

## **Balancing Problems and Remedies: Anti-Terrorism Legislation and Rights**

We are all determined to fight terrorism and to do our utmost to banish it from the face of the earth. But the force we use to fight it should always be proportional and focused on the actual terrorists. We cannot and must not fight them by using their own methods – by inflicting indiscriminate violence and terror on innocent civilians, including children.<sup>1</sup>

Although United Nations Secretary-General Kofi Annan made this comment in 1999, it has proven prescient in light of legislative response to recent terrorist attacks. While it is directed towards the physical countering of terrorism, his comment is equally applicable to the challenge of striking a balance between civil rights and counter-terrorism initiatives. More recently, he expressed similar fears before the United Nations Commission for Human Rights, saying: “This is a time when your mission to promote and protect human rights in the widest sense is more important than ever, your responsibility to act more urgent.”<sup>2</sup>

The Secretary-General’s concern was recently re-emphasized by Amnesty International:<sup>3</sup>

The current framework of international law and multilateral action is undergoing the most sustained attack since its establishment half a century ago. International human rights and humanitarian law is being directly challenged as ineffective in responding to the security issues of the present and future. In the name of the “war on terror” governments are eroding human rights principles, standards and values.

This note is an analysis of the corpus of New Zealand’s anti-terrorism legislation in light of the significant challenges to human rights and humanitarian law that anti-terrorism legislation poses.

### **Anti-Terrorism Legislation Introduced Before September 11 2001**

#### *International Terrorism (Emergency Powers) Act 1987*

In 1987 the Public Safety Conservation Act 1932 was repealed and the International Terrorism (Emergency Powers) Act 1987 was enacted. It allowed for three Cabinet Ministers to declare an “international terrorist emergency”

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1 Kofi Anan (Address to the UN General Assembly, New York, 18 November 1999).

2 Kofi Anan (Statement to the Commission on Human Rights, New York, 24 April 2003).

3 Amnesty International, “Building an International Human Rights Agenda,” <<http://www.amnestyusa.org/annualreport/>> (at 24 July 2004).

where injury to persons, animals, or certain kinds of property was threatened or used in order to coerce, deter, or intimidate a Government, person, or group of persons.<sup>4</sup> Following a declaration, a wide range of powers was conferred upon the Police and Armed Forces for an initial period of seven days.<sup>5</sup>

### *New Zealand Security Intelligence Service Act 1969*

Until 1969 the New Zealand Security and Intelligence Service (“the SIS”) operated entirely outside statutory regulation. In 1969 legislation was enacted to formally establish the agency and charge it with collection and evaluation of intelligence on national security matters. The Minister in charge of the SIS was empowered to “issue a warrant for the interception or seizure of communications” relating to matters of national security.<sup>6</sup> In 1999 the House of Representatives (“the House”) enacted two amendments to the SIS legislation. The first overruled *Choudry v Attorney General*,<sup>7</sup> conferring explicit authorization to enter property in the course of an interception warrant, aiming to “provide greater certainty over when SIS powers may be exercised and to provide safeguards against potential abuse”.<sup>8</sup> The second amendment established the Commissioner of Security Warrants, who was intended to operate as a “substantial check on the power of the Executive”, in recognition that “the Prime Minister alone should no longer exercise the great power of issuing an interception warrant directed against New Zealand citizens or permanent residents”.<sup>9</sup>

### *Government Communications Security Act 2003*

This Act was enacted to address concern over the unregulated operations of the Government Communications Security Bureau (“the GCSB”) and to bring it under a similar statutory scheme as its sister organisation, the SIS.<sup>10</sup> Section 14 states that the GCSB is not to intercept the communications of New Zealand citizens or residents, although section 17 states that the GCSB can seek a warrant authorizing the interception of communications that could not otherwise be acquired by it, provided that it can be established that the communications are

4 International Terrorism (Emergency Powers) Act 1987, ss 2, 6.

5 Ibid ss 6-7.

6 Smith, “New Zealand’s Anti-Terrorism Campaign” <<http://www.fulbright.org.nz/voices/axford/doco/smithj.pdf>> (at 12 September 2004), citing (at n 61) “Report of the New Zealand Security Intelligence Service to the House of Representatives for the year ended 30 June 2002” [2002] AJHR G-35, 1, 23.

7 [1999] 2 NZLR 582 (CA).

8 John Smith, “New Zealand’s Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities” <<http://www.fulbright.org.nz/voices/axford/docs/smithj.pdf>> (at 10 July 2004) 2.

9 Rt Hon Sir Geoffrey Palmer “Security and Intelligence Services – Needs and Safeguards” in Domestic and External Security Secretariat, “Securing Our Nation’s Safety: How New Zealand Manages Its Security,” <<http://www.dpmc.govt.nz/dpmc/publications/securingoursafety/needs.html>> (at 1 July 2004) 9.

10 Intelligence and Security Committee, “Government Security Communications Bill Committee Report”, <<http://www.brookers.co.nz>> (at 24 July 2004).

sent to or received from an overseas country (amongst other criteria).<sup>11</sup> There is tension between section 17 and the section 4 definitions under “foreign intelligence,” which serves to define foreign organizations and persons who are liable to have their communications intercepted.<sup>12</sup> The Intelligence and Security Committee (“the Committee” in this section) recognized this by modifying the definition of “foreign person” to make it clear that a person who is not a New Zealand citizen or resident, or is acting as an agent or representative of such an individual, is deemed a “foreign person”.<sup>13</sup> However, the Committee did not consider it necessary to address the problem of New Zealanders’ communications being intercepted where they are involved in “foreign organisations”.<sup>14</sup>

### *Immigration Amendment Act 1999*

The Immigration Amendment Act 1999 introduced a regime “to protect sensitive security information that is relevant to immigration matters”.<sup>15</sup> The amendments provided for the issuance of security risk certificates where there is credible classified security information pertaining to a non-citizen who is subject to the Act.<sup>16</sup> The Minister of Immigration can decide to remove a person based on a certificate, although the certificate can be subject to review by the Inspector-General of Intelligence and Security.<sup>17</sup> The procedures introduced under these Amendments were those applied to Algerian refugee Ahmed Zaoui.

