# Regulatory Impact Statement: Designation of terrorist entity, options analysis, and recommendations

## Coversheet

| Purpose of Document | |
|---|---|
| Decision sought: | *Amend the Terrorism Suppression Act 2002 so that:*<br>• *a designated entity cannot apply for a revocation under section 34(3)(b) whilst imprisoned*<br>• *expiry of designation is paused for the term of imprisonment and the Prime Minister must periodically review during this time of imprisonment whether the designation is no longer justified.* |
| Advising agencies: | *Department of the Prime Minister and Cabinet*<br>*Ministry of Justice* |
| Proposing Ministers: | *Rt Hon Jacinda Ardern, Prime Minister*<br>*Hon Kiri Allan, Minister of Justice* |
| Date finalised: | |

**Problem Definition**

Individuals designated as terrorists under the Terrorism Suppression Act (TSA) and convicted domestically of terrorist acts[1] or imprisoned for any other reason, may not continue to meet the criteria for ongoing designation under current law even if they are known to have an ongoing intent to participate in terrorist activities by any means available to them.

*The designations scheme of the TSA*

The designation scheme of the TSA provides a framework to prevent terrorist acts by identified terrorist entities (which can be individuals or groups):

1. Under section 22 of the TSA, the Prime Minister may designate a terrorist entity if the Prime Minister believes on reasonable grounds that the entity has carried out, or participated in, a terrorist act.
2. A designation freezes the assets of the terrorist entity and makes it a criminal offence to participate in or support the activities of the designated terrorist entity.

[1] Terrorist acts are, per s 5(1):

- An act intended to cause death, serious bodily injury or other outcomes in s 5(3), and is carried out for a purpose that includes advancing a ideological, political, or religious cause, and is intended to intimidate a population, or to force a government or international organisation to do, or abstain from doing, any act, or
- Acts that are against a specified terrorist contention, or a terrorist act in armed conflict (as defined in s 4(1).

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This includes dealing with the property of the designated terrorist entity or making property or financial services available to the entity.

3. Under section 35 of the TSA, designations expire after three years, unless the Prime Minister renews the designations. To renew the designation, the grounds of section 22 of the TSA must continue to be met.
4. At any time, a designated entity or certain third parties with an interest in the designation, may apply for revocation of their designation based upon fulfilment of at least one of two grounds set out in sections 34(3)(a) and (b) of the TSA.

*The designations scheme of the Terrorism Suppression Act (TSA) does not specifically address the circumstance of a designated person being imprisoned in New Zealand.*

There is ambiguity in how the designations scheme should apply to such persons; in particular, it is not certain what the Prime Minister can take into account when considering an application for revocation of a designation, or when considering renewing a designation. Given the potentially devastating consequences of a terrorist attack, it is crucial that the TSA is clear about what the Prime Minister can take into account when considering the designation of an imprisoned individual, and that the authority the TSA provides to the Prime Minister in this situation is effective in suppressing terrorism in the evolved global terrorism landscape.

The designations scheme must be workable and effective in dealing with imprisoned individuals, as imprisonment alone is insufficient to prevent all terrorist acts. A designation freezes the assets of the terrorist entity and makes it a criminal offence to participate in or support the activities of the designated terrorist entity. This includes dealing with the property of the designated terrorist entity or making property or financial services available to the entity. Imprisonment does not achieve the same outcomes, as it does not impose restrictions on the use of the financial resources of imprisoned individuals outside of the prison environment, nor impose restrictions on others who may support or be supported by them in achieving their goals.

There are multiple instances of imprisoned individuals participating, supporting and even organising criminal activity conducted outside of the prison environment whilst imprisoned, and in some instances the property of the imprisoned individual being used to house the criminal activity.[2] This suggests that similar could be achieved for terrorist activity if a designation expires or is revoked (designation would prevent this occurring since it freezes all assets of the designated individual).

Designation is therefore necessary to prevent an imprisoned individual from planning, supporting or inciting terrorist attacks by others. If a designation was to expire or be revoked, an imprisoned person could use their resources to support terrorism, invest in other forms of terrorist financing, or make their resources available for terrorist purposes.

