



# People Against Prisons Aotearoa

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## Submission to the Justice Committee on the Counter-Terrorism Legislation Bill 2021

People Against Prisons Aotearoa (PAPA) is a prison abolitionist organisation working for a fairer, safer, and more just Aotearoa. Established in 2015, PAPA advocates for prisoners to ensure their human rights are met. We also push for changes to the New Zealand criminal justice system to create more just outcomes.

PAPA makes this submission to oppose the Counter-Terrorism Legislation Bill (2021) in its entirety.

This submission has been written on behalf of *PAPA* by Tom Pearce, Holly Willson, Bre-Anne McDonald, and Ti Lamusse.

PAPA wishes for its members to appear before the committee to present this submission.

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## Introduction

The Counter-Terrorism Legislation Bill makes a number of changes to existing legislation that significantly expand the power of the Crown to surveil, detain and prosecute people for suspected terrorist activity. Discussion documents for the Bill indicate that the amendments will be made for two primary reasons:

- To ensure New Zealand's Counter-Terrorism Legislation stays current and effective in responding to the evolving nature of terrorism and provides for prevention and early intervention, particularly in light of the Christchurch Mosque attacks;
- To meet New Zealand's obligations to the international community by aligning our counter-terrorism laws more closely with resolutions passed by the United Nations Security Council.

People Against Prisons Aotearoa (PAPA) opposes the Counter-Terrorism Legislation Bill (2021) in its entirety. The amendments made by this Bill come at a significant cost to the political freedoms of all New Zealanders. They pose threats to individuals engaging in legitimate political activism and make it more likely that Māori, Pasifika and Muslim communities will be subject to undue scrutiny and suspicion from law enforcement.

More broadly, the criminal justice approach that the legislation takes to those who might be planning to engage in terrorist activity does not offer an effective route to rehabilitation. It may instead further radicalise the targeted individuals as well as provide them the opportunity to radicalise others.

Despite these costs, the amendments do not offer improved security of safety to New Zealanders.

Of particular, but not exclusive, concern in the proposed Bill are:

- amendments to the Terrorism Suppression Act (2002) section 4(1) to include a very broad definition of "material support";
- amendments to sections 5(2)(a), 5(2)(b) that redefine a terrorist act to use the wording of "fear in a population" instead of "terror in a civilian population" and "coerce" instead of "unduly compel";
- the insertion of section 5A which broadens the definition of a terrorist act to include planning or preparation, or a "credible threat" to carry out a terrorist act;
- the creation of a new offence of planning for or preparing to carry out a terrorist act in section 6B;
- the replacement of section 10(1) with an expanded definition of providing material support for terrorist entities;
- the creation of a new offence of providing weapons or combat training in section 13AA;
- the Crown's proposed reduction in the evidential standard to prove a terrorist act in section 13AA(1)(b)(ii) (i.e. prosecutors for any purported terrorist act will not need to prove any specific target, location, date, or time);

- the creation in section 13F of a new offence of travelling to, from or via New Zealand for various purposes outlined in other sections of the Terrorism Suppression Act (2002); and
- amendments to the Search and Surveillance Act (2012) sections 15, 16, 17 and 48 to grant Police warrantless search and surveillance powers relating to the new offence created in section 6B of the Terrorism Suppression Act (2002).

## Part One: Lack of Oversight and Due Process

Taken together, the additions and amendments proposed under the Counter-Terrorism Legislation Bill (2021) significantly expand the scope and ability of the New Zealand Police and intelligence agencies to act without appropriate oversight or due process.

We highlight as a particular concern the Police's significantly expanded ability to carry out searches or surveillance. This can be done entirely at the discretion of any individual officer with no accountability or oversight, as the new legislation provides new contexts for warrantless search and surveillance. The creation of a new offence for planning and preparation, as well as the broadened definition of a terrorist act, leaves a very low bar for this discretion should an officer wish to circumvent appropriate processes for carrying out search or surveillance.

One effect of this is likely to be increased inequality in outcomes throughout the justice system. Māori are already four times more likely than Pākehā to be subject to warrantless searches.<sup>1</sup> The changes in the Counter-Terrorism Legislation Bill will further increase this disparity, driving higher numbers of Māori into the criminal justice system.

Additionally, the Bill would make it significantly more likely that legitimate activist or advocacy groups will be subject to undue surveillance by the police as a result of these changes. These groups often engage in planning and preparation for protest, and the expanded definitions of "fear" instead of "terror" and "coerce", instead of "unduly compel", provide a very broad scope for police to use their discretion to target these groups.

Increased police scrutiny and surveillance, along with expanded powers of warrantless searches, will lead to disproportionate detection rates of unrelated crimes in populations that are already the subject of police bias. This comes with consequently disproportionately high arrests and prosecutions in these populations.<sup>2</sup>

The proposed legislation contains some attempts to mitigate the effects of these expanded definitions and powers. However, the mitigations aim only to prevent individuals being convicted and do nothing to prevent the misuse of police discretion to unfairly or unjustly target individuals.

