

Casting a Wide Net
Domestic Legislative Responses to Global Threats of Terror

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Introduction

While terrorism is often understood as a new concept, acts of terrorism can be traced back as far as Ancient Greece.¹ Despite this long existence, terrorism in the 21st Century has adopted an ipseity truly distinct from its predecessors. The events of 9/11 served as a catalyst for a new genus of terrorism, synonymous with a certain breed of harm and associated with a particular class of individuals. 9/11 sparked a reconceptualisation of the identity of terrorism, associated almost exclusively with radical Islamic groups, namely Islamic State of Iraq and the Levant (“ISIL”) and Al Qaeda. This new identity has come to inform popular understanding of the concept of terrorism. ‘New terrorism’, as it is known,² possesses a ubiquitous quality. Perpetrators, using religion as a guise for hate, seek maximum casualty without discrimination. The threat posed by ‘new terrorism’ is pervasive, unpredictable, and constant. It is harm on a catastrophic scale. The ‘war on terror’ is not confined to an identifiable battleground. It is fought in public places across the globe. Its casualties are non-participants, innocent civilians undertaking their daily routine. Perpetrators seek to maximise harm to a population and willingly desire to sacrifice their own lives in the infliction of that harm.

Globalisation has impacted greatly upon the contemporary concept of terrorism. Modern technology has effectively compressed our world into a global village where the farthest reaches are readily accessible. Terrorist groups have used this to their advantage. ISIL, in particular, has successfully utilised the tools of the technological era to secure a presence in countries far from its physical presence in the Middle East. An almost constant stream of ISIL propaganda proliferates on social media inciting sympathetic viewers to undertake acts of domestic terrorism. This has the effect of eroding the delineation of national borders and fostering a mentality that the enemy is already within our gates.

Western media exhibits routine preoccupation with acts of terrorism perpetrated by these groups and those who have taken up their calls for action. However, equal attention is given to the impending threat of terrorism purportedly looming over the globe. Characteristically, the daily news is peppered with reports of recent attacks or, in the alternative, suspensory articles anticipating the next manifestation of the ever-present terrorist threat. Headlines such as “Terrorist Attack in New Zealand ‘Not If But When’”³ epitomise a well-established “pattern of sensationalised reporting that has become typical of news coverage of terrorism-related events and investigations... around the world”.⁴ Western media reports routinely frame articles by reference to

¹ Randall David Law *The Routledge History of Terrorism* (Routledge, Abingdon Oxon, 2015) at 1.

² Lucia Zedner “Terrorizing Criminal Law” (2014) 8(1) *Criminal Law and Philosophy* 99 at 114.

³ Carolyne Meng-Yee “Terrorist Attack in NZ ‘not if but when’” (6 August 2016) *New Zealand Herald* <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11688188>

⁴ Andrew Lynch, Edwina MacDonald and George Williams (eds) *Law and Liberty in the War on Terror* (The Federation Press, Sydney, 2007) at 211.

themes of war which serves to “heighten the sense of threat and... can also be used to justify repressive measures in order to safeguard ‘national security’.”⁵ In conjunction with themes of war, racialised framing also dominates media coverage of the war on terror.⁶ Racialised framing of terrorism-related news reports is a divisive method “whereby race, culture, or religion is used to explain events”⁷ as opposed to the social causes which more often lie at the root of an individual’s behaviour. This phenomenon is not attributable to the media alone. However, the tendency of Western journalism to report events through a war and race-based lens can contribute to the alienation of minority cultures associated with that race. Majoritarian scrutiny of an entire group may in fact serve to create risk where none formerly existed, given the impact marginalisation can have on those targeted.

The result is a culture of fear. This culture drives social demand for protection and, in a liberal democratic society such as New Zealand, it is the obligation of the state to provide such protection. The criminal law is a significant regulatory tool through which this end is achieved. However, perceived through a liberal lens, the state is an antagonistic entity that, when gifted *too* much power, is predisposed to coercive and oppressive behaviour towards its citizens. In addition, the criminal law is, by its very nature, a bluntly coercive system, apt to manipulation. For these reasons, the power surrendered to the state in exchange for individual security should be measured carefully against the liberties that stand to be eroded in the process.

