Regulatory Impact Statement

Foreign Terrorist Fighters – Targeted review of relevant legislation.

Agency Disclosure Statement

1. This regulatory impact statement (RIS) has been prepared by the Department of the Prime Minister and Cabinet (DPMC), in consultation with the New Zealand Security Intelligence Service (NZSIS), the New Zealand Customs Service (Customs), and the Department of Internal Affairs (DIA).

2. Cabinet considered the threat posed by foreign terrorist fighters and other violent extremists shortly after the election and agreed a targeted review of capability, capacity, and legislation be undertaken to ensure they are adequate to respond to the evolving threat and approved terms of reference for the review. The review had to report back to Cabinet within 4 weeks.

3. The focus of the review was on interim measures that could be taken in advance of the comprehensive review of legislative settings that will occur in a broader review that is required to commence before 30 June 2015 under the Intelligence and Security Committee Act 1996. To that end any legislative amendments will be subject to a sunset clause of 1 April 2018.

4. This RIS provides an analysis of the options to update and amend the New Zealand Security Intelligence Service (NZSIS) Act 1969, the Customs and Excise Act 1996, and the Passports Act 1992 which were recommended by the targeted review.

5. The nature of the review meant that changes to intrusive state powers were considered. The terms of reference required the review and any recommendations to be underpinned by respect for human rights, individual privacy and traditions of free speech in New Zealand.

6. The review also reflects recent United Nations Security Council (UNSC) Resolutions on FTFs, for example R 2178, which expressly encourage nations to take active steps to prevent their nationals from travelling to conflict zones. This includes measures to restrict the international movement of citizens suspected of seeking to participate with violent extremist groups, and careful control of national identity documents.

Rajesh Chhana
Director, National Security Policy
Department of the Prime Minister and Cabinet

12 November 2014

Status quo and problem definition

1. UNSC Resolution 2178 (issued on 24 September 2014) defines the term Foreign Terrorist Fighter as "individuals who travel to a State other than their States of residence or nationality for the purpose of perpetration, planning, or preparation in, terrorist acts or the providing of terrorist training, including in connection with armed conflict",

2. The threat posed by foreign terrorist fighters (FTFs) and other violent extremists is evolving rapidly. The most immediate and latest manifestation of the FTF issue is seen with the rise of the Islamic State of Iraq and Levant (ISIL). Fighters involved with ISIL are responsible for widespread use of indiscriminate and extreme acts of violence primarily in the Iraq and Syria region. There are an estimated 15,000 – 20,000 FTFs associated with ISIL of which an estimated 3,000 hold western passports. These fighters threaten to return to their countries of origin radicalised and with military training.

3. ISIL's rapid growth, ambition, resources and methods, as well as their ability to radicalise individuals and facilitate their participation in violent terrorism make it a threat locally, regionally and internationally. New Zealand's domestic threat level was recently increased by officials from VERY LOW to LOW (a terrorist attack is possible but not likely) and continues to be monitored closely.

4. UNSC R 2178 on FTFs outlines a range of measures expected of countries. This included additional obligations to prevent and suppress recruitment, organising, transporting, equipping, and financing of FTF travel and activities. UNSC R 2178 requires countries to have laws that discourage the entry or transit of individuals believed to be travelling for terrorism related purposes, have effective border controls, and controls for the issuance of identity papers or travel documents.

5. The targeted review was undertaken to ensure New Zealand has adequate capacity, capability and legislation to respond to this evolving threat.

Objectives

6. The Terms of Reference for the 'Foreign Terrorist Fighters: Targeted Review Capability, Capacity and Legislation' [CAB Min (14) 32/2] note the purpose of this review is to ensure that New Zealand has the capability, capacity and legislation to counter the evolving domestic threat posed by foreign terrorist fighters and other violent extremists. At a high level, the review considered what measures could add to the safety and security of New Zealand in the short term. The review considered, in particular, the following matters:

   - The statutory powers available to agencies to investigate and monitor suspected and returning foreign terrorist fighters and other violent extremists.