Section 9(2)(h) [redacted]

<u>Revocation of designation</u>

When presented with an application for revocation of a designation under s 34(3)(b) of the TSA, the Prime Minster must consider whether the entity in question is still involved in any

[2] See for instance Rimutaka prisoner ran drug importing ring from cell | Stuff.co.nz

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way in the "acts of the kind that made, or that would make, the entity eligible for designation"

Section 9(2)(h) [redacted]

Section 9(2)(h) [redacted]

Renewal of designation

A designation under s 22 of the TSA expires 3 years after the date on which it takes effect, unless it is earlier revoked or renewed by the Prime Minister. Per s 35(2), The Prime Minister may order that a designation remain in force for a further 3 years after the making of the order if the Prime Minister is satisfied that there are still reasonable grounds as set out in section 22 for an entity to be designated under that section.

Section 9(2)(h) [redacted].

Section 9(2)(h) [redacted].

**Executive Summary**

The designation scheme of the TSA provides a framework to prevent further terrorist acts. The Act provides that the Prime Minister to designate a terrorist entity if they believe on reasonable grounds that the entity has carried out, or participated in, a terrorist act. Once

designated, the entity is prevented from financing terrorism through restrictions on their use of personal finances and property.

The designations scheme of the TSA does not specifically address the circumstance of a designated individual being imprisoned in New Zealand. This means there is ambiguity in how the designations scheme should apply to such individuals, potentially leading to an imprisoned individuals designation being revoked when they continue to intend to commit terrorist acts.

Given the potentially devastating consequences of a terrorist attack, it is crucial that the TSA is clear about what the Prime Minister can take into account when considering the designation of an imprisoned individual, and that the authority the TSA provides to the Prime Minister in this situation is effective in suppressing terrorism in the evolved global terrorism landscape.

The designations scheme must be workable and effective in dealing with imprisoned individuals, as imprisonment alone is insufficient to prevent all terrorist acts. Imprisonment does not impose the same restrictions on the assets of individuals as designation, meaning that imprisoned individuals could use their resources to support terrorism, invest in other forms of terrorist financing, or make their resources available for terrorist purposes.

When a person is designated and imprisoned, the threshold for an application for revocation of "no longer involved", and the threshold for renewal of the original designations grounds in section 22, are not accurate measures of ongoing threat. In this situation, it is the restrictions placed on a person through designation and imprisonment that cause these thresholds to be met or not, rather than the entity's intention to be involved in terrorism. As a result, an entity may be so restricted by imprisonment and designation that they may have their designation revoked, or do not meet the grounds under section 34 of the TSA for their designation to be kept in place.

There are two ways in which this could occur:

1. Any entity (or interested third party) can make an application for revocation of the designation at any time under section 34(3)(b) of the TSA. Section 9(2)(h) [redacted].
2. Designation as a terrorist entity expires automatically after three years, unless renewed or revoked prior to the expiry date. Renewal requires that the Prime Minister be satisfied that 'there are still reasonable grounds as set out in section 22 for an entity to be designated'.

The individual who carried out the attack on Christchurch masjidain on 15 March 2019 ("**the individual**") has been designated and imprisoned on a life sentence. Their designation is due to expire in August 2023. It is crucial that the TSA is able to deal with this situation before the designation expires, as imprisonment alone does not sufficiently prevent a person from being involved in terrorism.

We therefore propose amending the TSA so that, in the case of a designated individual who is imprisoned:

- they cannot apply for a revocation under section 34(3)(b) while in prison;

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- expiry of the designation is paused while they are in prison. Throughout the term of imprisonment, the Prime Minister must also periodically review whether the designation is no longer justified; and
- in carrying out this review, the Prime Minister may consider any relevant information, must consider any information provided by the designated and imprisoned person (or certain third parties), and may weigh these pieces of information as they consider reasonable.

## Limitations and Constraints on Analysis

There is currently one individual who is imprisoned and designated ("the individual"), whose designation will expire in August 2023, and may not be able to be renewed if these issues are not addressed. This could enable the individual to use their resources to support others to carry out a terrorist attack (for example, by allowing property to be used for terrorist training). Resolving the ambiguities in the TSA before this designation expires was therefore considered crucial, but imposed significant constraints on our analysis.

