2178(6)(a) (2014). Among other things, this binding resolution requires all United Nation Member States to establish criminal offences for their nationals travelling or attempting to travel to perpetrate, plan, prepare or participate in terrorist acts or training.¹¹

A4.2 What options are available to address the problem

Option 1: Maintain the status quo

Option One is to make no change and, instead of explicitly criminalising travelling, rely on existing offences and operational tools that may capture this conduct. Under this option Police and agencies such as Customs and MBIE (Immigration), would continue to rely on existing offences and operational tools that may capture people travelling for terrorism purposes. For example, TSA and Crimes Act offences and powers to confiscate passports, decline or cancel visas.

Section 8 of the TSA criminalises terrorist financing. This could likely include the purchase of a ticket for travelling to undertake terrorist activities.

The TSA includes offences of attempting to undertake a terrorist act. This may cover individuals travelling for terrorism purposes. The TSA also includes a participation offence. This requires a person to intend to enhance the group’s ability to carry out terrorist acts.

The conspiracy offence set out in s310 of the Crimes Act states that it is an offence to conspire with any person to commit any offence. This provision may capture behaviour when a person has planned with another person to travel to another country to undertake behaviour that in New Zealand would be an offence.

¹¹ UNSCR 2178 (2014) at [6a].

The operational tools include the Passports Act 1992 provision that allows the relevant Minister to cancel or refuse to issue a passport where there is reasonable cause to believe the person intends to engage in or facilitate a terrorist act.¹² Police can also give warnings to individuals who are attempting to travel for terrorist purposes.

Option 2: Criminalise travel with the intention to commit specified offences in the TSA [preferred option]

This option would create a new offence that explicitly criminalises travel with the intention to carry out the following specified offences in the TSA:

- Engage in a terrorist act – section 6A TSA (including planning, preparing, or carrying out that act per section 25(1));
- Terrorist bombing – section 7 TSA;
- Offences related to terrorist finance (including the proposed material support offence, which will capture training) – sections 8-10 TSA;
- Recruiting members of terrorist groups – section 12 TSA;
- Participating in a terrorist group – section 13 TSA; and
- Offences related to unmarked plastic explosives, nuclear and radioactive material – sections 13B, 13C, 13D, 13E TSA.

Travel for the purposes of the offence would include people who travel to, from or via New Zealand (and includes attempts to travel).

The wording of the offence would make it clear that travelling with the intention to carry out a specified offence in the TSA makes the travelling culpable. This narrows down the range of conduct captured by the offence so it is a more proportionate response.

This option would require a Bill to amend the TSA.

Option 3: Travel ban

The third option is to criminalise travel to a declared area. We note that this could be combined with Option Two. Option Three is based on:

- Australian legislation: Section 119.2 in the Australian Criminal Code criminalises a person intentionally entering or remaining in a declared area where the person knows or should know that the area is a declared area. The Australian Minister of Foreign Affairs may demarcate an area for the purpose of this offence if they are satisfied that a listed terrorist organisation is engaging in hostile activity in that area. It is a defence if the person can show they had a legitimate purpose for being in or remaining in the area. This does not apply to a person who is a non-Australian citizen or resident who travels to Australia.
- United Kingdom (UK) legislation: Section 4 of the Counter Terrorism and Border Security Act 2019 makes it an offence for a UK national or resident to travel to, or remain in, designated areas unless they are exempted or have reasonable excuse.

The purpose of this offence design is to manage the advent of a conflict arising in a particular

¹² Section 27GA Passports Act 1992.

zone. It relies on the location as a proxy for culpable intent.

We do not recommend this Option. The Australian and UK offences have been repeatedly criticised because of their inconsistency with human rights. By way of example, the offence reverses the onus and places a burden on the defendant to show that they were in the area for a legitimate purpose. It assumes culpability because a person is travelling to a country involved in a conflict. This is inconsistent with the right to be presumed innocent.

Also, identifying an area to declare presents a challenge. There are geopolitical ramifications associated with declaring an area. If New Zealand declares an area where a travel ban would be imposed this could seriously affect New Zealand's relationship with that country, or that country's political allies.