## **Anti-Terrorism Legislation After September 11 2001**

### *Origins in International Law*

Most of New Zealand’s anti-terrorism legislation arises from international agreements. Terrorism is a significant challenge to peace and security, and given that a primary purpose of the United Nations (“UN”) is the preservation of international peace and security, it is not surprising that there is a large body of UN conventions on terrorism.<sup>18</sup> Despite their multiplicity, the Conventions were found wanting in the aftermath of September 11. These factors go towards explaining the strident tone of UN Security Council Resolutions 1368 and 1373.<sup>19</sup>

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11 Government Communications Security Act 2003, ss 14, 17.

12 Ibid ss 17, 4.

13 Intelligence and Security Committee, supra note 10.

14 Ibid.

15 Immigration Amendment Act 1999, Preamble.

16 Immigration Act 1987, s 114D.

17 Immigration Act 1987, ss 114G, 114K, 114F.

18 Charter of the United Nations, preamble and arts 1, 24. For UN Conventions on terrorism see Alex Conte, “A Clash of Wills: Counter-Terrorism and Human Rights” (2003) 20 NZ Univ L Rev 338 n 7. [“Counter-Terrorism and Human Rights”]

19 Security Council, UN Res S/RES/1368 (12 September 2001); Security Council, UN Res S/RES/1373 (28 September 2001)

Resolution 1368 condemned the attacks, deeming them a threat to international peace and security, and called on all states to cooperate to bring those responsible to justice. Resolution 1373 continued the tone of the earlier Resolution and emphasized the seriousness of its intention by establishing a Security Council Committee to monitor implementation of the Resolution, and set a 90-day deadline for its implementation.<sup>20</sup> A number of requirements were set out by the resolutions. First, the funding of terrorists was to be suppressed, and their assets frozen.<sup>21</sup> States were required to: refrain from supporting terrorist acts; prevent the commissioning, planning, financing, and committing of terrorist acts; bring to justice those suspected of commissioning, planning, financing, and committing terrorist acts; assist other states in the investigation of terrorism; and monitor the movement of terrorists.<sup>22</sup> Individual states were to decide how to meet these requirements.<sup>23</sup>

### *Terrorism Suppression Act 2002*

The Terrorism (Bombings and Financing) Bill was introduced to the House on 17 April 2001 to implement the 1997 International Convention for the Suppression of Terrorist Bombings and the 1999 International Convention for the Suppression of the Financing of Terrorism, by criminalizing terrorism involving explosives and its financing.<sup>24</sup> No submissions were received on the Bill and it was due to be reported back to the House by the Foreign Affairs, Defence and Trade Committee (“the Committee” in this section) on 13 September 2001.<sup>25</sup>

Following the September 11 terrorist attacks, the Committee decided not to report the Bill back to Parliament in its original form.<sup>26</sup> It lay dormant until after Resolution 1373 emerged, and because of the time limit in the Resolution, the Committee decided to invite submissions from selected groups rather than allowing public submissions.<sup>27</sup> Following strong criticism, the Committee was forced to reverse this decision despite the additional time required.<sup>28</sup> On November 8 the Committee released its interim report.<sup>29</sup> The name of the Bill was changed to the Terrorism Suppression Bill in order to reflect its expanded functions.<sup>30</sup> Its criminal provisions forbade the providing or collecting of funds intended or suspected to be used for a terrorist act.<sup>31</sup> Dealing with the property

20 Palmer, “Counter Terrorism Law” [2002] NZLJ 456.

21 *Ibid.*

22 *Ibid.*

23 *Ibid.*

24 Terrorism Suppression Act 2002, ss 3-4.

25 Smith, *supra* note 8, 15.

26 *Ibid* 18-19.

27 *Ibid* 22-23.

28 *Ibid* 23.

29 Foreign Affairs, Defence and Trade Committee, “Terrorism (Bombings and Financing) Bill Report”, <<http://www.clerk.parliament.govt.nz/content/91/fd121int.pdf>> (at 6 July 2004) 1, 5. [“Terrorism Bill Report”]

30 *Ibid* 6.

31 Terrorism Suppression Bill, cl 9.

of terrorists or their supporters attracted criminal sanctions where the person dealing knew or was reckless as to whether the property was owned or controlled directly or indirectly by terrorists or their supporters.<sup>32</sup> The Bill also criminalized the knowing or reckless provision of property, finance or services to terrorists.<sup>33</sup> Criminal penalties were established for participation in a terrorist group or the recruiting of others to a terrorist group.<sup>34</sup> Financial institutions were required to notify Police if they knew or suspected that they possessed or controlled property of a terrorist.<sup>35</sup> There was a defence for persons acting with “lawful justification or reasonable excuse”.<sup>36</sup>