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<sup>1</sup> Chris McKeen, Felipe Rodrigues, and Eugene Bingham, 'Unwarranted: The Little-Known, but Widely-Used Police Tactic', accessed 23 June 2021, <https://interactives.stuff.co.nz/2020/12/unwarranted-police-searches-racial-bias-justice/>.

<sup>2</sup> Policy, Strategy and Research Group, 'Over-Representation of Māori in the Criminal Justice System: An Exploratory Report' (Wellington: Department of Corrections, 2007).

Some overseas jurisdictions, notably the UK<sup>3</sup> and Australia,<sup>4</sup> have created an independent monitor to report on how counter-terrorism laws perform in practice. PAPA strongly urges the justice committee to consider establishing a similar role in New Zealand, with access to non-public classified information, for the specific monitoring of Police and SIS use of powers under the Act.

## Part Two: Harms to Freedom

In addition to the threat of undue search and surveillance, the Counter-Terrorism Legislation Bill (2021) places other limits on the freedoms of New Zealanders. This is a consequence of the broader, more generalised language, used in new and amended definitions, and the new and expanded criminal offences created by the Bill.

For example, activist groups organising to resist racist violence commonly provide training to ensure the safety of their members. These could easily be misinterpreted for the kind of combat training that would become an offence under the Bill. Other kinds of legitimate activism could similarly be misconstrued within the expanded and generalised scope of the Bill. As Aotearoa currently celebrates the history and activism of the Polynesian Panthers,<sup>5</sup> this Bill defines terrorism widely enough to have categorised their activism and community self-defence as terrorist activities or training.

More broadly, new elements of counter-terrorism laws introduced by the Bill may discourage people from donating or travelling to support or aid civilian populations in war zones. We acknowledge that the proposed legislation includes effective safeguards to prevent prosecution for these efforts when they are done in good faith. However, the creation of and publicity given to new offences is likely to inhibit the willingness of New Zealanders to contribute to international humanitarian efforts. Successful or attempted prosecutions for these new offences will reinforce this hesitancy.

For all the limitations created by the proposed legislation, there is no corresponding benefit for New Zealanders in the form of increased safety or security. Many of the powers granted to the Crown and the Police by the Bill are available through existing legislation. One example is the new offence of weapons training for terrorist purposes: this is already illegal under the Arms Act.

Other changes may not be redundant but have similarly had their necessity questioned by commentators. Anjum Rahman of the Islamic Women's Council has pointed out that, among other things, the broadened definitions in the Bill would not have been necessary to prevent the

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<sup>3</sup> See: <https://www.gov.uk/government/organisations/independent-reviewer-of-terrorism-legislation>.

<sup>4</sup> See: <https://www.inslm.gov.au/>.

<sup>5</sup> Brad Flahive and Alex Liu, 'Polynesian Panthers: Radical Group Celebrates 50 Years of Activism in Aotearoa | Stuff.Co.Nz', *Stuff*, 16 June 2021, <https://www.stuff.co.nz/national/125445408/polynesian-panthers-radical-group-celebrates-50-years-of-activism-in-aotearoa>.

Christchurch Mosque attacks.<sup>6</sup> This is despite the Christchurch attacks being one of the primary drivers behind the changes.

### Part Three: Entrenching Institutional Bias

The designation of a terrorist entity or act is not a politically neutral process. For example, the United Nations Security Council's consolidated list of sanctioned entities<sup>7</sup> does not include any white supremacist organisations, despite a sharp recent rise internationally in terrorist acts carried out by white supremacist or neo-Nazi entities.<sup>8</sup> Indeed some countries, notably Canada, the United Kingdom and Australia, have begun including neo-Nazi and white supremacist organisations on their lists of terrorist entities.<sup>9</sup>

Despite this, the Terrorism Suppression Act (2002) only uses the United Nations list. To date, the Christchurch Mosque attacker is the only white supremacist to be designated as a terrorist entity in New Zealand. More broadly, the United Nations list is dominated by Muslim groups and groups seen as a threat to Western-aligned or allied governments. Therefore, using the United Nations' list is a form of institutional and legal bias against Muslim New Zealanders. The result of the bias in this list, combined with the proposed new offences, is that Muslim New Zealanders are more likely than any other group in New Zealand to fall afoul of counter-terrorism laws. In particular, the proposed offences involving travel or providing material support are of concern here, as they may bring undue suspicion to any Muslims in New Zealand with social ties to countries that have large numbers of UN-designated terrorist entities.

The broadened definition of "terrorist acts" is also of concern in this regard as it greatly empowers the incumbent Prime Minister to designate groups as terrorist entities. Commentators have already noted that many overseas liberation groups resisting repressive regimes could be designated terrorist entities, regardless of the validity of their struggle.<sup>10</sup> Indeed, the Duterte administration in the Philippines regularly cites New Zealand's designation of the Communist Party of the Philippines and its armed wing, the New People's Army, as a terrorist entity.<sup>11</sup> This designation is used to justify state violence and extra-judicial killings in

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<sup>6</sup> Anjum Rahman, 'Widening the Definition of Terrorism Won't Help the Communities Most at Risk | The Spinoff', *The Spinoff*, accessed 23 June 2021, <https://thespinoff.co.nz/society/04-05-2021/widening-the-definition-of-terrorism-wont-help-the-communities-most-at-risk/>.