   - The statutory powers available to restrict and disrupt the ability of suspected foreign terrorist fighters to travel to conflict zones.

- Whether specific criminal offences should be introduced to address the behaviour of suspected and returning foreign terrorist fighters, and other violent extremists.

7. The terms of reference also required the review and recommendations to be underpinned by:

   - Respect for human rights, individual privacy and traditions of free speech in New Zealand;
   - Compliance with any international obligations and agreements;
   - The need to ensure public confidence in the work of the security and intelligence agencies.

Options and impact analysis

8. The options are set out below under the three matters for consideration under the terms of reference for the targeted review;

   - Statutory powers to investigate and monitor
   - Statutory powers to restrict and disrupt travel
   - Introduction of specific criminal offences

Statutory powers to investigate and monitor

9. The ability to gather and use information effectively is critical to addressing the risks posed by FTFs and violent extremist activity in New Zealand. To this end, the NZSIS can currently apply for intelligence warrants that allow the interception and seizure of communications, documents and things. Electronic tracking can also be authorised. The authorisation process for domestic intelligence warrants involves joint approval by the Minister in Charge of the NZSIS and the Commissioner of Security Warrants (CSW), with foreign intelligence warrants issued by the Minister in consultation with the Minister of Foreign Affairs.
10. In seeking to address the threats posed by terrorism and FTF activity, particular attention was given to the Search and Surveillance Act 2012 (SSA) and the work of the Law Commission leading to that Act. One of the purposes of the SSA was to modernise law enforcement search and surveillance powers to reflect changing technology whilst respecting human rights. Similar considerations apply to the modernisation of intelligence powers.
11. The review found that there were two areas in which changes could be made to better support the ability to investigate and monitor.

    - visual surveillance powers for the NZSIS; and
    - surveillance in situations of emergency or urgency for the NZSIS.

12. In addition, during the course of the review an issue regarding direct access to Customs information was identified, and an amendment to allow direct access to critical travel information from Customs for counter terrorism investigation purposes was recommend.

Visual surveillance

Status quo and problem

13. The NZSIS cannot generally undertake visual surveillance in a private setting or which would involve trespass onto private property. This means that the NZSIS cannot install a video camera in a private premise for the purpose of observing activities of security concern, such as individuals constructing or training with weapons.

14. Visual surveillance powers were recommended by the Law Commission and made available to law enforcement when their powers were modernised under the Search and Surveillance Act (2012). The Act allows modern technology to be used to conduct efficient and effective investigations while regulating to ensure that activity is consistent with human rights values. The lack of a visual surveillance regime is a significant gap in NZSIS's capability to conduct effective and efficient investigations of suspected and returning FTFs. Such powers for the NZSIS can only be provided through legislative change.

15. Maintaining the status quo will continue to limit the powers relating to visual surveillance. This option is not preferred because, as identified above this impedes NZSIS's ability to investigate security threats and is inconsistent with the powers granted to law enforcement agencies.

Preferred option – provide a visual surveillance power for NZSIS

16. The review recommended the NZSIS Act be amended to enable visual surveillance in a private setting and/or which would involve trespass onto private property (both with and without a visual surveillance device) to be carried out under a warrant. Any visual surveillance activity that can currently be undertaken lawfully without a warrant would continue outside of the warrant regime.

17. Such an amendment would allow the NZSIS to use modern technology to conduct its investigations in the same way as the Police, under a statutory regime. Given the potential intrusiveness of visual surveillance of private property appropriate safeguards and oversight mechanisms need to be set out in statute. The safeguards would include:

    - Satisfying the Minister in Charge and Commissioner of Security Warrants (CSW) that the conditions for issuing a warrant as specified in section 4A(3) of the NZSIS Act apply;

    - Obligations to mitigate the impact of intelligence warrants. This includes obligations to minimise impacts on third parties and destroy irrelevant records.