The Bill authorized the Prime Minister to designate a group as a “terrorist” or an “associated terrorist” where there was “good cause to suspect” that the entity had “carried out”, “participated in”, “facilitated”, or was “owned” or “controlled” by a designated terrorist.<sup>37</sup> These interim designations would expire in 30 days if not revoked.<sup>38</sup> Final designations were applied on a similar basis and lasted for five years unless extended by an order of the High Court or revoked by the Prime Minister, the Inspector-General of Intelligence and Security (“the Inspector-General”), or the High Court.<sup>39</sup> In making a designation, the Bill authorized the consideration of any relevant information including classified information or information provided by the UN.<sup>40</sup>

For those designated, judicial review was only permitted after the person had applied first to the Prime Minister for revocation, and then to the Inspector-General for review. Only then was appeal to the Court of Appeal permitted on points of law; judicial review involving classified information was not permitted.<sup>41</sup> There was no allowance for the Government to assume control of the assets of designated persons, although the forfeiture of property in New Zealand was provided for in the Bill.<sup>42</sup>

The Committee indicated its willingness to consider written submissions received by 30 November 2001, to hear oral submissions in January and February 2002, with the aim of reporting back to Parliament in March.<sup>43</sup> In the meantime, the Committee decided to enact regulations under the United Nations Act 1946 to meet the requirements of Resolution 1373. The Regulations closely mirrored some of the provisions in the Terrorism Suppression Bill.<sup>44</sup> It prohibited persons from directly or indirectly collecting or making available funds, or providing

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32 Ibid cl 10A.

33 Ibid cl 10B.

34 Ibid cls 10D-10E.

35 Ibid cl 17I.

36 Ibid cls 9, 10A-10B.

37 Ibid cl 17A.

38 Ibid cl 17B.

39 Ibid cl 17C, D, V.

40 Ibid cl 17E, K.

41 Ibid cl 17M, N, P, T, U, O.

42 Ibid cl 17Y.

43 Terrorism Bill Report, *supra* note 29, 5.

44 Smith, *supra* note 8, 25.

property or services to terrorists, or dealing with property owned or controlled by persons or groups designated by the UN as terrorists.<sup>45</sup> New Zealanders were also prohibited from participating in or recruiting for designated groups.<sup>46</sup>

The Committee received 143 submissions on the Bill.<sup>47</sup> Following deliberations, Committee members recommended a range of amendments. The most significant and the one involving the most difficulty was to define what constituted a terrorist act.<sup>48</sup> The definition that the Committee arrived at was set out in sections 4 and 5, defining “terrorism” from the basis of existing international covenants and legislation.<sup>49</sup> A terrorist act is an act that is carried out to advance an ideological, political or religious cause with the intention to induce terror in a population or to compel a government to take actions.<sup>50</sup> This must be done with the aim of causing one of the following: death or serious injury; serious risk to the health and safety of a population; serious disruption to infrastructure if likely to endanger human life; destruction or damage to property of high value or high importance; major economic loss if likely to result in an outcome that endangers safety; or major environmental damage if likely to result in an outcome that endangers safety.<sup>51</sup> There is an exception under section 4(1) where the act occurs in an armed conflict, although it will still be a “terrorist act” if: it is intended to compel a government or a quasi-governmental organisation to do or not do something; and it is intended to harm a civilian; and it is not excluded by article 3 of the Financing Convention.

Section 5(5) provides that by themselves, protests, advocacy, dissent, strikes, or lockouts do not constitute terrorist action. A provision under section (1)(b) provides that an action in breach of any of the terrorism conventions to which New Zealand is a party is also a terrorist act for the purposes of the Act. Section 25 provides that terrorism is deemed to have occurred even if there is only “a credible threat to carry out the act, whether it is actually carried out or not”.

Consequently, it can be said that for a person or organization to be designated as a terrorist, three elements must be present: an intention to cause significant harm to humans, or introduce an economically destructive disease; done in order to advance a political cause; with the intention to induce terror, or unduly compel a government to take or refrain from taking action.<sup>52</sup> Meeting the definition of being a terrorist does not constitute a criminal act, but it does constitute one of the core elements on which the Act’s penalties are applicable. The definition was shown to operate robustly when the Act was used on 1 November 2002 to designate an Indonesian group as terrorists following the Bali nightclub bombing.<sup>53</sup>

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45 United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001, rr 6, 7, 9.

46 *Ibid*, rr 11-12.

47 Smith, *supra* note 8, 26.

48 *Ibid* 27.

49 Palmer, *supra* note 20, 457.

50 *Ibid* 457.

51 *Ibid*.

52 *Ibid* 457.

53 *Ibid* 458.

Provisions relating to the financing of terrorism were changed: reckless financing was not to be criminalized.<sup>54</sup> The collection of funds for the purpose of advocating democratic government or the protection of human rights was lawful.<sup>55</sup> The standard required to satisfy the criminal offence of participating in terrorist groups was increased, requiring that participation had to enhance the ability of terrorists to commit terrorist acts.<sup>56</sup>

The Committee also proposed substantial revisions to the terrorist designation process. There was a knowledge requirement added before a person could be designated as a terrorist or an associate.<sup>57</sup> Final designations were to expire after only three years.<sup>58</sup> Judicial review would be permitted and third parties with a sufficiently close connection to the designated person would also be eligible to bring judicial review.<sup>59</sup> Classified information would be presented in Court and a non-classified summary would be provided to the designated person.<sup>60</sup> The Government would be able to assert custody and control of frozen property.<sup>61</sup> Provision was made for most of the statute to be reviewed in 2004 or 2005.<sup>62</sup>

The Bill's second reading occurred in October 2002 and the amendments were accepted.<sup>63</sup> Most provisions of the Terrorism Suppression Act took effect on 18 October 2002.<sup>64</sup>

### *Counter-Terrorism Bill*

Throughout the debate on the Terrorism Suppression Act, the Government refused to rule out additional anti-terrorism measures in new legislation. The Counter-Terrorism Bill was introduced two months after the approval of the Terrorism Suppression Act. While the earlier statute was concerned with the civil and criminal aspects of designating terrorists and their associates, the Counter-Terrorism Bill focussed on elaborating the criminal penalties and investigative powers applicable to terrorist and non-terrorist acts.<sup>65</sup>

The Bill proposed to implement the remainder of Resolution 1373 not addressed by the earlier Act, as well as implementing the Convention on the Physical Protection of Nuclear Material and on the Marking of Plastic Explosives for the Purpose of Detection.<sup>66</sup>

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54 Smith, *supra* note 8, 27.