Despite this, the modern era has given rise to a phenomenon of ‘overcriminalisation’ – a trend in Western law-making towards overextension and distortion of the conventional remit of the criminal law.⁸ ‘New terrorism’ possesses novel qualities that challenge the basic assumptions underpinning the traditional criminal law. This has driven the state response in a predominantly preventive direction. These challenges have justified, in part, the criminalisation of conduct that would traditionally be considered too attenuated from the infliction of harm to warrant such measures. Consequently, counter terrorism laws have contributed extensively to the phenomenon of ‘overcriminalisation’ experienced in the modern era. However, the legislative endeavour to counter terrorism has gone further still. It has followed an emerging trend in state legislative action whereby conduct that would traditionally be governed by the criminal law is instead crafted to operate in the civil realm. This is a novel breed of overcriminalisation in the sense that, rather than overtly distorting the boundaries of the criminal law, these measures transcend the boundaries altogether. They operate extraneously to its remit. The consequence of this legislative tactic is the

⁵ Lynch, above n 4, at 211.

⁶ At 212.

⁷ At 213.

⁸ Douglas Husak *Overcriminalization: The Limits of the Criminal Law* (Oxford Scholarship Online, 2008).

disempowerment of the individual at the advantage of the state and, from a liberal perspective, such a consequence is a matter for concern.

The domestic legislative responses to the global threat of ‘new terrorism’ challenge traditional perceptions of criminalisation theory and alter the complexion of orthodox criminal law. This statement rings true for some jurisdictions more than others. New Zealand’s counter terrorism legislative framework is the product of international obligations and jurisdictional influence. The Terrorism Suppression Act 2002 (“TSA”) stands at the forefront of this framework as New Zealand’s predominant legislative tool in the ‘war on terror’. This dissertation seeks to investigate the measures instituted under the TSA, exploring the validity of our state’s legislative response to the global threat of ‘new terrorism’. The predominant concern is whether these measures adequately address their purported target or whether they extended beyond their necessary limits and, in fact, surrender a dubious degree of power to the state or operate to create risks as opposed to dispelling them.

Chapter I examines the liberal conception of the obligation-based relationship between the state and its citizens and the fundamental role the criminal law assumes in fulfilment of the state’s respective obligations. It explores the principled justifications that underpin traditional criminal law and the way in which the novel features of ‘new terrorism’ challenge its modus operandi. It then discusses how legislative responses to these challenges have contributed to the modern phenomenon of overcriminalisation and have concurrently propagated a novel breed of overcriminalisation that has burgeoned across Western law-making in the modern era.

Chapter II outlines New Zealand’s current counter terrorism legislative framework. It provides a brief history of counter terrorism law in New Zealand and the legislative instruments and amendments that currently inform our legislative framework. It then examines the TSA in greater depth as New Zealand’s direct response to the threat of ‘new terrorism’.

Chapters III and IV seek to critically analyse two particular features of the Terrorism Suppression Act 2002 – the statutory definition of “terrorist act” and the designation regime that the Act implements.

Chapter III outlines the current global ‘dilemma of consensus’ concerning the definition of “terrorist act”. It examines the statutory definition of “terrorist act” enshrined in s 5 of the TSA and explores the novel inclusion of a motive element, typical of statutory definitions in a number of common law countries, including New Zealand. This discussion highlights the potentially discriminatory nature of counter terrorism measures informed by this species of definition, in the sense that they privilege the security of the majority at the expense of the liberties of the minority. As a consequence, they may act to create risks where none formerly existed.

Chapter IV examines the hybrid civil-criminal designation regime implemented under the TSA. It outlines an imagined scenario designed to illustrate the potential remit of this regime beyond its identified target - 'new terrorism'. It explores the implications of the hybrid civil-criminal nature of the regime, a tactic that is part of a burgeoning trend in Western law-making and a novel breed of overcriminalisation. It then cautions that such measures necessarily involve the exchange of liberty for security and the bolstering of state power in the process. This in turn means placing enormous trust in the self-restraint of the government of the day.

This analysis highlights that, perceived through a liberal-lens, the primarily preventive state responses to the threat posed by 'new terrorism' may in themselves give rise to alternative, yet equally dangerous, threats to the individual.