    - Oversight by the Inspector-General of Intelligence and Security.

Surveillance in situations of emergency or urgency

Status quo and problem

18. The nature of intelligence investigations means that at times there are urgent situations that arise where immediate action may be necessary. For example, information may come to light that a person not previously identified as a risk is about to travel to a conflict zone. The NZSIS does have processes in place to expedite the preparation of

warrant applications and obtain approval for these warrants from the Minister in Charge of the NZSIS, the CSW and, as appropriate, the Minister of Foreign Affairs. However, despite these processes, the logistical reality often means a delay, and in the intervening time vital intelligence may be lost and the person may leave New Zealand.

19. This issue was considered by the Law Commission in relation to law enforcement. A regime for surveillance without a warrant in situations of emergency or urgency was included in SSA. This was included even though Police have almost 24/7 access to warrant issuing officers (such as a Judge or Justices of the Peace) throughout the country.

20. Retaining the status quo would leave open the possibility of losing vital intelligence. There is little more the NZSIS could do to expedite consideration of warrants given the limitations of communicating classified information remotely.

Preferred option – emergency or urgent surveillance activity

21. The review recommended that the NZSIS Act be amended to allow (normally warranted) surveillance activities to be undertaken without a warrant in situations of emergency or urgency for a period of up to 48 hours. This would ensure the NZSIS could react to urgent situations and commence surveillance while a warrant application is prepared for consideration. This approach is consistent with the provisions of the SSA providing for a similar process for law enforcement. However, unlike the SSA which allows a front line officer to exercise the

22. Strong safeguards and oversight mechanisms need to be specified in legislation to ensure that such a power is only used for the purpose for which is intended. To provide appropriate safeguards the follow requirements are proposed:

- Requiring the Director to be satisfied that the threshold for issuing a warrant under section 4A(3) would be met;
- Limiting the duration of the authorisation to a period not exceeding 48 hours (with no ability to extend this period);
- Providing that the authorisation can only be exercised in circumstances where it is impracticable to obtain a warrant in the timeframe required and where the delay is likely to result in a loss of intelligence;
- Applying the current statutory obligations to mitigate the impact of intelligence warrants to urgent authorisations. This includes obligations to minimise impacts on third parties and destroy irrelevant records;
- Requiring the Director to notify the Minister in Charge, and where the warrant would have been a domestic warrant, the CSW, within 12 hours after exercising the authority;
- Enabling the Minister, and where appropriate the CSW, to direct the NZSIS to discontinue activity under the authorisation and destroy any information collected;
- If no application or a warrant is made to continue the activity beyond 48 hours, the Director must provide the Minister in Charge and the CSW, where appropriate, a

report setting out why the authorisation was given, the reason why an application for a warrant was not made and the nature of the information collected.

- The Minister and the CSW where appropriate must determine whether it was appropriate for the authorisation to be given, and if not, refer the matter to the Inspector-General for investigation.
- Requiring the Director to notify the Inspector-General of Intelligence and Security as soon as practicable after exercising the authority; and
- Requiring the NZSIS annual report to include the number of times the authority was exercised during the reporting year, how many were followed by an application for a warrant and how many times the Minister and CSW found that it was no appropriate to give an authorisation.

Direct access to Customs information

Status quo and problem

23. Customs' systems hold data and intelligence relevant to identifying persons of potential interest from a counter-terrorism perspective. This includes, for example, travel history and current travel itineraries from Passenger Name Record data supplied to Customs by airlines, and the results of past interactions with passengers undertaken at the border.
24. Customs have historically provided direct access to this information to other government agencies including NZSIS and Police. Questions have been raised as to whether the Customs and Excise Act permits direct access by these agencies to Customs' passenger movement databases and other holdings. There is need for clarity about the access by appropriate agencies to this key repository of information.
25. Maintaining the status quo is not preferred because a Customs-initiated review of the grounds to provide NZSIS and Police direct access to Customs data and holdings suggests it may not be consistent with the Customs and Excise Act. An alternative is to allow NZSIS and Police to have indirect access to the Customs data. But this would require Customs to allocate at least three additional staff to the task of responding to NZSIS and Police requests. This would be a slow, inefficient and ineffective means to provide NZSIS and Police with information critical to terrorist and FTF investigations. Security considerations may also restrict the utility of this approach.