55 Terrorism Bill Report, *supra* note 29, 6.

56 *Ibid* 18.

57 Smith, *supra* note 8, 28; Terrorism Bill Report, *supra* note 29, 8-9.

58 Smith, *supra* note 8, 28.

59 *Ibid*.

60 Terrorism Bill Report, *supra* note 29, 7-18

61 Smith, *supra* note 8, 28.

62 Terrorism Suppression Act 2002, s 70.

63 Smith, *supra* note 8, 29.

64 Terrorism Suppression Act, s 2.

65 Smith, *supra* note 8, 31.

66 Foreign Affairs, Defence and Trade Committee, "Counter-Terrorism Bill Report", <<http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/27bar2.pdf>> (at 10 July 2004) 2 ["Counter-Terrorism Bill Report"].

New criminal offences were introduced including: infecting animals with disease; contamination of food, crops, water, and other human foodstuffs; threatening or falsely communicating information about harm to persons or property; harbouring or concealing terrorists; and dealing with radioactive material. Terrorism was to be made an aggravating factor for the purpose of sentencing.<sup>67</sup> Measures were also included that were intended to assist the Police in their investigation of terrorist incidents and other serious crimes. Information obtained through an interception warrant under the Crimes Act 1961 or the Misuse of Drugs Amendment Act 1978 could be used in a prosecution under either Act.<sup>68</sup> Tracking devices could be used for investigation of all criminal offences, and a regime was established for the Police to apply for a warrant to use a tracking device, except in circumstances where it was impractical to obtain a warrant in advance.<sup>69</sup> Under threat of criminal penalty, Police would be able to compel people to provide information where it was “reasonable or necessary” to allow access to a computer on premises covered by the warrant.<sup>70</sup>

The Bill proposed to expand the powers set out in the Terrorism Suppression Act concerning the freezing of designated terrorists’ property. It would permit Customs to detain property or cash crossing the New Zealand border if it had “good cause to suspect” that the property was directly or indirectly owned or controlled by designated terrorists.<sup>71</sup> This property could be held for up to 14 days, although Customs had to ensure that those whose property was detained had “sufficient cash to provide themselves or any dependents with the necessities of life”.<sup>72</sup>

Over several months, the Foreign Affairs, Defence and Trade Committee (“the Committee” in this section) received 25 submissions. The Committee considered whether the provisions of the Bill ought to be specific to terrorism or whether they should be of general application.<sup>73</sup> It concluded that terrorism ought to be addressed through the existing criminal law where possible, and amendments required to combat terrorism should be applicable for the investigation and persecution of other forms of offending, despite this being outside the scope of the Bill.<sup>74</sup>

On 8 August 2003 the Committee referred the Bill back to the House with amendments. The crime of infecting animals was altered to require both a “serious risk to the health and safety of an animal population, and major damage to the national economy”.<sup>75</sup> The offence of threatening to do harm to persons or property was made more specific, by requiring that there be a threat to engage in action

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67 Ibid 2.

68 Ibid 2.

69 Smith, *supra* note 8, 32.

70 Counter-Terrorism Bill Report, *supra* note 66, 3.

71 Ibid 3-4.

72 Ibid 4.

73 Ibid 2.

74 Smith, *supra* note 8, 33.

75 Counter-Terrorism Bill Report, *supra* note 66, 6.



likely to cause risk to the health or safety of a person, major harm to property, or major economic loss, and to require proof that the threat was made with an intention to cause a significant disruption of infrastructure, civil administration, or civilian or commercial activities.<sup>76</sup> Interception warrants were to be made available for terrorism-related offences.<sup>77</sup> In relation to the right given to the Police to compel people to aid them to gain access to computers, a distinction was made between compulsion and requiring people to provide assistance to enable the Police to access a computer containing potentially incriminating information.<sup>78</sup> Only Police and Customs officers would be authorized to use tracking devices, rather than any “authorized public officer.”<sup>79</sup>

The second reading of the Bill occurred on 14 October 2003. The House agreed to divide the Bill into six parts in accordance with the existing Acts to be amended. The Crimes Amendment Bill, the Terrorism Suppression Amendment Bill, the Misuse of Drugs Amendment Bill (No 2), the New Zealand Security Intelligence Service Amendment Bill, the Sentencing Amendment Bill, and the Summary Proceedings Amendment Bill thereby came into existence.<sup>80</sup> When they passed into law, the Government indicated that its legislative programme on terrorism was completed, although this has not been borne out by subsequent events.<sup>81</sup>

### *Border Security Bill*

The Border Security Bill amends the Customs and Excise Act 1996 and the Immigration Act 1987, with the aim of enhancing border security against terrorism and trans-national criminal organisations.<sup>82</sup> The amendments are said to be based on international conventions, although these are not identified.<sup>83</sup> Under the amendments to the Customs and Excise Act 1996, international carriers are required to provide advance information on passengers and crew to the Customs Service and the Immigration Service, to facilitate identification of dangerous passengers.<sup>84</sup> The regime around exports is modified to create standards for the security of supplies and to allow low-risk exports to be certified with a Customs declaration.<sup>85</sup> Amendments also strengthen controls against persons entering New Zealand at remote locations to deter evasion of border security.<sup>86</sup>

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76 Ibid 7.