Meeting this timeline would require Cabinet to agree to any changes to the scheme by September 2022, in order for the TSA to be amended by July 2023. This meant that we only had a limited number of weeks to analyse options and advise Ministers.

As such, we were limited to only analysing options that changed the settings of the designations scheme in relation to an imprisoned and designated individual; we did not have the time to do the minimum necessary analysis on potential changes to the designations scheme as a whole, such as changes to the grounds for designation (and specifically the grounds for renewal and revocation), nor to review the TSA as a whole. We therefore ruled these options as out of scope. Section (9)(2)(f)(iv) [redacted].

The small amount of time also meant that we were not able to conduct public consultation; we were only able to consult with other government agencies.

The extent of data and evidence is minimal due to the timeframe for changes and the rarity of imposing the designation scheme in New Zealand. We have only had one instance of a designated entity being imprisoned to draw evidence from. Consultation with New Zealand Police (Police) and the Minister of Foreign Affairs and Trade (MFAT) confirmed that the designation scheme is robust in freezing any assets and finances held by that terrorist entity, although the functionality to be able to assess any ongoing potential threat is obstructed.

This hinders the designation process by expiring without opportunity to collect information on the individual and reinstate.

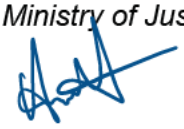
## Responsible Manager(s) (completed by relevant manager)

*Andrew Hill*

*Manager, Terrorism and Law Enforcement Stewardship*

*Criminal Justice*

*Ministry of Justice*



*26 July 2022*

| Quality Assurance (completed by QA panel) | |
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| Reviewing Agency: | Ministry of Justice |
| Panel Assessment & Comment: | *A panel within the Ministry of Justice has reviewed the Regulatory Impact Statement. The panel considers that the information and analysis summarised in the Regulatory Impact Statement partially meets the quality assurance criteria. The paper is generally complete as well as clear and concise. However, while the paper is convincing about the nature of the problem, it is not convincing about whether the options considered clearly address that problem or are the best options available. The inability to reconsider the grounds for a designation, while explicitly identified as a constraint, is a significant limitation on the quality of the analysis. Finally, the paper does not meet the consultation requirements because the proposals in the paper have not been the subject of any substantial consultation with relevant stakeholders.* |

# Section 1: Diagnosing the policy problem

## What is the context behind the policy problem?

The purpose of the Terrorism Suppression Act 2002 (the TSA) is to make provision in New Zealand law for the suppression of terrorism, and to meet our international commitments regarding terrorism, including the implementation of United Nations Security Council sanctions related to counterterrorism and preventing terrorist financing.[3] The TSA was brought into force at a time when terrorism was primarily carried out by groups with a defined organisational hierarchy, and the structure of the current designation scheme in the TSA reflects this. The nature of terrorism has evolved internationally, with threats increasingly coming from radicalised individuals acting alone, and these changes are being reflected in New Zealand.

The TSA designations framework is designed to prevent terrorist acts by identifying those who are involved in terrorist acts, either directly or indirectly (through facilitating, financing, or supporting terrorist acts) and then imposing measures to suppress the capability and activity of terrorist entities. These include criminalising participation in terrorist groups, recruitment for terrorist groups, financing terrorism, dealing with or making available property or financial or related services to terrorist entities, and harbouring or concealing terrorist entities.[4]

The designation scheme of the TSA provides a framework to prevent terrorist acts by identified terrorist entities (which can be individuals or groups):

1. Under section 22 of the TSA, the Prime Minister may designate a terrorist entity if the Prime Minister believes on reasonable grounds that the entity has carried out, or participated in, a terrorist act.[5]
2. A designation freezes the assets of the terrorist entity and makes it a criminal offence to participate in or support the activities of the designated terrorist entity. This includes dealing with the property of the designated terrorist entity or making property or financial services available to the entity.
3. Under section 35 of the TSA, designations expire after three years, unless the Prime Minister renews the designations. To renew the designation, the grounds of section 22 of the TSA must continue to be met.
4. At any time, a designated entity or certain third parties with an interest in the designation, may apply for revocation of their designation based upon fulfilment of at least one of two grounds set out in sections 34(3)(a) and (b) of the TSA.