Preferred Option – Access to Customs information related to terrorism and FTF

26. It is proposed that the Customs and Excise Act 1996 be clarified to enable suitably authorised persons from the Police and NZSIS to have conditional direct access to Customs' passenger movement, craft and trade data, and intelligence holdings. The use of data and intelligence will be limited to the purposes of conducting counter terrorism investigations.
27. This amendment will also be subject to a sunset clause expiring on 1 April 2018. Whether the amendment continues beyond that date will be addressed under the review of the Customs and Excise Act.

Statutory powers to disrupt and restrict travel

28. UNSC Resolution 2178 urges states to use their control of identity documents in order to restrict movement of suspected FTF's and to generally prevent their onward travel if they are already outside their home country.

29. The measures New Zealand currently has at its disposal are not as advanced as those of our international counterparts. In the UK, the government can currently require the surrender of travel documents, and are now considering proposals to allow seizure of passports at the border. This echoes new measures taken in Canada to cancel passports, and Australia, where the Counter Terrorism Amendment (Foreign Fighters) Bill (2014) contains powers to suspend or cancel travel documents, without notification, if it is suspected the person may leave Australia to engage in conduct that may prejudice the security of Australia, or a foreign country.

30. The Passports Act 1992 currently provides that the Minister of Internal Affairs may cancel or refuse to issue a passport or other travel documents if the Minister believes on reasonable grounds that a person is a danger to the security of New Zealand (see sections 4A, 8A, 20A, 25A, 27B and 27E of the Passports Act). A decision to cancel or refuse to issue a travel document prevents a person from applying for a new travel document for a period of 12 months.

31. The review considered whether any amendments to the Passports Act 1992 would better enable a response to the threats posed by FTFs. The review concluded that amendments to the Passports Act should be made to address the following matters:

    - Period of cancellation or refusal to issue travel documents
    - Temporary suspension of travel documents
    - Deferring provision of notice of travel document cancellation
    - Court processes
    - Limiting liability
    - Clarification of some provisions

32. Each of the proposals are discussed below. All of the proposals to enhance powers to restrict and disrupt travel will be subject to a sunset clause that expires on 1 April 2018.

Period of cancellation and refusal to issue travel documents

Status quo and problem

33. There are currently provisions to cancel an individual's travel document on the basis that that they are a danger to security for a period of 12 months. Currently, there are a small number of cases where the circumstances and intentions of an individual suspected of engaging in FTF or terrorist activity are assessed to have not changed after the 12 months period of cancellation ends. A further application to refuse to issue a passport or travel document is required. This involves a new application repeating all the information in the original case.

34. In this small number of cases there is often information at the time of the original cancellation which shows the person's intentions and circumstances are unlikely to

change after 12 months. The circumstances could include the fact that the conflict the person is seeking to join as an FTF is assessed as likely to continue for more than 12 months, and the information available demonstrates that the person has a firm intention to join that conflict.

35. Retaining the status quo of a 12 month period for travel document cancellation of is not preferred because it does not provide a basis to address the small number of high risk cases where an individual's circumstances and intentions are unlikely to change in 12 months and a longer time frame restricting their travel can be justified.

Preferred option – Increase the maximum period of travel document cancellation

36. The review recommended that the Passports Act be amended to allow the Minister of Internal Affairs to set a cancellation period of up to three years. This would be in circumstances where the Minister is satisfied that, in the absence of a significant change in the person's circumstances, the person would continue to pose a danger to New Zealand or any other country such that a passport or other travel document would not be issued. It is not expected that the ability to impose a longer term would be used very often.