CHAPTER I

‘New Terrorism’: the Liberal State, and the Role of the Criminal Law

“... the catastrophic scale of the 9/11 attacks was deemed to change the legal landscape.”⁹

I The Liberal State and The Role of Criminal Law

A. The Liberal State and the Criminal Law

In New Zealand, we live in a liberal democratic society based on the premise of an antagonistic relationship between the state and its citizens. The emphasis is on preserving individual liberties and constraining state power. The classical liberal conception of the relationship between the state and individual citizens focuses upon mutual obligations between each party. The citizen’s obligations to submit to the will of the state and obey the laws through which this will is implemented are explained as “...reciprocal burdens when accepting the benefit of the services and protection provided by the state; or... that, absent obedience to the law, the result would be chaos or a return to a Hobbesian state of nature.”¹⁰ In exchange, the state must fulfil its respective obligations. The least controversial and most widely accepted state obligation is to secure conditions of order and security from the hazards and threats which the citizen would otherwise face. The state is tasked with sustaining an environment far removed from a state of nature where individuals can pursue utility free from overt risk. The criminal law serves as the foremost regulatory tool for which this end is achieved.

The state utilises the criminal law as an instrument through which it may “seek to reduce the incidence of the kinds of conduct that are properly criminalised...”¹¹ in accordance with its duty to protect citizens from harm. The criminal law serves as “... a powerful and condemnatory response by the state.”¹² Its ultimate aim involves “the co-ordination and regulation of behaviour so as to facilitate the well-being of community members.”¹³ It undertakes this task by carving out “a catalogue of specified actions or omissions that are prohibited, together with ranges of sanctions for violations.”¹⁴ As well as being a tool by which the state may effectively regulate

⁹ Andrew Ashworth and Lucia Zedner *Preventive Justice* (Oxford University Press, Oxford, 2014) at 182.

¹⁰ At 7.

¹¹ Andrew Ashworth and Lucia Zedner “Prevention and Criminalization: Justification and Limits” (2012) 15.4 *New Criminal Law Review* 542 at 543.

¹² AP Simester and Warren J Brookbanks *Principles of the Criminal Law* (3rd ed, Thomson Reuters, Wellington, 2007) at 5.

¹³ AP Simester and Andreas von Hirsch *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing Ltd, Oxford, 2011) at 4.

¹⁴ Simester, above n 12, at 3.

society in order to optimise the necessary conditions for individual utility, the criminal law is “also a bluntly coercive system, directed at controlling the behaviour of citizens.”¹⁵

The criminal law serves as the means through which the state may legitimately restrict or remove the most basic individual liberties. It legitimates state intrusion, on the community’s behalf, into an individual’s “sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest.”¹⁶ Framed within a liberal narrative, the coercion implicit in criminalisation has been labelled “rational coercion”¹⁷ which “operates via, and appeals to, the subject’s responsible agency; it offers her reasons for her actions, reasons she may choose to ignore.”¹⁸ If an individual chooses to ignore these reasons they consequently risk exposure to state censure. Liberal ideas of personal autonomy and freedom are implicit within this conceptualisation of the coercive nature of the criminal law.

Extraneous to its obligation to protect, the state has traditionally been conceived as the greatest threat to the individual in liberal theory.¹⁹ Liberal tradition regards the surrendering of a degree of individual liberty to the state as a necessary evil. There is reticence to afford the state any more power than is necessary to fulfil its obligation to protect, “an apprehension that power given to the state is seldom ever used only for the purposes for which it is given, but is always and endemically liable to abuse.”²⁰ The core concern is that “the power to proscribe generates strong temptations to misuse it as a weapon of social control.”²¹ We should be fervently aware that the means given to the government to combat our enemies will in turn be used by it against its own enemies.²² The concept of “enemies of the state” should not be restricted to some obscure external entity. Ordinary citizens may fall in discord with the government of the day’s objectives. History clearly illustrates that outright opposition can quickly be branded duplicitous subversion and the individuals behind such opposition as enemies of the state. Thus, the power afforded to the state can potentially be used against ordinary citizens in ways not initially contemplated. Given the traditional liberal suspicion of state agenda, this factor should remain at the forefront of any consideration of state power.

Consequently, from a liberal perspective, resort to the criminalisation of conduct should only be made “in order to protect individual autonomy or to protect those

¹⁵ Simester, above n 12, at 5-6.