The designations scheme generally involves limitations on certain rights protected by the Bill of Rights Act 1990 (BORA) but these limitations have been considered justifiable as framework are designed to be preventative (and in that regard protect the rights of New Zealanders to be safe). The options analysis therefore sets out whether each of the options considered is likely to be justifiable under BORA. Section 9(2)(h) [redacted].

[3] For example: United Nations Security Council Resolutions 2178 (2014), 1267 (1999), 1373 (2001), 1333 (2000), 1988 (2011), and 1390 (2002).

[4] Terrorism Suppression Act, ss 13, 12, 8, 9, 10 and 13A respectively. There are additional implications of designation under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, which further restrict the financing and dealing of the property of designated entities.

[5] See 4, above, for the definition of a terrorist act.

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## What is the policy problem or opportunity?

The policy problem is as stated above in the 'Problem definition' section.

*Stakeholder engagement*

We have consulted on these proposals with Department of Corrections, Police, Ministry of Foreign Affairs and Trade (MFAT) and Crown Law. The nature of their interests are to strengthen the implementation of the TSA to prevent and suppress terrorism, including through international partnerships.

We are aware, however, that counter-terrorism efforts globally have often been perceived as concentrated on minority faith communities, the Muslim community in particular. In New Zealand, the Royal Commission found there was a disproportionate focus from public sector agencies involved in the counter-terrorism effort on Islamist extremist terrorism as the presenting threat. The list of entities currently designated by New Zealand includes eleven entities with a faith motivation. All entities designated by the United Nations relate to Da'esh, Al-Qaida, and the Taliban. These policies therefore risk continuing to over-securitise Muslims, by increasing the challenges of designations.

However, there have been substantial moves to broaden the designations regime to include non-Muslim terrorist entities. There are now three white identity-motivated extremist entities designated by New Zealand; the Proud Boys, the Base, and the individual. Muslim communities have voiced their support for these designations, as evidence of the government moving to treat all forms of terrorism equally. Section (9)(2)(f)(iv) [redacted]

## What objectives are sought in relation to the policy problem?

- Ensure that the designations scheme fulfils its purpose in the context of modern terrorism with imprisoned and designated individuals, and
- Ensure that proposed solution is justifiable under the Bill of Rights Act and considers and gives reasonable weight to human rights considerations.

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# Section 2: Deciding upon an option to address the policy problem

## What criteria will be used to compare options to the status quo?

The options have been assessed against the following criteria:

- **Effectiveness:** to what extent does the option achieve the purpose of the designations scheme to identify terrorists and prevent them from carrying out terrorist acts?
- **Uphold democratic and constitutional principles:** is the option consistent with our democratic and constitutional norms; to what extent is the option demonstrably justifiable under the Bill of Rights Act 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?[6] International obligations include those set out in United Nations Security Council Resolutions (UNSCR)

When considering options, we placed additional weight on the extent to which the option effectively achieved the purpose of the designations scheme and protected the rights of the New Zealand public not to be subject to a terrorist attack.

## What scope will options be considered within?

As discussed in the limitations and constraints section, the scope of feasible options has been limited to only considering changing the settings of the existing designations scheme in relation to imprisoned and designated individuals. This meant we did not consider amending section 22 (as this would mean that the threshold for designation and renewal would change for all current and future designations) or reviewing the designations scheme or the TSA as a whole.

No non-regulatory options were considered feasible, as the designated authority is provided for and constrained through primary legislation; secondary legislation therefore would not work to resolve this issue.

We briefly looked at the overall designations schemes of comparable jurisdictions to determine whether their designations scheme specifically address the situation of an imprisoned individual, or whether their designations scheme (whilst not specific to this situation) nonetheless would not prevent a designation remaining in place for an imprisoned and designated individual.

We found that New Zealand's designation scheme is broadly in line with the designation schemes of Australia and Canada. Both provide a discretionary power to a Minister to designate an entity once similar grounds to those set out in section 22 of the TSA have been met. Designations in both countries expire after a period of time prescribed by legislation (three and five years respectively). Both schemes require the original grounds to be met again for the designation to stay in place, however, in practice there is a strong presumption that designations will be renewed in those jurisdictions (unlike New Zealand).