37. This option is preferred because it recognises the long term nature of the FTF issue and a period longer than 12 months would send a stronger signal to individuals seeking to travel for FTF as well as other prospective FTFs. The information provided to the Minister to consider an extended period would include risk assessments and intelligence to demonstrate the ongoing risk of the person in question.

38. Cancelling an individual's travel documents for a period of up to three years is a significant imposition. As a safeguard it is recommended that the person be given an opportunity to make a submission as to the length of the period, and there should also be periodic reviews once every 12 months by the Minister and that the person be invited to provide written submissions. Further the current rights of appeal and judicial review would be available to the individual.

Temporary suspension of travel documents

Status quo and problem

39. There are cases where information comes to light that a person may intend to travel to engage in or facilitate a terrorist act. The information may indicate that travel is imminent and be sufficient for the NZSIS to recommend the cancellation of the passport or other travel document. The preparation of the full package of information to enable a Ministerial decision, however, takes time and in some cases the person could leave New Zealand.

40. Given the speed at which travel can be booked and organised and the nature of intelligence collection that means there would be value in having a process to suspend a passport or other travel document for a short period to enable an urgent submission of a full briefing in support of passport or travel document cancellation to the Minster of Internal Affairs.

41. Retaining the status quo is not the preferred option because current processes do not allow sufficient responsiveness when information indicates an individual may intend to travel imminently for the purposes of terrorism or FTF related activities.

Preferred Option – Temporary suspension of travel document

42. It is proposed that the Passports Act be amended so that a person's passport or travel document may be suspended by the Minister for a period of no more than 10 working days. This period would provide enough time to assess the individual's intention more thoroughly via an urgent investigation and for the submission of a full briefing to the Minister.

43. It is noted that when a person's passport or travel document is suspended in this manner, there would not be a requirement to notify them of the suspension. This is because providing notice could alert them that they are under investigation and jeopardise an intelligence investigation or place intelligence operators, and potentially the public, at risk.

44. The safeguards would include the Minister being satisfied on reasonable grounds that the person is likely to travel imminently and that a briefing recommending longer-term cancellation on national security grounds was being prepared. The suspension would be limited to a maximum of 10 working days. It is possible that in some situations the preparation of the briefing recommending cancellation may reveal that the case does not meet the test in the Passports Act. In that case the Minister would be notified immediately and the period of suspension will lapse.

45. Individuals that become aware of the temporary suspension of their travel documents are would be entitled to seek a judicial review as is the case for individuals affected by decisions on the cancellation and refusal to issue of travel documents.

Deferring provision of notice of travel document cancellation

Status quo and problem.

46. The Passports Act currently requires notice be given to a person when their passport or travel document has been cancelled. In relation to FTFs, in some cases providing notice to a person may raise operational risks. For example, giving notice could reveal the existence of an intelligence investigation and potentially jeopardise the investigation, put the security and safety of the intelligence operators involved in the case at risk, and in some cases give rise to a threat to public safety.

47. Maintaining this position is not preferred because of the risks in some cases.

Preferred Option – Deferred notice of cancellation

48. It is proposed that the Passports Act be amended to allow deferment of notice when a Passport or travel document is cancelled to allow sufficient time for steps to be taken to mitigate any risks. The amendment would allow the Minister to defer notification for up to 30 days if the Minister is satisfied that providing notice immediately would put an investigation at risk or endanger the safety of any person.

49. The delay in notification in the case of a cancellation based upon national security related grounds is considered to be justified in that the seriousness of the situation, and the risks around their reaction to the cancellation, outweigh their right to be informed immediately.

Court processes

50. The Passports Act currently contains special provisions that apply to proceedings where national security is involved (for example cancellation of passports on grounds of national security). The provisions provide a regime for the management and protection of classified security information that may be required to be presented in appeals and other applications under the Act.