¹⁶ John Stuart Mill *On Liberty; Representative Government; The Subjection of Women* (Oxford University Press, Great Britain, 1912) at 17.

¹⁷ Simester, above n 12, at 6.

¹⁸ Simester, above n 11, at 6-7.

¹⁹ Jeremy Waldron *Torture, Terror, and Trade-offs: A Philosophy for the White House* (Oxford University Press Inc., United States, 2010) at 40.

²⁰ At 40.

²¹ Simester, above n 12, at 18.

²² Waldron, above n 19, at 40.

social arrangements necessary to ensure that individuals have the capacity and facilities to exercise their autonomy.”²³ This is so germane to liberal ideology that it has been asserted that something equivalent to a right not to be punished exists, placing the burden of proof firmly on those who would wish to turn non-criminal activity into an offence.²⁴ The imposition of state censure must therefore be clearly and compellingly justified. Justification is found by appealing to the principles and values that traditionally underpin the criminal law.

B. Justifying the Criminalisation of Conduct

In a liberal democratic society, principles of individual autonomy and welfare are of paramount importance. At a very basic level, the principle of individual autonomy stands for the proposition that individuals are autonomous, rational beings who are responsible for their own actions and possess the capacity and sufficient free will to make meaningful choices.²⁵ Interdependent with the principle of individual autonomy is the principle of welfare which confers that “the State has a duty not merely to prevent the denial of freedom, but also to promote it by creating the conditions of autonomy.”²⁶

Supplementary to the principles of individual autonomy and welfare is the harm principle. As articulated by John Stuart Mill, the harm principle holds that “the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will is to prevent harm to others.”²⁷ An additional important element to the harm principle is wrongfulness “in the sense of culpably assailing a person’s interests, or abusing them by using them as a means to another’s satisfaction.”²⁸ Furthermore, the harm inflicted must have an element of public interest in that the victim is not just the individual but also the community as a whole.²⁹

Alongside these principles sits the minimalist approach to criminalisation which “is based on a particular conception of the criminal law and its relationship to the principles of autonomy and welfare and to other forms of social control.”³⁰ The minimalist approach holds that the criminalisation of conduct should accord respect to human right protections and the aforementioned intrinsic individual right against punishment.³¹ Furthermore, criminalisation should be treated as a last resort and

²³ Ashworth, above n 13, at 52.

²⁴ Husak, above n 8.

²⁵ See Ashworth, above n 13, for further discussion.

²⁶ Ashworth, above n 13, at 26.

²⁷ Mill, above n 16, at 15.

²⁸ Ashworth, above n 13, at 29.

²⁹ Ashworth, above n 13, at 29-30.

³⁰ At 31.

³¹ See Ashworth, above n 13, at 31-35 for further discussion.

should never be resorted to if it is counter productive in the sense of being ineffective or exacerbating harm done.³²

These principles provide a basis upon which the legislature can justifiably expand or recede the limits of the criminal law. However, practically and historically speaking, the state has exhibited a strong tendency towards expansion. Any inclination towards receding the limits of the criminal law has been sparse and idiosyncratic. An example of a state sanctioned retreat in the limits of the criminal law can be found in the abolishment of the offence of attempted suicide in 1961.³³ Notably, attempted suicide was not treated as a serious crime from the early 1900s and most charges resulted in either discharge or conviction with sureties for good behaviour.³⁴ Thus, while the abolishment of this offence represented state acknowledgement of a shift in social attitudes and a corresponding statutory adjustment, it came more than half a century after this change initially emerged. This is illustrative of state reticence to recede the limits of the criminal law in haste. A similar reticence is scarcely present when it comes to expanding the scope of the criminal law.