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[6] These include United Nations Security Council Resolutions 1373, 1267, 1333, 1390 and 2178, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination,

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The United Kingdom takes a slightly different approach. The grounds for designation include the case of ‘glorification’ of terrorism, and the relevant Minister must apply a proportionality test once they are satisfied that the grounds for designation have been met. Lastly, designations do not automatically expire, but there are provisions for revocation applications and a related appeals body.

Altering New Zealand’s designation scheme to be more in line with international approaches would, as discussed in the limitations and constraints section, involve more consideration than was possible in the limited time we had for addressing this issue. Section (9)(2)(f)(iv) [redacted]

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## What options are being considered?

We have considered options to address the issue of how renewal and revocation of a designation must be considered when the designated individual is imprisoned, and there is a reasonable belief that the individual would participate in or support a terrorist act if the designated expires or is revoked.

In particular, these options focus on:

- Ensuring that the restrictions imposed on an individual from imprisonment do not provide grounds for revocation of a designations and,
- Allowing, when appropriate, for an act of terrorism to be used to assess the threat of an individual after a designation has been put in place, if the individual is imprisoned.

These options are:

1. **Status quo** – no change.
2. **Designation lasts for the term of imprisonment**: Amend the TSA so that an imprisoned individual can no longer apply for revocation under section 34(3)(b) and the expiry of their designation under section 35 is paused for the length of their imprisonment.
3. **Change the grounds for revocation and renewal:** to instead be a consideration of whether ongoing designation of the imprisoned individual is no longer justified. This requires amending the TSA so that:
   - As under option 2, an imprisoned individual can no longer apply for revocation under section 34(3)(b) and the expiry of their designation under section 35 is paused for the length of their imprisonment.
   - The Prime Minister is required to, at least once every three years, consider whether the designation is no longer justified (and may consider any relevant information in doing so). If this threshold is met, or the Prime Minister fails to review within three years, the designation must be revoked.
   - In this review, the Prime Minister must consider any relevant information provided by the designated individual, alongside any other relevant information.

*Early versions of options 2 and 3*

We had also considered amending the TSA so that in both renewal and revocation the Prime Minister can consider acts before the designation came into effect.

Section 9(2)(h) [redacted] As such, we have not analysed it separately.

When developing option 3, we also considered specifying legislatively the grounds under which a designation continues to be justified for an imprisoned individual, e.g. indicators that the threat of an individual carrying out a terrorist act continues. However, specifying legislatively would have risked inflexibility (e.g. by focusing too closely on current terrorist risk profiles), without capturing other scenarios. It would also have relied on evidence as to the inner thoughts of an individual which are not always possible to provide, or appropriate for government to consider. Having such broad discretionary authority being assessed based on the Prime Minister's belief about an individual's thoughts would be inconsistent with the rule of law.

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## How do the options compare to the status quo/counterfactual?

| *Revocation* | Option 1: status quo | Option 2: Designation lasts for the term of imprisonment, with no opportunity for revocation | Option 3: Change the grounds for revocation and renewal – no longer justified |
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| **Is it effective at meeting the purpose of the TSA?** | 0 | + <br>This would better meet the purpose of the TSA, by ensuring that imprisonment does not lead to a designation being removed where there remains a threat of an individual carrying out further terrorist acts.<br>It would mean that the controls on behaviour imposed as part of imprisonment and designation would not allow a designation to lapse, where the lapsing of the designation would provide opportunities for the individual to commit further terrorist acts, such as using property to financially support others.<br>However, as this option would not provide an opportunity to review whether designation continues to be justified, it would not match as well with the preventative nature of the designations scheme. | ++ <br>As per Option 2, this would ensure that imprisonment does not lead to a designation being removed where there remains a ongoing threat of their carrying out terrorist acts.<br>However, replacing the revocation and renewal processes with a periodic review would better align with the preventative nature of the designations framework, as designations would be removed when they are no longer justified, i.e. when they would no longer prevent terrorist acts. |
| **Does it meet our international commitments and standards?**[7] | 0 | - - <br>This option better meets our international commitments regarding terrorism, by ensuring that individuals designated as terrorists do not have opportunities to commit terrorist acts. The TSA implements New Zealand's obligations, including under the Anti-Terrorism Resolution and the UN Global Counter-Terrorism Strategy.<br>However, this option would also significantly impact our international human rights commitments as revocation and the | - <br>As per Option 2, however this option would combine the existing revocation and renewal processes into a periodic review of whether a designation remains justified. This is more in keeping with our international human rights commitments regarding terrorism, as designations would be regularly reviewed to determine if they continued to be justified. |