Additionally, an offence of this type is more likely to be used to target a particular type of terrorist entity: it is more likely to be used to demarcate entities operating in active conflict zones rather than, for example, white supremacist groups in Western countries. Currently, this means Option Three is likely to disproportionately impact travellers to certain countries, such as Syria and Afghanistan. This may disproportionately impact Muslim people, humanitarian workers, and refugees. We note that Option Three is also likely to disproportionately affect women who have no terrorist intent but may be travelling in the context of a patriarchal structure.

Conversely, Option Two is less likely to have a discriminatory impact on certain groups of people because it is not tied to geographical location. It instead relies on the TSA, including the current definition of terrorist act, which is not specific to any ideology, political or religious cause.

It is unclear if Option Three would meet the requirements of UNSCR 2178. Such an offence requires the pre-emptive marking out of areas to which the offence applies (not accounting for people travelling to other areas to undertake terrorist activity).

It would additionally capture all people who travelled to the declared area rather than just those travelling for harmful purposes, per Option Two. This could substantially limit the right to freedom of movement, and legitimate provision of aid. It is not clear that this limit would be rationally connected to the objective of such an offence: to prevent people travelling for the purpose of causing harm or building the capability of terrorist entities. This is because the offence would be linked to the place the person was travelling to, not what they were intending to do once in that place.

We suggest including "without reasonable excuse" in the Option Three offence to partially alleviate some of these issues. We do not, however, recommend this Option.

UNSCR 2178 does not require that states be able to prosecute people who are travelling to "their States of residence or nationality". Therefore, there would be an exception for people returning to their country of residence or country of citizenship

In developing this option, we also considered it important to include such an exception. The exception is designed to protect a person's right to leave any state, and to enter their own. Option Three presumes that if a person travels to a particular location, they have culpable intent (i.e. to commit an offence). Given that there is no requirement to prove a culpable

intent under Option Three, we consider it is more important to provide exceptions for people wishing to return to their places of residence or nationality who may have legitimate reasons to do so.

Conversely, Option Two requires the prosecution to prove an intention to commit a terrorist offence. This requirement makes the case for provision of an exception less compelling. If the prosecution can establish a person is intending to commit a terrorist offence, there is limited justification for still enabling them to travel, even to their place of residence or nationality.

We note that, in circumstances where a person is travelling to their state of residence or nationality, New Zealand operational agencies may still make those states aware of travel concerns. The extent to which that information can be provided is case specific.

Non-regulatory options

These were not appropriate – see comments above.

Consultation and agency views

None of the agencies supported Option One. All the agencies consulted either support Option Two or the proposed approach to criminalising travel. NZ Police would also like Option Three. MFAT did not support Option Three. We did not consider Option Three proportionate or effective at addressing the problem, particularly given the risks to human rights obligations, the inflexibility of the proposed offence, and the scope of UNSCR2178(6a).

International

The Ministry has considered international approaches to the criminalisation of travel for terrorism purposes. Overseas jurisdictions including the United Kingdom, Canada, Australia the United States and Norway have introduced specific travel offences. A table comparing the travel offences in these countries is attached at Appendix One.

In addition, these options were developed with reference to the United Nations best practice guidance.¹³

¹³ *Guidance to states on human right-compliant responses to the threat posed by foreign terrorist fighters*, (United Nations Counter-terrorism Implementation Taskforce, 2018).