C. The Phenomenon of ‘Overcriminalisation’

In the modern era the ambit and boundaries of the criminal law have expanded exponentially. This has been labelled a phenomenon of ‘overcriminalisation’³⁵ – “an explosive growth in the size and scope of the criminal law.”³⁶ In the 21st century, the breadth of the criminal law continues to expand and counterterrorism laws are no exception to this. Academics in the United Kingdom have labelled the period since 9/11 one of “hyper legislation”³⁷ and have identified a tendency to expansion inherent in the criminalisation of terrorist offences.³⁸ This tendency is not just temporal, whereby liability attaches at a point well removed from the commission of a substantive offence, it is also lateral, meaning “the boundaries of the criminal law are also stretched... by the imposition of liability for associative and facilitative acts.”³⁹

However, as will be discussed in further detail in Chapter IV, a trend has emerged in modern Western law-making that goes beyond the concept of overcriminalisation as first articulated by Douglas Husak.⁴⁰ This growing legislative trend involves the implementation of civil measures that would traditionally be governed by the criminal law. This operational shift from criminal to civil effectively advantages the state to

³² Ashworth, above n 13, at 29-30.

³³ Abolished from the Crimes Act 1961.

³⁴ Jock Phillips “Suicide – Preventing Suicide” (21 January 2015) Te Ara – the Encyclopedia of New Zealand < <http://www.teara.govt.nz/en/suicide/page-6>>.

³⁵ See Husak, above n 24, for further discussion.

³⁶ At 2.

³⁷ Ashworth, above n 9, at 171.

³⁸ Zedner, above n 2, at 114.

³⁹ At 114.

⁴⁰ See Husak, above n 8, for further discussion.

the disadvantage of the individual. It removes guaranteed procedural safeguards and the need to justify the criminalisation of conduct upon a principled basis through appealing to the values outlined above. This tactic is an evolved progeny of the type of overcriminalisation articulated by Husak. Rather than overextending the remit of the criminal law, these measures sidestep the criminal law altogether and inhabit a space that is decisively less favourable to the individual exposed. While this trend is not exclusive to counter terrorism measures, it is widely utilised in various state responses to the threat of ‘new terrorism’.

The tendency to expansion evident within the criminalisation of terrorist acts is explicable largely due to the strong social demand for prompt and effective state action against the looming terrorist threat and the unique challenges that modern terrorism poses for the traditional conception of the criminal law. These challenges also operate to justify the habitual reliance on civil, as opposed to criminal measures, in the legislative “war on terror”.

II “New Terrorism” and the Criminal Law: Demands and Challenges

The rationale for the criminalisation of terrorist acts “is, at one level, unproblematic. Terrorist acts involve a “high degree of premeditation and culpable wrong doing of the most serious kind.”⁴¹ However, the criminalisation of acts of ‘new terrorism’ invoke a unique set of challenges that do not typically arise in the proscription of general offences.

The gravity of the prospective harm threatened by acts of ‘new terrorism’ ignites social demand for direct action by the state. The magnitude of this harm means that ex post facto punishment is largely insufficient. Requiring that sufficient steps be taken towards the commission of a terrorist offence before intervention is justified is a potentially catastrophic risk in light of the severe degree of harm threatened. There is therefore a strong imperative to prevent this potentially catastrophic harm well before it is inflicted.

Compounding this, “pressure to criminalise early derives from the obvious, but little discussed, willingness of terrorists to sacrifice their own lives in the pursuit of their goals.”⁴² Characteristically, perpetrators of ‘new terrorism’ have no intention of facing the repercussions of criminal liability. Instead, “suicide bombing is a common characteristic of contemporary terrorism that radically undermines the criminal law’s potential deterrent effect.”⁴³ The threat of state sanction falls on apathetic ears “since

⁴¹ Zedner, above n 2, at 109.

⁴² Zedner, above n 2, at 114.

⁴³ Ashworth, above n 9, at 179.

perpetrators are unlikely to be inhibited by the threat of punishment.”⁴⁴ This severely limits the criminal law’s power to deter would-be offenders.

The degree of harm threatened and the limited effectiveness of the traditional deterrent power of the criminal law mean that the criminalisation of ‘new terrorism’ poses a unique challenge. Consequently, “anti-terrorism laws are framed to achieve a purpose that has not previously informed the general criminal law: the laws are designed primarily to forestall the commission of a terrorist crime, not to inhibit its commission by prescribing a penalty for crime committed.”⁴⁵ Accordingly, the criminalisation of ‘new terrorism’ is largely a preventive endeavour. The scope of the criminal law has expanded to meet these demands and “resort to criminalisation has had the effect of radically enlarging the substantive scope of the criminal law and, in doing so, making crimes of conduct that was once held to lie well beyond its remit.”⁴⁶ The radical expansion of the criminal law to counter the unique challenges of ‘new terrorism’ simultaneously means arming the state with extensive coercive powers and the cession of individual liberties in exchange. This is arguably justifiable where the powers endowed meet the threat posed. However, given the liberal suspicion of state power and its tendency to abuse, the precise scope of the powers endowed warrants close inspection.