[7] This includes international counter-terrorism frameworks, international human rights and humanitarian law.

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| | | requirement for periodic re-authorisation is a key balance against the wider discretionary powers of the Prime Minister under section 22. | |
| **Does it uphold democratic principles?** | 0 | - -<br>This option would impact on the rights of individuals protected under our democratic and constitutional norms, by removing the ability of imprisoned individuals to challenge their designated status on an ongoing basis. This has significant natural justice implications, as it leaves an individual's only recourse to judicially review the original decision.<br>It may also engage other rights protected under s 14, 15, 16 17, 26(1, 2), 27(1, 2) of the Bill of Rights Act 1990, as it may lead to a designation being in place for longer.<br>The rights and freedoms affirmed by the Bill of Rights Act are not absolute. Under section 5 limitations can be justified if they: serve a sufficiently important purpose, are rationally connected to that purpose, impair the right or freedom no more than is reasonably necessary and are proportionate to the importance of the objective.<br>For an imprisoned individual, designation only imposes marginal increases in the limitations of freedoms that are an inevitable consequence of their incarceration,[8] albeit limitations that further compound the infringement on their rights and liberties. Depending on the length of the term of imprisonment, this could have life-long impacts on individuals, meaning the overall imposition is significant.<br>It would leave an individual's only recourse to judicially review the original decision. Given that the original decision cannot take into account subsequent evidence, there would be no opportunity to | -<br>Amending the process potentially engages the same rights as discussed in Option 2. However, continuing to require periodic review of the designation (albeit with a different legal test) significantly changes the impact upon these rights.<br>Whilst the additional limitations imposed through designation are further compounding the significant rights-limiting impact of imprisonment, the periodic review of designations means the impact on rights is significantly less than in Option 2, as it will provide ongoing opportunities to consider whether the designation remains necessary. Unlike in Option 2, these subsequent decisions can also be judicially reviewed.<br>Additionally, requiring the Prime Minister to consider information provided by the designated individual ensures that any evidence indicating there is no longer a threat of further terrorist acts (e.g. evidence of rehabilitation or remorse) is brought to their attention.<br>Overall, we consider this option would be justified, as whilst there are compounding infringements on their rights and liberties, this is justified by the importance of preventing further terrorist attacks, and no more than is necessary to meet the policy intent.<br>We consider this is no more than is necessary to provide an effective solution to this policy problem because there are no less-infringing options available in the time constraints and the additional controls of regular review, which can be subject to judicial review, mitigate the rights infringement. |

[8] The primary impact of designation for an imprisoned individual are restrictions on their ability to use property.

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| | | judicially review or appeal, unless the Prime Minister chooses of their own volition to review the situation.<br>Additionally, the rights of the broader public to safety (including the right not to be deprived of life) need to be considered, as a designation being lifted could allow the individual to commit terrorist acts and increase the threat of a terrorist attack, with potentially dire consequences for those targeted and the broader public.<br>Overall, we consider this option is not a justified infringement, as whilst the objective of preventing further terrorist acts is important, the option significantly impairs the freedoms of individuals, and does so more than is necessary to achieve the policy intent (as discussed in Option 3).<br>We have considered the impact on Māori in the context of Te Tiriti o Waitangi. The history of over-representation of Māori in the criminal justice systems carries the risk that strong measures such as terrorist designations might disproportionately impact Māori in comparison to other population groups. However, given the very small number of individuals who are likely to be designated, such effects are unlikely. Conversely, there is some evidence that Maori may be the targets of certain ideological motivations for terrorism that have an ethnic bias.[9] Under Article 3 of Te Tiriti, Māori have a right to the protections of all other citizens. Designation of terrorist entities that might target Māori will enhance those protections against this type of violence. | |
| **Overall assessment** | 0 | - - | + |