Section A4.3: Impact Analysis

	Option 1: Maintain the status quo	Option 2: Criminalise travel with the intention to commit specified offences in the TSA	Option 3: Travel ban
<p>Effectiveness (ie. public safety, national security and harm reduction through:</p> <ul style="list-style-type: none"> • clear, consistent legislative framework • intervention at the most appropriate stage • rehabilitation, reintegration, de-radicalisation, de-escalation of the risks of (further) terrorist acts • social cohesion • proportionate response) 	<p style="text-align: center;">0</p> <p>Relying on the existing offences and powers is inadequate to address the problems identified and so would be ineffective at achieving the objectives, in particular, enabling and supporting intervention at the most appropriate stage, providing tools to direct a person into appropriate programmes to address their risk.</p> <p>While some existing offences may cover travel in some situations, it will not always be clear to people that their travel will be criminalised under those offences.</p> <p>An unsuccessful prosecution due to the inadequacies of the current law creates a risk that the person may try to travel again.</p> <p>Police and security agency surveillance is inefficient to manage long term risk as it is an investigative tool used to monitor activities for specific evidence of crime. It does not provide any de-radicalisation assistance.</p> <p>The use of operational tools may be more cost effective than bringing a prosecution against an individual. However, their use alone is not considered a proportionate response to an individual who intends to travel to cause harm. It also does not take into account the reduction in social, environmental and economic costs that would arise from terrorism being interrupted at this earlier stage.</p>	<p style="text-align: center;">+</p> <p>Criminalisation to prevent people travelling for the purpose of causing harm or building the capability of terrorist entities enables earlier intervention.</p> <p>A specific offence of travelling would enable the capture of a wider range of conduct and would ensure that the offence applies to the right-wing extremist threat as well as travel to support designated terrorist groups/entities.</p> <p>If convicted of the terrorism travel offence an individual may receive de-radicalisation assistance through their sentence. However, there is also a risk that the terrorist views of some individuals may be hardened by being punished or integrated into the prison environment.</p> <p>The offence would be carefully worded to avoid net widening or capturing people travelling for legitimate reasons (eg. to visit relatives). Providing a specific offence would provide a mechanism to attach a specific and proportionate penalty to this behaviour, rather than relying on this behaviour being captured by another offence which may mean the behaviour does not attract the penalty considered appropriate. There would be costs associated with bringing a prosecution and costs of imprisonment or sentence management.</p> <p>Creating a standalone travel offence will provide greater certainty to the public that this behaviour is not acceptable in New Zealand. It would also make clear the offence and associated penalty they may be liable for if they undertake this conduct.</p>	<p style="text-align: center;">0</p> <p>This option would require pre-emptive marking out of areas, and not account for people travelling to other areas to undertake terrorist activity. It is more likely to be applied to a defined group, often in a war zone, rather than a loosely defined network, and could not adapt to evolving risks. As a result, we do not consider it meets the objective of effectiveness.</p>

	Option 1: Maintain the status quo	Option 2: Criminalise travel with the intention to commit specified offences in the TSA	Option 3: Travel ban
Uphold democratic and constitutional principles (consistency with democratic/ constitutional norms, demonstrably justifiable in a free society, consistent with Te Tiriti)	<p style="text-align: center;">0</p> <p>This option broadly upholds our democratic norms and constitutional principles. However, cancellation of a person's passport has implications for the right to freedom of movement under s18 of NZBORA 1990.</p> <p>There is also a lack of transparency if relying on general offences. It may be difficult for the public to understand why they are being prosecuted if not specifically provided for in legislation. The public may see government as discriminating against someone based on their ethnicity.</p> <p>This option is consistent with the principles of the Treaty of Waitangi.</p>	<p style="text-align: center;">0</p> <p>The proposed offence engages NZBORA 1990. Specifically, s17 which protects freedom of association and s18 which protects freedom of movement. However, the proposed offence will apply in a targeted way where there is evidence of intent to commit a terrorist offence. We consider that criminalising behaviour that has a direct link with a criminal intent is a justifiable limitation on those rights and freedoms, particularly in light of changes to our national risk/threat profile.</p> <p>This option is consistent with the principles of Treaty of Waitangi and not considered likely to impact expressions of tino rangatiratanga.</p>	<p style="text-align: center;">0</p> <p>This would have a disproportionate impact on human rights, particularly the rights to be presumed innocent (by placing an onus on the traveller to demonstrate an excuse for travelling) and to freedom of movement (the offence would capture all people travelling to an area, not just those travelling for harmful purposes).</p>
International commitments and standards (including international counter-terrorism framework, and international human rights and humanitarian law)	<p style="text-align: center;">0</p> <p>This option reflects the current situation. MFAT has indicated that the absence of a specific offence for travelling to undertake terrorist activities could be perceived as a gap in the implementation of our international obligations.</p> <p>This option does not address the recommendation from the United Nations Counter-terrorism Executive Directorate, which has:</p> <p>“... urge[d] New Zealand to continue to amend its legislation to fully criminalise terrorist-related activities [including terrorist travel] in accordance with the relevant [UN Security] Council resolutions, international commitments, and international human rights law, in particular, the principle of legality.”¹⁴</p>	<p style="text-align: center;">+</p> <p>Creation of a specific offence for travelling for terrorism purposes would clearly show we are adhering to our international obligations namely UN Security Council Resolution (UNSCR) 2178. A number of overseas jurisdictions have specific terrorism travel offences. The scope of travel captured is also consistent with UNSCR 2178. The scope includes travelling, to, from or via New Zealand to engage in terrorist activity.</p> <p>UNSCR 2178 also requires that counter terrorism measures must comply with international human rights law, international refugee law and international humanitarian law. The International Covenant on Civil and Political Rights provides that restrictions to human rights should be limited to those that are necessary to protect national security or the rights and freedoms of others. We consider that this option is a justifiable limitation on the rights engaged.</p>	<p style="text-align: center;">0</p> <p>As above, this would have a disproportionate impact on human rights (which are embedded in our international commitments), particularly the rights to be presumed innocent (by placing an onus on the traveller to demonstrate an excuse for travelling) and to freedom of movement (the offence would capture all people travelling to an area, not just those travelling for harmful purposes).</p> <p>We also consider that this would have a disproportionate impact on gender, which is also embedded in our international counter-terrorism commitments.</p>