The following chapter will endeavour to explore New Zealand’s counter terrorism legislative framework. It will serve as an empirical foundation from which any concerns arising from the power endowed under our counter terrorism legislation may be explored in more depth in the following chapters.

⁴⁴ Ashworth, above n 9, at 179.

⁴⁵ Lynch, above n 4, at Foreword V.

⁴⁶ Zedner, above n 2, at 115.

CHAPTER II

New Zealand's Counter Terrorism Legislative Framework

“The threat of a terrorist act has the ability to induce terror in a population, whether or not the threat is carried out... It is therefore necessary to cover the threat of terrorist acts in some way.”⁴⁷

I A Brief History

The genesis of New Zealand's counter terrorism legislative framework is found in national emergency legislative initiatives dating back to the early 20th Century. Previously, in the early 19th Century, the government utilised national emergency measures, making proclamations of martial law and employing other legal measures, in response to Maori resistance.⁴⁸ The first direct legislative action came in response to a series of riots during the Great Depression. Subsequently, the Public Safety Conservation Act 1932 (“PSC”) was “introduced, debated and enacted over a period of 48 hours.”⁴⁹

The PSC Act allowed the Governor General to declare a state of emergency throughout New Zealand if it appeared that any action had been taken, or was immediately threatened by an individual or group, which imperilled, or was likely to imperil, public safety or order, or deprive the community of the essentials of life.⁵⁰ Once an emergency had been proclaimed,⁵¹ the Act gave the Governor General the power to make all regulations necessary for the prohibition of any acts injurious to public safety, the conservation of public safety and order, and the securing of the essentials of life for the community.⁵²

The broad ranging and unbridled discretionary powers the Act bestowed upon the Executive led it to be described as “potentially the most dangerous and repressive piece of legislation on the New Zealand statute books.”⁵³ Its most notorious use came in response to the Water Front Strikes in 1951 where “the Act revealed its true potential for the abrogation of civil liberties.”⁵⁴ Following extended and increasingly

⁴⁷ Foreign Affairs, Defence and Trade Committee *Terrorism (Bombings and Financing) Suppression Bill* (23 March 2002) at 3-4.

⁴⁸ John Smith “New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, And International Responsibilities” (December 2003) Fulbright New Zealand <<http://www.fulbright.org.nz/publications/2003-smith/>> at 5.

⁴⁹ Jennifer Caldwell “International Terrorism (Emergency Powers) Act 1987 (New Zealand)” (1988) 6(1) AULR 108 at 108.

⁵⁰ Public Safety Conservation Act 1932, s 2(1).

⁵¹ A proclamation could not be in force for more than a month. However, another proclamation could be issued within that time per s 2(2). The proclamation had to be communicated to Parliament within 14 days of its commencement per s 2(3)

⁵² Section 3.

⁵³ Geoffrey Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2nd ed, Oxford University Press, Auckland, 1987) at 177.

⁵⁴ Caldwell, above n 49, at 108.

tense negotiations and strike action by unionised port workers in Auckland, the National government utilised the Act and proclaimed a state of emergency. Under its authority the government promulgated regulations “prohibiting processions, demonstrations, pickets, and signs in support of the strike, giving the police extremely wide powers of arrest and entry, and... prohibiting publication of anything likely to encourage the strike.”⁵⁵ Additionally, the regulations made provision for the freezing of union assets and effectively made an offence of supplying food or clothing to striking workers.⁵⁶ Quickly, the strikers were forced to concede defeat.