77 Ibid 7-8.

78 Ibid 10.

79 Ibid 11.

80 Smith, *supra* note 8, 35.

81 Smith, *supra* note 8, 35.

82 “Border Security Bill Explanatory Note” <<http://www.knowledge-basket.co.nz/gpprint/docs/bills/20030531.txt>> (at 10 July 2004).

83 Ibid.

84 Border Security Bill, cl 6.

85 Ibid cls 4A – 4E.

86 Ibid cls 4(3), 18.

The Immigration Act 1987 is modified to require commercial carriers to use an electronic system to allow the Immigration Service to perform documentation checks on passengers and crew with reference to its records and those of overseas agencies.<sup>87</sup> The Immigration Service will be able to prevent persons from entering New Zealand or attach conditions to their visit.<sup>88</sup> International carriers will be required to give the Immigration Service access to records they hold of visitor's travel arrangements including who the person may travel with or be associated with.<sup>89</sup> This information will be retained only if action by the Immigration Service is based on it.<sup>90</sup>

The Government Administration Committee ("the Committee" in this section) noted concerns expressed by the Human Rights Commission ("the Commission") on the intrusive powers given to the Customs Service.<sup>91</sup> The Commission expressed concern over intrusions into private business premises by officials under clauses 19A to 19H, allowing for voluntary licensing of an area to be used for storing export goods.<sup>92</sup> The Committee concluded that no changes were necessary owing to the voluntary element.<sup>93</sup> The Commission also expressed concern over clause 7, which provides that once a craft has received clearance from Customs it must immediately depart from New Zealand.<sup>94</sup> It was argued that there should be a reasonable timeframe in which craft can leave, to which the Committee responded by stating that anything other than immediate departure risks allowing stowaways and illegal cargo to enter the craft.<sup>95</sup> In taking this approach, the Committee seems to have missed the point that the inclusion of a reasonable timeframe provision in the amendment could still be sufficiently short to minimize the risk of illegal trafficking while also minimising potential uncertainty.

### *Maritime Security Bill*

The basis for the Maritime Security Bill lies in the treaty obligations of the International Convention for the Safety of Life at Sea 1974 and the International Code for the Security of Ships and of Port Facilities, to which New Zealand became a signatory in December 2002.<sup>96</sup> The stated purpose of the Bill is to ensure that New Zealand remains in step with international maritime practice

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87 Ibid cl 30.

88 Ibid cls 29, 31.

89 Ibid cl 29.

90 Ibid cl 29.

91 Government Administration Committee, "Border Security Bill Report", <<http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/53bar2.pdf>>, (at 13 July 2004) 4.

92 Ibid.

93 Ibid.

94 Ibid 7.

95 Ibid.

96 Maritime Security Bill, cls 3, 5; "Maritime Security Bill Explanatory Note" <<http://www.knowledge-basket.co.nz/gpprint/docs/bills/20030801.txt>> (at 10 July 2004).

and with international efforts to combat terrorism.<sup>97</sup> The Bill applies to ports, offshore installations, and international passenger and cargo ships. The Bill sets out what is required to comply with the international treaties, assigns roles and responsibilities to the Government, merchant shipping and port authorities, and creates offences and penalties for non-compliance<sup>98</sup>. Port authorities must comply with specified security requirements.<sup>99</sup> Shipping companies and ship's Masters must comply with specified security requirements, and must provide information when entering New Zealand ports.<sup>100</sup> Ships may be detained, and neighbouring States may be informed of a ship's security status.<sup>101</sup>

### *Mercenary Activities (Prevention) Bill*

This Bill implements the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries 1989.<sup>102</sup> While terrorism is never explicitly mentioned in the Bill, it takes little imagination to see how it applies to individuals participating in terrorist organisations. The Convention is problematic: the definition of "mercenary" is regarded as being too narrow, owing to the difficulty of reaching international consensus on what constitutes mercenary activities.<sup>103</sup>

The Bill will create new offences to criminalize mercenary activities, which are not presently punishable under New Zealand law, and will also aid in the prevention of New Zealand being used as a recruiting source.<sup>104</sup> It will allow for extraterritorial jurisdiction where New Zealanders commit mercenary acts overseas, and will allow the Government to prosecute unextradited foreigners suspected of committing mercenary activities outside New Zealand.<sup>105</sup> Provisions also expand New Zealand's capacity to cooperate with other countries in the investigation and prosecution of mercenary activities.<sup>106</sup>

The Mercenary Activities (Prevention) Bill has attracted debate between political parties represented on the Foreign Affairs, Defence and Trade Committee ("the Committee" in this section). The Committee's Report addressed amendments recommended by the United Future, Labour, Progressive Coalition, and Green parties. National and New Zealand First presented a separate minority Report in opposition.<sup>107</sup> The minority Report argued that the definition of "mercenary"

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97 Ibid cls 3, 5.