¹⁴ Draft report on the focused visit of the Counter-Terrorism Committee to New Zealand (11-13 July 2018), Paragraph 18, page 9.

	Option 1: Maintain the status quo	Option 2: Criminalise travel with the intention to commit specified offences in the TSA	Option 3: Travel ban
Overall assessment	0	++	0

Key:

- worse than doing nothing/the status quo
- 0 about the same as doing nothing/the status quo
- + better than doing nothing/the status quo
- much worse than doing nothing/the status quo
- ++ much better than doing nothing/the status quo

A4.4 What other options have been ruled out of scope, or not considered, and why?

Non-regulatory options were not considered to be appropriate for addressing this issue.

As a variation to Option 2, we considered whether it would be sufficient to criminalise travelling with the intent to commit an offence of engaging in a terrorist act or participating in a terrorist group. However, we consider it appropriate to extend the travel offence to link with other offences creating a risk of physical harm (sections 7, 13B, 13C, 13E of the TSA), and relating to provision of support to terrorist groups (sections 8 – 10 and 13 of the TSA). These offences equally build the capability of terrorist groups and cause risk of serious injury.

A4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The preferred option is to introduce a specific terrorist international travel offence for inclusion in the TSA, to make it clear that this behaviour is both harmful and criminal, and to give better effect to our international obligations. This offence would add to enforcement agencies' toolkit to intervene early to prevent terrorism both domestically and internationally.

The offence gives better effect to the implementation of UNSCR 2178(6a) and targets harmful behaviour, while complying with human rights.

DPMC, MFAT and NZ Police support the preferred option. NZ Police support inclusion of both Option Two and Option Three. MFAT's view is that the clearest way to implement UNSCR 2178 is to have a specific offence, as other jurisdictions have done. New Zealand Customs Services, Immigration NZ and security agencies have indicated support for the underlying policy behind introducing a terrorist travel offence.

The offence will interfere with the rights of individuals however we consider this is justified as the offence requires travel with a criminal intent. We consider the new offence will better achieve the objective of preventing people from travelling for the purpose of causing harm or building the capability of terrorist entities.

B. Terrorism financing offence

B4.1 What is the specific problem?

Terrorists need resources in the form of funds, property and other types of support to carry out terrorist acts. The TSA currently criminalises:

- the provision of funds for terrorist acts, terrorist entities and designated terrorist entities, and
- the provision of property and financial services for designated terrorist entities.

These provisions are central to our international obligations in the counter-terrorism space.