[9] See the Combined Threat Assessment Group's November 2021 report, for instance, which highlighted the threat of white identity-motivated violent extremism as leading to the vast majority of reported online threats, including threats of violence against tangata whenua. 2021-11-23-New-Zealands-Violent-Extremism-Environment.pdf (nzsis.govt.nz)

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

Our preferred option is Option 3.

This option would best meet the purpose of the TSA whilst also being justifiable under BORA. Under this option, imprisonment would not lead to designations being erroneously removed where an individual continues to pose a threat of a terrorist act. Whilst designated they will have constraints on their ability to commit a terrorist act, support a terrorist act, and it would be a criminal offence for others to provide the entity with support to do so. However, the periodic review function provides a check on the Prime Minister's broad discretionary powers and allows an opportunity for rehabilitation efforts of the designated individual to be considered. This option therefore maintains the balance the TSA strives to achieve of effectively preventing terrorism, whilst respecting human rights and the rule of law.

These changes are, as far as possible, consistent with the rest of the Act as designations remain a preventive tool, linked to the threat of a further terrorist act. This is crucial to the changes being justifiable under the New Zealand Bill of Rights Act 1990; the changes infringe upon several rights but are justified on the basis that they go no further than necessary to meet the policy objectives of protecting New Zealand against further terrorist acts.

Section 9(2)(h) [redacted] maintaining the designation of persons for whom there is a reasonable belief that they have engaged in acts of terrorism and a reasonable belief that they continue to pose a risk of inciting or encouraging future terrorist acts is a measure that is rationally connected to the TSA's central purpose of suppressing terrorism. The proposed amendments would provide that where a designated person has been imprisoned following the terrorist act that formed the basis of their original designation, the fact of their imprisonment will justify the continuation of the designation, subject only to three yearly reviews by the Prime Minister. They will lose the right to apply for a revocation of the designation.

If the subject's imprisonment is either for an offence against the TSA or for offending that is related to the terrorist act in such a way that it confirms the subjects involvement in that act, the continuation of the designation remains rationally connected to the purpose of suppressing terrorism, and the limitation of freedoms caused by designation will be justified. In the case of a person who is imprisoned they will only be marginal increases in the limitations of freedoms that are an inevitable consequence of their incarceration. The fact of imprisonment could be entirely coincidental and thereby not relevant to the risk of terrorism, but any risk of the amendment being overbroad is met by the fact that even with the proposed amendments the Prime Minister can still revoke a designation that is not warranted under section 34, even without an application by the subject.

For these reasons the proposed amendment to the TSA will limit freedoms guaranteed by the BORA but those limits appear to be demonstrably justified.

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## Section 3: Delivering an option

### How will the new arrangements be implemented?

The proposed arrangements will be implemented before August 2023 and will come into effect the day after Royal Assent.

Given the small changes proposed, the legislative process should provide sufficient time for interested parties to be aware of the changes as they may affect them. Any affected individuals will be notified.

Police and MFAT will be the agencies that enforce and monitor their respective duties for the designation scheme. There will not be a role for local government.

If Cabinet agrees to these proposals and the Bill is passed, the Minister intends to prepare a Cabinet memo which sets out the process and scope of relevant information that the Prime Minister will consider. This is likely to include drawing on information provided by the Terrorism Designation Working Group and the Department of Corrections. It will include controls to ensure that prejudicial information (e.g. the gender, ethnicity, and religious beliefs of an individual) are not considered.

The Prime Minister will be required to consider any information submitted by the imprisoned individual and will be able to determine the weight to be reasonably given to the information received.

### How will the new arrangements be monitored, evaluated, and reviewed?

The Ministry of Justice and MFAT will be responsible for administering the legislation. There will be an opportunity to review this approach as part of the broader counter-terrorism legislative review that the Ministry of Justice is leading in response to Recommendation 18 of the Report of the RCOI.

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