<sup>7</sup> See:

<https://scsanctions.un.org/fop/fop?xml=htdocs/resources/xml/en/consolidated.xml&xslt=htdocs/resources/xsl/en/consolidated.xsl>.

<sup>8</sup> 'Data Visualization - Violent White Supremacy', *Jigsaw*, accessed 23 June 2021, <https://jigsaw.google.com/the-current/white-supremacy/data-visualization/>.

<sup>9</sup> Hayley Evans, 'All You Need to Know About the U.K. Proscribing the Neo-Nazi Group Atomwaffen Division', *Lawfare*, 17 May 2021, <https://www.lawfareblog.com/all-you-need-know-about-uk-proscribing-neo-nazi-group-atomwaffen-division>.

<sup>10</sup> Cameron Walker, 'A Decade after Urewera the Terrorism Suppression Act Remains a Threat to Civil Liberties', *The Spinoff*, 18 October 2017, <https://thespinoff.co.nz/society/18-10-2017/a-decade-after-urewera-the-terrorism-suppression-act-remains-a-threat-to-civil-liberties/>.

<sup>11</sup> Walker, 'Encouraging Abuse: Foreign Terrorist Designations of the CPP/NPA', *New Mandala*, 17 September 2020, <https://www.newmandala.org/encouraging-abuse-foreign-terrorist-designations-of-the-cpp-npa/>.

the Philippines. PAPA expresses serious concerns regarding the necessity of expanding legislation that grants these powers of designation.

## Part Four: Issues with the Criminal Justice Approach

One stated focus of the Bill is ensuring that law enforcement in New Zealand is able to prevent or intervene early in terrorist activity. While prevention or early intervention is of clear importance, the criminal justice approach in the Bill is inappropriate at best and more than likely counter-productive.

The trauma and stigma of being imprisoned remains with people for a long time. It damages job prospects, relationships and standing in the community. In short, it harms people's ability to reintegrate into society, and makes people more likely to reoffend.<sup>12</sup> Meanwhile, time in prison can encourage "maladaptive" behaviours, such as seeing violence as a solution to interpersonal issues.<sup>13</sup>

At the same time, it is well understood that a sense of grievance or injustice is one of the primary drivers in the process of radicalisation that leads to terrorist acts.<sup>14</sup> This sense of grievance or injustice is likely to be created or significantly amplified by using a criminalising approach with an individual who has yet to commit any violent acts.

Furthermore, research suggests that imprisonment, both through the design and physical environment of prisons as well as the situational, historical and other contextual factors of imprisoned people, provides an ideal ground for the spread of radicalisation.<sup>15</sup> This calls into question both the safety and effectiveness of imprisonment as a punishment for individuals identified as being at risk of carrying out a terrorist act.

## Part Five: Recommendations

PAPA calls on the Justice Committee to reject the Counter-Terrorism Legislation Bill (2021) as a whole. The amendments and new offences pose significant threats to the freedoms of all New Zealanders, as well as legislatively entrenching further bias and discrimination against already marginalised groups. The effectiveness of the proposed changes are questionable at best, and there is little indication that they will bring about greater safety for the people of New Zealand.

Failing a wholesale rejection of the proposed bill, we recommend the Government:

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<sup>12</sup> Annaliese Johnston, 'Beyond the Prison Gate: Reoffending and Reintegration in Aotearoa New Zealand' (Auckland: Salvation Army Social Policy & Parliamentary Unit, 2016).

<sup>13</sup> National Health Committee, 'Health in Justice: Kia Piki Te Ora, Kia Tika! – Improving the Health of Prisoners and Their Families and Whānau: He Whakapiki i Te Ora o Ngā Mauhere Me ō Rātou Whānau' (Wellington: Ministry of Health, 2010).

<sup>14</sup> Jayde Walker, 'An Introduction to Countering Violent Extremism', *Practice: The New Zealand Corrections Journal* 5, no. 2 (2017): 47–54.

<sup>15</sup> Joshua Sinai, 'Developing a Model of Prison Radicalisation', in *Prisons, Terrorism and Extremism: Critical Issues in Management, Radicalisation and Reform*, ed. Andrew Silke, Political Violence (London: Routledge, 2014), 35–46.

- Establishes an independent oversight body, with access to non-public classified information, for the specific purpose of monitoring of police and SIS use of powers under the Act;
- Retains the wording of “terror” and “unduly compel” in the definition of terrorism;
- Removes sections that criminalise planning and preparation;
- Removes sections that criminalise provision of weapons or combat training;
- Leaves the existing evidential standards to prove a terrorist act intact;
- Removes amendments that expand warrantless search and surveillance powers.