However, the TSA does not currently criminalise the full range of material support that people are providing for terrorist acts/to entities that carry out terrorist acts. Such support includes buying/stockpiling resources, lodging accommodation, transport, skills or training and non-financial advice and services. This is a problem because:

- international best practice requires countries to take measures to prevent and suppress the provision of all forms of support to terrorists, and
- the TSA as it is currently written could be improved to better deal with emerging risks such as the exploitation of web-based fundraising tools, foreign terrorist fighters and lone actors.

B4.2 What options are available to address the problem

We looked at a range of options and considered some of the settings. However, we consider there are only two options: maintaining the status quo, or clarifying and broadening the existing offence to include things that have monetary value.

Option 1: Maintain the status quo

This option would rely on the existing offences in the TSA to deny resources to those seeking to commit terrorism. The existing offences relate to the provision of “funds” and “property, or financial or related services” to certain terrorist acts or entities. The definition of “funds” and “property” are broad and could be read to include certain other types of support beyond their obvious meaning if/where courts deemed appropriate. Intention and/or knowledge would continue to be the required mens rea elements for the offences.

Option 2: Broaden the terrorism financing offence to include all forms of material support [preferred option]

The new offence would prohibit the provision of funds, property and other material support. The scope of the offence would be expanded to include:

- Buying/stockpiling resources
- Lodging/accommodation
- Transport
- Skills or training, and
- Non-financial advice and services (including cyber and information services).

The offence would have a “without lawful justification or reasonable excuse” carveout to exclude legitimate support, such as the provision of humanitarian aid that does no more than

satisfy essential human needs.

Section 10(3) of the TSA already contains one example of a “reasonable excuse” for providing property to a designated terrorist entity is where the property (for example items of food, clothing or medicine), is made available in an act that does no more than satisfy the essential human needs of an individual (or a dependant). A similar exception could be included in a material support offence.¹⁵

This would be one example of a “reasonable excuse” precluding liability. The courts would be free to determine other situations that qualified as a “reasonable excuse” as they saw fit, for example if web-based providers were captured, a reasonable excuse could be read in where although a provider was put on notice as to a risk that funds on its platform were being collected for use in a terrorist act, given the volume of material, they were unable to prevent the fundraising immediately.

Further the mens rea element of recklessness would be applied to this offence. Recklessness is the conscious taking of an unreasonable risk (having regard to the degree and nature of the risk which is known to be present). Proof of recklessness requires that the defendant be shown to have recognised that the specified consequence or circumstance was “a real possibility”. In this context, it would require proof that the person providing/collecting support perceived that there was a risk that the support would be used for terrorist acts/entities but proceeded regardless.

In determining whether it is appropriate to capture reckless donors or service providers we have considered the burden we wish to impose on such defendants to investigate the activities of entities they are providing support to. Recklessness is a lower mens rea standard than knowledge (which is the standard in the current offence). Knowledge requires the defendant to act “knowing” that some circumstance exists and requires the defendant to have a positive and correct belief that these relevant circumstances do indeed exist. Recklessness requires that the defendant foresees or appreciates that their conduct will create a risk of harm, and it was unreasonable for them to run the risk. A recklessness standard strikes the appropriate balance between not dissuading the provision of legitimate aid and other necessary services, and cutting off the resources of terrorists, ideally before attacks occur. We note that the defendant will still have the ability to prove lawful justification or reasonable excuse.

¹⁵ By way of example, the United States had a broad provision criminalising the provision of material support or resources to designated foreign terrorist organisations that explicitly excludes medicine and religious materials.