98 Ibid cl 4.

99 Ibid cls 37-41.

100 Ibid cls 19-26, 28-29, 31, 36.

101 Ibid cls 27, 30, 32, 34.

102 Mercenary Activities (Prevention) Bill cls 3.4.

103 Foreign Affairs, Defence and Trade Committee. "Mercenary Activities (Prevention) Bill Report", <<http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/83bar2.pdf>> (at 13 July 2004) 2-3 ["Mercenary Bill Report"]

104 Mercenary Activities (Prevention) Bill cls 7-12.

105 Ibid cls 13-23.

106 Ibid cls 13-23.

107 Mercenary Bill Report, *supra* 104, 6.

lacked clarity and certainty, that the signatories to the Convention did not include New Zealand's traditional allies, and that the Convention is irrelevant to domestic circumstances.<sup>108</sup>

The other parties argued that the definition of "mercenary" ought to be amended to make the payment of money one of the mercenary's purposes rather than the primary purpose, due to the difficulty in proving the criminal standard of what a person's primary purpose is in committing an act.<sup>109</sup> It was further argued that the definition should be amended to clarify that making private gain was one of several purposes that a mercenary has for taking part in hostilities.<sup>110</sup> It was recommended that activities like peacekeeping, acting as a bodyguard and de-mining do not fall within the definition.<sup>111</sup> Consideration was given to how private military companies should be treated, but the Committee concluded the Bill was concerned with bringing New Zealand into compliance with the Convention, which did not address such organisations; they concluded that there was no need to address those organisations under the Bill.<sup>112</sup>

### *Identity (Citizenship and Travel Documents) Bill*

This Bill is based on minimizing risks to national security arising from international terrorism and people smuggling.<sup>113</sup> The Citizenship Act 1977 is amended to increase the period of residency before citizenship is granted from three years to a minimum of 75% of the five years preceding the application.<sup>114</sup> Time spent in New Zealand on temporary permits no longer counts towards this requirement. The Minister of Immigration can no longer grant citizenship to applicants with serious criminal convictions, and in the case of applicants with less serious convictions, conditions may be attached to the grant of citizenship.<sup>115</sup> Access is permitted to immigration information for assessing citizenship applications.<sup>116</sup>

The Passports Act 1992 is amended to reduce the maximum validity of new passports from 10 years to 5 years.<sup>117</sup> Provision is made for the disclosure of travel documentation for the purpose of aiding border security and verifying the identity of travel document holders.<sup>118</sup> The Minister of Internal Affairs is given the power to cancel travel documentation on national security grounds, and Courts

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108 Ibid.

109 Ibid 3.

110 Ibid 2.

111 Ibid 4.

112 Ibid 5.

113 "Identity (Citizenship and Travel Documents) Explanatory Note" <<http://www.knowledge-basket.co.nz/gpprint/docs/bills/20041481.txt>> (at 11 July 2004).

114 Identity (Citizenship and Travel Documents) Bill, cl 8.

115 Ibid cl 8.

116 Ibid cl 14.

117 Ibid cl 24.

118 Ibid cl 45.

are given the power to forbid the issuing of a passport when sentencing a person for terrorism-related offences.<sup>119</sup>

### *Telecommunications (Interception Capability) Act 2004*

This Act places an obligation on telecommunications service providers to have an interception facility for use under an interception warrant.<sup>120</sup> While the Act states that it does not extend the interception powers of the Police, the SIS or the GCSB<sup>121</sup>, it does have the effect of enhancing the range of formats in which information is available to be intercepted. Consequently, it is arguable that the Police, the SIS and the GCSB have had their powers enhanced. There are privacy protections included: it must be possible for providers to exclude communications that are not authorized for interception; interceptions must be made with lawful authorization; and service providers are not required to decrypt encrypted communications unless they provided the encryption facility.<sup>122</sup>

## **The Problematic Nature of Anti-Terrorism Legislation**

### *Defining “terrorism”*

Defining “terrorism” is simple only in the most superficial sense. There are 109 definitions of “terrorism” and no single definition has gained international acceptance.<sup>123</sup> Another aspect of the inherent difficulty is the problem that “one person’s terrorist is another person’s freedom fighter”.<sup>124</sup> Resolution 1373 does not attempt to provide a definition despite its heavy reliance on the concept of terrorism; the de facto definition is that created by the body of earlier UN Conventions on terrorism.<sup>125</sup>

### *What problem is anti-terror legislation attempting to address?*

There are at least two problems that anti-terror legislation could address: the causes of terrorism, and the suppression of terrorism.<sup>126</sup> In respect to the first, this could be where a person seeks to oppose a legitimate government through terrorism.<sup>127</sup> A fundamental role of a government is to maintain order and produce

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119 Ibid cl 23.

120 Telecommunications (Interception Capability) Bill cls 5, 7-8.

121 Law and Order Committee, “Telecommunications (Interception Capability) Bill Report,” 1 <<http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/15bar2.pdf>> (at 13 July 2004).

122 Telecommunications (Interception Capability) Act, s 6.

123 Palmer, *supra* note 20, 457.

124 Ibid 457.

125 Ibid 457.

126 Ibid 458.

127 Ibid 458.

stable behavioural patterns among members of the society it governs; the use of terror to disrupt this stability challenges this fundamental role.<sup>128</sup> In respect to the second, this could be where a government suppresses attempts at reforming some basic social division.<sup>129</sup> Where peaceful avenues of action have been exhausted, those on the losing side of the division can resort to force to make their point.<sup>130</sup> The difficulty is how to decide which of these is the correct problem to address in a given circumstance.<sup>131</sup>

Taking the Terrorism Suppression Act 2002 as an example, section 5 includes within the definition of “terrorism” an act intended to induce terror in a civilian population. The principle of civilian inviolability is an established principle of the law of war, and of international criminal law. However, causing terror in civilians has not inhibited recognition by international law of successful revolutionaries, and war between nations certainly causes terror in their populations.<sup>132</sup> Consideration can also be given to an alternative to the definition in section 5, which is an intention to “unduly compel or force” a government to do something or not do something, which could be much more common depending on how “unduly” is to be interpreted.<sup>133</sup>

What arises from this line of reasoning is a return to the problem of defining “terrorism.” We know it when we see it, but in stepping back from the first-person perspective and taking the objective viewpoint that the law requires, our certainty over the unjustness of the deemed terrorist’s actions is thrown into disarray.