51. However, in addition to an appeal against the Minister's decision a person could also seek a judicial review or other legal challenge of the same decision under the Passports Act. The special provisions do not apply to those proceedings consequently any classified security information could be precluded from being presented. The status quo in this regard is not preferred because classified security information will be managed in different ways depending on the form of proceedings.

52. A related issue is that in some circumstances it may become necessary to withdraw classified security information from a proceeding. In that case the information cannot be relied on by the Crown but it needs to be protected from further disclosure. Section 37 of the Immigration Act 2009 provides a model for a regime for allow this to occur. The status quo is not preferred as it does not provide the full range of options to manage classified security information.

Preferred Option - Extending closed court processes including ability to withdraw information

53. It is proposed that the Passports Act be amended so that the special provisions (ss 29AA – 29AC), relating to the protection of classified security information, also apply to judicial reviews and any other litigation to ensure a consistent approach to classified information, and that a provision modelled on section 37 of the Immigration Act be inserted.

Limiting Crown liability

54. The cancellation or suspension of a travel document may cause an individual loss or damages due to the prevention of their travel, as well as other individuals or commercial entities associated with the travel. There is currently no Crown protection from liability for such losses or damages incurred when the Crown is taking action within its statutory authority to prevent an individual travelling to participate in possible terrorist activity.

55. It is proposed that the Crown should be exempted from liability for losses and damages caused through the prevention of travel, except where those actions are grossly negligent or shown to be in bad faith. Such a provision would be similar to the protection from liability in section 280E of the Customs and Excise Act 1996.

Clarifications

56. In carrying out the review there were two matters of clarification were identified in order to better respond to UNSC Resolution 2178. The first is to make it explicit that cancellation or refusal to issue a travel document can be made on the grounds that a person is a danger to the national security of any other country, in addition to New Zealand, because the person intends to engage in or facilitate a terrorist act or the proliferation of weapons of mass destruction. The second is to make it explicit that a

person's travel document may be cancelled when they are outside New Zealand. A person will still be able to travel back to New Zealand in that case because they must be issued with an emergency travel document for that purpose.

Introduction of specific criminal offences

57. The general criminal law and terrorism offences address the most serious forms of offending, with offences carrying maximum penalties of life imprisonment. In other jurisdictions, for example the UK and Australia, there are a greater range of offences currently in their criminal law and they are proposing to introduce new offences. Given the continuing evolution of the FTF phenomenon it raises a question as to whether new criminal offences that more explicitly captured the behaviour associated with FTFs, and provide a graduated scale of offending and penalty levels.

58. The review considered the offence regimes in other jurisdiction and concluded that there were a number of complexities associated with the development of criminal offences, and associated procedural provisions to manage classified security information in court proceedings. The focus of the targeted review was on addressing short term immediate gaps. The preferred option is to therefore not introduce any new offences in the short term, but consideration could be given to further work on this matter as part of a broader review.

Consultation

59. DPMC led the review in consultation with NZSIS, DIA, Customs, NZDF, Justice, Immigration NZ, Police, Crown Law, MBIE (INZ), MFAT, and GCSB.

Conclusions and recommendations

60. The targeted review was focused on identifying measures that could add to the safety and security of New Zealand in the short term. As discussed above, the review identified a small number of targeted amendments to the NZSIS Act 1969, Customs and Excise Act 1996 and Passports Act 1992 that would serve that purpose. The amendments are also consistent with the requirements of UNSC Resolution 2178.

Implementation plan

61. The relevant operational agencies (principally NZSIS, DIA, Customs and Police) were consulted during the review and development of the legislation to ensure that the changes can be successfully implemented. All agencies are prepared to implement the changes given the urgency associated with the change.

Monitoring, evaluation and review

62. All of the legislative amendments are subject to a sunset clause of 1 April 2018. The changes to the NZSIS Act, and the issue of FTFs and other violent extremists generally, will be considered by the review of the intelligence and security agencies that must commence before 30 June 2015 under the Intelligence and Security Committee Act. The changes to the Customs and Excise Act and Passports Act will be assessed in future planned reviews of those Acts.