Section B4.3: Impact Analysis

	Option 1: Maintain the status quo	Option 2: Broadening the terrorism financing offence
<p>Effectiveness (ie. public safety, national security and harm reduction through:</p> <ul style="list-style-type: none"> • clear, consistent legislative framework • intervention at the most appropriate stage • rehabilitation, reintegration, de-radicalisation, de-escalation of risk • social cohesion • proportionate response) 	<p style="text-align: center;">0</p> <p>Relying on the existing financing and provision of property and financial services offences provides some tools for prosecuting the provision of certain resources to some acts/entities. In particular, the existing offences are relatively effective in relation to the provision of funds. However, in order to prosecute the provision of wider types of support, a strained interpretation of the existing offences would be required.</p> <p>The existing provision offences lack clarity. For example, the provision of non-financial expert advice or assistance is not clearly covered by existing offences.</p>	<p style="text-align: center;">+</p> <p>A broader “provision of funds, property and other material support” offence better reflects the realities of modern terrorism. The offence would criminalise the provision of different types of resources, apply consistently to acts/designated entities and entities that carry out terrorist acts, and contain a recklessness mens rea alternative.</p> <p>Maximum penalties would be amended to reflect severity of conduct.</p> <p>The proposed offence is easier to understand and apply and clarifies the range of support that it is criminal to provide terrorists with.</p> <p>There would be increased scope for prosecution under the proposed offence.</p>
<p>Uphold democratic and constitutional principles (consistency with constitutional / democratic norms, demonstrably justifiable in a free society, consistent with Te Tiriti)</p>	<p style="text-align: center;">0</p> <p>The existing offences create tensions with fundamental rights and freedoms and the principles of the Treaty of Waitangi. These are balanced against the need to uphold public safety and respond to our international obligations.</p>	<p style="text-align: center;">-</p> <p>The proposed offence is broader and therefore increases tensions with fundamental rights and freedoms and the principles of the Treaty of Waitangi.</p> <p>For example, the proposed offence may have an increased impact on an individual’s freedom of association in the context of providing humanitarian aid. However, officials consider that this impact is mitigated by maintaining the carveout of “lawful justification or reasonable excuse” for providing support in certain circumstances. This carveout can serve to protect donors.</p> <p>Various other protections exist in the TSA, for example the requirement for the consent of the Attorney-General to prosecute, and the safeguards built into the definition of “terrorist act” in section 5.</p>
<p>International commitments and standards (including international counter-terrorism framework, and international human rights and humanitarian law).</p>	<p style="text-align: center;">0</p> <p>The status quo meets out international obligations. However, international standards and best practice have evolved to justify requiring a broader definition of terrorism financing and the provision of other support to terrorist acts/entities.</p>	<p style="text-align: center;">+</p> <p>Creation of an expanded provision offence framework arguably enhances our commitment to international counter-terrorism obligations, and in line with offences adopted in comparable partner jurisdictions.</p>
<p>Overall assessment</p>	<p style="text-align: center;">0</p>	<p style="text-align: center;">+</p>

Key:

- worse than doing nothing/the status quo

-- much worse than doing nothing/the status quo

0 about the same as doing nothing/the status quo

+ better than doing nothing/the status quo

++ much better than doing nothing/the status quo

B4.4 What other options have been ruled out of scope, or not considered, and why?

Regulatory changes will be in the form of legislation as the issues lie within existing legislation. Therefore, non-regulatory options were not considered.

B4.5 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The preferred option is to:

- increase and clarify the range of support that it is a criminal offence to provide terrorists with
- ensure criminalisation of the full range of prohibited support to terrorist acts and both designated entities and entities that are not designated but that carry out terrorist acts
- include a recklessness mens rea element as an alternative to requiring proof of intention/knowledge, and
- streamline the maximum penalty across the range of offences to ensure proportionality to the prescribed mens rea.

The offences uphold New Zealand's democratic and constitutional principles. Any limitation on human rights is mitigated by appropriate safeguards and carveouts within the wording of the offences.

Successful criminal prosecution offers an effective and efficient level of public safety (in the short-term) and at a lower cost, compared with other early intervention tools.

These proposals form one part of a counter-terrorism package. Other aspects of the package are still being developed.

Section 5: Conclusions

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

Preferred options

Based on our analysis, the preferred option is to amend the Terrorism Suppression Act 2002 to:

- Create a new offence to criminalise a person who travels to, from or via New Zealand with an intention to commit a specified offence in the TSA; and
- Amend the terrorism financing, property and financial services offences to create a broader, streamlined offence prohibiting the provision of funds, property and other material support.

Police and security agencies support this option to close the gaps in the existing legislation relating to terrorism travel and terrorist financing.

This option gives clear effect to our international obligations.