### *The powers of the executive*

Anti-terrorism legislation, particularly the Counter-Terrorism Bill and the Terrorism Suppression Act, contain expansions of the powers of the Government’s executive branch. Sporadically, criticism has been sufficient to cause the modification of bills to achieve a more equitable result. Submissions on the Terrorism Suppression Bill were critical of the lack of judicial safeguards for those designated as terrorists, and consequently the rights of judicial review in the resultant Act are quite expansive, extending to include some persons associated with the designated persons.<sup>134</sup> Similarly, criticism that the Director of the SIS could have a Minister designate a person or group as a terrorist, without divulging the classified basis for doing so, gave rise to changes specifically aimed at preventing this.<sup>135</sup>

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128 Ibid 458.

129 Ibid 458.

130 Ibid 458.

131 Ibid 458.

132 Ibid 458.

133 Ibid 458.

134 “Canterbury Council of Civil Liberties Responds to Terrorism Bill” <<http://www.arena.org.nz/tercivlb.htm>> (at 11 July 2004).

135 “New Document Reveals What the Government Really Wanted in the Terrorism Suppression Bill” <<http://www.arena.org.nz/gateurmj.htm>> (at 11 July 2004).

Through the Committee hearing process, civil liberties groups and concerned individuals have been able to effect change in the substance, if not the general tone of anti-terror legislation. It could be argued that the Committee members might have identified the same deficiencies as the outside commentators did, but there are several viable refutations of this argument, neither of which places our legislature in a positive light.

First, it should be noted that it had originally been intended that the Terrorism Suppression Bill would not be subject to the conventional public submissions process, but rather to a curtailed process where only submitters invited by the Committee would be permitted.<sup>136</sup> The fact that the Committee was willing to prevent the public from expressing its opinions on a Bill that granted powers to the executive to curtail the civil rights of members of the public is disturbing. Secondly, it should also be noted that, particularly in relation to the Terrorism Suppression Act and the Counter-Terrorism Bill, the Committees responsible for them suffered a near-complete collapse of partisan political representation, where not only the governing coalition, but also the opposition parties, provided no constructive criticism on the Bills.<sup>137</sup> More recently, this situation has improved with all parties seemingly willing to represent varying points of view.<sup>138</sup> The only consistent criticism of the anti-terrorism legislation has come from the Greens who, for the trouble of upholding the democratic legislative process, were labelled the “loony-fringe, loony-tune Green fraternity”, and their arguments called, “daft, stupid, ill-informed,” “unmitigated rubbish,” and “deeply disturbing and offensive”.<sup>139</sup>

## Privacy

The Counter-Terrorism Bill has been criticized for containing provisions on search warrants and tracking devices that do not relate specifically to terrorists. The first criticism relates to evidence of private communications: clause 8 sought to overturn *R v Aranui*, to ensure that evidence of private conversation lawfully intercepted will be admissible if it discloses offending.<sup>140</sup> This is unnecessary, given that the Court of Appeal has overruled *Aranui* in *R v Bower*.<sup>141</sup> It fails to capture evidence relating to terrorism-related offences because lawfully intercepted private communications disclosing such evidence would remain inadmissible under clause 8.<sup>142</sup>

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136 Smith, *supra* note 8, 22-23.

137 See particularly: Foreign Affairs, Defence and Trade Committee, “Counter-Terrorism Bill Report” *supra* note 67; “Terrorism (Bombings and Financing) Bill Report” *supra* note 29.

138 See particularly Foreign Affairs, Defence and Trade Committee, “Mercenary Activities (Prevention) Bill Report” *supra* note 108.

139 (8 October 2002) 603 NZPD 1079 (Ron Mark), 1093 (Hon Phil Goff), 1088 (Simon Power).

140 (1999) 16 CRNZ 304 (CA).

141 [2002] 1 NZLR 105 (CA).

142 Conte, “Tracking Devices, Search Warrants and Self-Incrimination” [2003] NZLJ 235 [“Tracking Devices”].

The Bill also extended the scope of the use of tracking devices under clause 34, beyond both the present position and the ambit of terrorist offences.<sup>143</sup> In submissions, the Privacy Commissioner supported the scheme of the proposal because it would create legislative controls on surveillance technology.<sup>144</sup> However, the Commissioner also proposed an offence provision for unauthorized use of such technology.<sup>145</sup>

The final and most problematic reform relates to the introduction of a new police power when exercising a search warrant. Clause 33 amends the Summary Proceedings Act to enable a constable to require information, such as passwords, to be given in order to access computer data.<sup>146</sup> This conflicts with domestic human rights legislation and international human rights obligations, as well as the common law privilege against self-incrimination and the right to be presumed innocent.<sup>147</sup> The privilege against self-incrimination is normally exercisable through the right to silence, and the right to the presumption of innocence is exercised through the burden on the Crown through all steps of the criminal process.<sup>148</sup> The combined effect is that a person cannot be compelled to assist in the investigation of an offence by him or her by being required to make a statement.<sup>149</sup> Arguably, the rights of legal representation and silence contained in the New Zealand Bill of Rights Act (“the NZBORA”) could also be threatened, although the picture is muddled by the effect of sections 5 and 6 of the NZBORA.<sup>150</sup> Amendments were proposed on this point, and the Committee’s response was to back away from requiring people to give information tending to incriminate them, but still require them to provide help in accessing a computer containing data that could be incriminating.<sup>151</sup>