Whilst the offences create some limitations on the rights of the individuals (ie. freedom of movement), the policy objective, including promotion of public safety, is sufficiently important to warrant some limitation on the rights and freedoms of some individuals.

The agencies consulted support the proposals.

5.2 Summary table of costs and benefits of the preferred approach

Affected parties	Comment:	Impact	Evidence certainty
Additional costs of proposed approach, compared to taking no action			
Regulated parties (eg. financial institutions, web-based fundraising platforms etc)	Increased monitoring or costs of addressing concerns raised by police and intelligence agencies	Low	Low
New Zealand Police	Cost of prosecution	Not able to be quantified but expected to be low	Medium
Corrections	Sentence management (estimate based on imprisonment of 5 individuals per year)	\$325,000 per year	Low
Court costs	Cost based on average cost of High Court Criminal case (based on 5 cases per year)	\$181,650 per year	Low
Justice	Costs of legal aid (estimated average, based on 5 cases per year)	\$80,000 per year	Medium
Total Monetised Cost		\$586,650 per year	Low
Non-monetised costs		Low	Low

Expected benefits of proposed approach, compared to taking no action

Regulated parties (eg. financial institutions, web-based fundraising platforms etc)	Increased clarity on what constitutes criminal conduct (although to what extent it provides clarity has not been tested with tech companies).	Low	Low
NZ Police	Enhanced ability for early intervention to disrupt and deter terrorist activity.	Low	Low
Public of New Zealand	A reduced risk to the public of a large-scale harmful event.	Low	Low
International community	A reduced risk of support of terrorism from New Zealand	Low	Low
Total Monetised Benefit		N/A	N/A
Non-monetised benefits		Low	Low

5.3 What other impacts is this approach likely to have?

The number of people who will be prosecuted for the new offences is unknown. It is also unknown how often convictions will be secured. Police and Ministry assumptions suggest that prosecution numbers will be low (up to five people per year).

Cost implications for the Department of Corrections are unknown. While it is possible that costs associated with individuals sentenced under the TSA could be met within Corrections baseline budget, it is also possible that effectively managing some of these individuals may require additional measures and associated costs (e.g. additional staff, specialist facilities, etc).

Unintended impacts include ordinary people being hesitant to do something in their everyday life as they do not want to risk being captured under the offences. i.e. parents may be hesitant to provide necessities for their children.

There is a risk that the proposals could reduce the provision of aid and financial support to charities.

There is a potential for negative impacts on the Government's relationship with tech companies if there are additional costs to them and our lack of consultation with these companies in developing the proposal. This is a particular concern given Government is working closely with this sector as part of the work on the Christchurch Call.

While the intention is to provide greater clarity to tech companies there is a possibility that this change could have a chilling impact on freedom of speech due to regulators pre-emptively placing restrictions on their platforms to ensure compliance.

5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

The proposal is generally compatible with the Government's 'Expectations for the design of regulatory systems'. While the new offences proposed will infringe on individual human rights, the Ministry considers these limits are justified to ensure public safety for all New Zealanders.

The proposals ensure clearer compliance with New Zealand's international counter-terrorism obligations.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

The preferred option requires legislation to amend the TSA.

The legislation for the new offences is expected to be introduced in 2020. Enactment and commencement of the arrangements will depend on the Government’s and Parliament’s priorities. The legislative process (including delayed commencement if necessary) will provide sufficient time to ensure affected parties are prepared for the changes.

Transitional arrangements will need to be considered.

Enforcement, prosecuting, and intelligence agencies will have responsibility for ensuring their staff are prepared for implementation and operation. Police will be responsible for gathering evidence and taking prosecutions. There will not be a role for local government.

The proposal to adjust the penalty of the terrorism financing offence for the new mens rea element of recklessness down to a 10-year maximum. Implementation of this change will rely on the way this is applied by the judiciary.

This also follows for the travelling offence penalty to be set at half the maximum penalty of the related TSA offence.

Relevant agencies will need to arrange wide communication to ensure that the benefit of clarity of what constitutes criminal conduct is realised.

6.2 What are the implementation risks?

There are concerns that the new offences proposed may widen the net too far. If definitions are too widely interpreted there is a potential risk of capturing conduct which should not be criminalised, for example the legitimate provision of aid. Even though material support offences in overseas jurisdictions have not opened the floodgates in terms of convicting those looking to provide legitimate aid, their mere presence on statute books has deterred aid workers and organisations from delivering essential assistance in crisis zones. This risk is mitigated by including the “reasonable excuse” safeguard in the material support offence.

Section 7: Monitoring, evaluation and review

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

The Ministry of Justice will be responsible for administering the legislation. Data will be collected on the number of prosecutions and convictions for the new offences. Police will be responsible for taking prosecutions. Corrections will be responsible for rehabilitation and reintegration programmes during and following completion of a sentence.

7.2 When and how will the new arrangements be reviewed?

The proposals will be reviewed periodically in the context of the general oversight of counter-terrorism legislation, emerging terrorism threats and international obligations with regard to counter-terrorism. We are required to criminalise terrorism financing as part of our FATF obligations and we are periodically assessed on this in FATF reviews.

Appendix One

International Terrorist Travel Offences

	United Kingdom	Canada	Australia	United States	Norway
Offence and Legislation	<p>Counter Terrorism and Border Security Act 2019 s 4 “Entering or remaining in a designated area” – Criminal offence for a UK national or resident to travel to, or remain in, designated areas unless they are exempted or have reasonable excuse.</p> <p>Terrorism Act 2006 s 8 “Attendance at a place used for terrorist training,” if a person knows or believes (including wilful blindness) that instruction or training is being provided there wholly or partly for purposes connected with the commission or preparation of acts of terrorism</p>	<p>Criminal Code (R.S.C., 1985, c. C-46) s 83.181 “Leaving Canada to participate in activity of terrorist group” – with the intent to leave Canada, for the purpose of committing terrorism.</p> <p>Prevention of Terrorist Travel Act 2015 s 4 Cancellation of passport “to prevent the commission of a terrorism offence”</p> <p>It is a crime to leave Canada to participate in activity of a terrorist group, to facilitate terrorist activity or to commit an offence for terrorist group.</p>	<p>Federal Criminal Code Act 1995 Part 5.5, s 119.1 “Incursions into foreign countries with the intention of engaging in hostile activities” if a person enters with the intention of engaging in a hostile activity*, or engages in hostile activity* in a foreign country. See 117.1 Definitions.</p> <p>s 119.2 “Entering, or remaining in, declared areas” if the area is declared by the Foreign Affairs Minister per 119.3, with exceptions under 119.2(3).</p> <p>ss 119.4-119.6 cover preparations, use of property, recruitment in relation to above. NB: Part 5.4 contains the other terrorism offences.</p>	<p>18 U.S. Code, Part I, Chapter 113B Terrorism s 2339A “Providing material support to terrorists” – providing personnel (1 or more individuals who may be or include oneself) or transportation; knowing or intending they are to be used in preparation for, or in carrying out, a terrorist act. s 2339B “Providing material support or resources to designated foreign terrorist organizations” – as above, if the person knows the organisation is a terrorist organisation. s 2339D “Receiving military-type training from a foreign terrorist organization” – as above if the person knows the organisation is a designated terrorist entity.</p>	<p>Norway Penal Code, Part II, Chapter 18 Terrorist acts and terrorism-related acts Section 145. “Participation in military activity in an armed conflict abroad” Any person who intends to participate in armed conflict abroad (unless on behalf of a government force) and initiates a journey the area or commits other acts that facilitate carrying out the offence shall be subject to punishment for attempt.</p>
Penalty	10 years imprisonment, or a fine, or both	Liable to imprisonment for a term of not more than 10 years.	Imprisonment for life (119.1). Imprisonment for 10 years (declared areas).	s 2339A Imprisonment for 15 years or a fine; or life or a fine (if death results). s 2339B Imprisonment for 20 years or a fine; or life or a fine (if death results). s 2339D Imprisonment for 10 years or a fine.	Participation carries a penalty of a term not exceeding 6 years; the travel (as an attempt) “is punishable by a milder penalty than is a completed violation”