Similar privacy invasions can be found in other anti-terrorism legislation. The Border Security Bill is significantly invasive, involving the collection of data on passengers’ and crews’ travel plans and information on those with whom they are associated, although most of this data is not retained.<sup>152</sup> The Telecommunications (Interception Capability) Bill simplifies access by various state agencies to voice and data communications.

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143 Ibid.

144 Ibid.

145 Ibid.

146 Ibid 236.

147 Ibid 236.

148 Ibid 236.

149 Ibid 236.

150 Ibid 236.

151 Counter-Terrorism Bill Report, *supra* note 66.

152 Border Security Bill cl 29.



### *Can conflicts with the New Zealand Bill of Rights Act 1990 be justified?*

Whether limitations on rights can be justified depends on the application of section 5 of the NZBORA, which provides that “the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

A two-part test is set out in *Attorney General v Radio New Zealand*, which can be used to determine whether anti-terrorism legislation is “demonstrably justified in a free and democratic society.”<sup>153</sup> First, it is sometimes acceptable to tolerate a limited abrogation of rights to achieve important objectives in legislation, for example, that concerning the reduction of road fatalities, or legislation relating to military justice. Terrorism impacts on the most basic of human rights – the right to life – and furthermore, curtails human rights by creating a climate of fear.<sup>154</sup> Taking the same approach to anti-terrorism legislation, as has been adopted with respect to previously accepted legislative limitations on rights, only seems logical.<sup>155</sup> The second limb of the test requires that the means used to implement the objective is proportional to the objective. This is where it becomes more difficult to find a broad justification for restrictions on human rights caused by anti-terrorism legislation.<sup>156</sup>

### *Anti-terror legislation and international law*

Article 4 of the International Covenant on Civil and Political Rights (“the ICCPR”) permits limitations on rights where a public emergency threatens the life of a nation. The UN Human Rights Committee has interpreted this as being limited to public emergencies as defined in the domestic legislation that deals with them.<sup>157</sup> It could be concluded that the ICCPR does not permit counter-terrorist measures to limit rights except in a narrow range of temporary circumstances so long as the “non-derogable” rights in article 4(2) are maintained.<sup>158</sup> However, counter-terrorism by definition involves the prevention of terrorist activities before they can cause a state of emergency. Consequentially, while counter-terror legislation may breach the ICCPR, provided that the legislation can be justified and is not excessive, the UN Human Rights Committee is not in a position to criticize it.<sup>159</sup>

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153 [1994] 1 NZLR 48.

154 Conte, Counter-Terrorism and Human Rights, *supra* note 18, 362.

155 *Ibid* 363.

156 *Ibid*.

157 “Derogation of Rights” (Art 4), CCPR General Comment 5 (31.7.81).

158 Conte, Counter-Terrorism and Human Rights, *supra* note 18, 353.

159 *Ibid*.

Statements made by the UN General Assembly appear to link the limitation of rights with anti-terrorism efforts. Resolution 54/164 characterizes terrorism as something aimed at the destruction of human rights, particularly the right to life and the right to live without fear and generally. The Resolution shows that the General Assembly regards terrorism as a challenge to the UN principles of maintenance of peace and security and the protection of human rights.<sup>160</sup> The UN Commission on Human Rights has made similar comments.<sup>161</sup>

## Conclusions

Returning to the comments of the UN Secretary-General and Amnesty International, the question is whether the legislative response to terrorism is proportionate to the threat. The answer must be that it is in danger of being legislative overkill. Anti-terrorism legislation is dangerous, not only because defining a terrorist is difficult, but also because the administration of the legislation is largely left to the executive. The Terrorism Suppression Act is made safer by the wide ambit of judicial review. However, it is arguable that this places the judicial ambulance at the bottom of the rights cliff; bringing a judicial review is expensive, time consuming, and assuming the applicant is successful, he or she has suffered a period where his or her rights have been impinged upon for which compensation is not available. Clause 33 of the Counter-Terrorism Bill is an affront to key elements of our constitution including the common law privilege against self-incrimination and the right to be presumed innocent, and rights under the NZBORA. Additionally, parts of that Bill do not bear exclusive relevance to counter-terrorism, in conflict with the Bill's name. The Border Security Bill permits the collection of information about visitors to New Zealand and represents an invasion of privacy. Statements that the Telecommunications (Interception Capability) Act does not expand the interception capabilities of the agencies it addresses have been shown to be dubious. The Identity (Citizenship and Travel Documents) Bill involves sharing of information without defining its nature.

Other aspects of the corpus of anti-terrorism legislation are less unattractive. The Mercenary Activities (Prevention) Bill is arguably not very effective but it addresses the problem in a constructive manner. The Maritime Security Bill offers protection against various threats, some in the nature of terror, without unduly impinging on civil rights.

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160 General Assembly, "Human Rights and Terrorism" UN Res 54/164 A/RES/54/164 (24 February 2000).

161 Economic and Social Council's Commission on Human Rights, Human Rights and Terrorism, UN Doc E/CN4/RES/2001/37 (23 April 2001).

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