Following the Water Front Strikes, use of the Act was threatened again twice over the course of its lifetime, both times in response to industrial unrest.⁵⁷ Yet, “the Act was perceived as a dangerously open ended licence; a blank cheque for the government with limitless funds once a state of emergency was declared.”⁵⁸ Furthermore, historically, it was utilised largely as a tool for the suppression and coercion of those causing domestic social unrest, particularly in the industrial sector in instances where the stability of the national economy was at stake. The former uses of the Act and the power it bestowed upon the Executive did not sit comfortably with the general public and, consequently, in 1987 the Labour government became committed to its repeal.⁵⁹

II New Zealand’s Current Counter Terrorism Legislative Framework

A. An Overview: Legislative Instruments and Amendments

New Zealand’s counter terrorism legislative framework comprises of several statutes and amendments to existing legislation that contribute in various ways to the state’s counter terrorism legislative endeavour. The TSA is the country’s central counter terrorism legislative instrument. The Act represents New Zealand’s direct response to 9/11 and the corresponding international obligations arising in the aftermath of that event. However, several legislative enactments dating prior to 9/11, implemented as a result of New Zealand’s commitment to various international treaties, remain in place.⁶⁰

Additionally, the International Terrorism (Emergency Powers) Act 1987 represents the state’s legislative response to the only act of terrorism it has experienced domestically, the Rainbow Warrior incident.⁶¹ While effectively dormant, the Act

⁵⁵ Caldwell, above n 49, at 108.

⁵⁶ Smith, above n 48, at 7.

⁵⁷ Smith, above n 48, at 6

⁵⁸ Caldwell, above n 49, at 108.

⁵⁹ At 108.

⁶⁰ These include the Aviation Crimes Act 1972, the Crimes (Internationally Protected Persons and United Nations and Associated Personnel, and Hostages) Act 1980, and the Maritime Crimes Act 1999.

⁶¹ Incidentally, the Act was also intended to replace the Public Safety Conservation Act 1932.

remains in force and provides the police with a variety of powers⁶² in the event of an “international terrorist emergency”.⁶³ The Act also makes provision for media censorship at the Prime Minister’s direction.⁶⁴

The Counter Terrorism Bill 2003 instituted amendments to a number of Acts including the TSA.⁶⁵ Additionally, in 2014, the Countering Terrorist Fighters Legislation Bill (“CTFLB”) implemented amendments to three existing pieces of legislation⁶⁶ in “response to the rapidly evolving threat of terrorism both locally and internationally.”⁶⁷ The Bill instituted decisively preventive measures including broadening the Security Intelligence Service’s powers of surveillance and their access to Customs’ database and giving the Minister of Internal Affairs greater powers to suspend and cancel passports.

This discussion will focus largely on the TSA as New Zealand’s central counter terrorism legislative instrument and direct response to the threat of ‘new terrorism’. However, other legislative instruments, particularly the CTFLB, are noteworthy for their decisively preventive focus. In light of the historical outline of the TSA to be discussed below, it will become apparent that these legislative instruments, which effectively operate in the background of the TSA, are arguably more pivotal to New Zealand’s counter terrorism legislative endeavour than the TSA itself.

B. The Terrorism Suppression Act 2002

1. Historical outline

Prior to September 11 2001, a Labour-led Government had introduced the Terrorism (Bombing and Financing) Bill to the House in order to implement legislative obligations arising under two international treaties.⁶⁸ The Bill was at Select Committee stage when the events of 9/11 occurred and was abruptly placed on hold. On the 28th of September 2001, the United Nations Security Council (“UNSC”) issued Resolution 1373 in response to the World Trade Centre attacks, described as “one of the most strongly worded resolutions in the history of the Security Council.”⁶⁹ The Resolution mandated broad ranging state action against the financing of

⁶² International Terrorism (Emergency Powers) Act 1987, s 6.

⁶³ Defined in s 2.

⁶⁴ Section 14.

⁶⁵ These include the Crimes Act 1961, the Summary Proceedings Act 1957, the Misuse of Drugs Act 1978, the New Zealand Security Intelligence Service Act 1969, and the Sentencing Act 2002.

⁶⁶ The New Zealand Security Intelligence Service Act 1969, the Custom and Excise Act 1996, and the Passports Act 1992.

⁶⁷ Countering Terrorist Fighters Legislation Bill 2014 (1 – 1) Introduction.

⁶⁸ The International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppressions of Financing of Terrorism.

⁶⁹ Alex Conte “A Clash of Wills: Counter Terrorism and Human Rights” (2003) 20 NZULR 338 at 342.

terrorism⁷⁰ and ordered domestic legislative implementation for all United Nations member states within 90 days.⁷¹ A committee was established to monitor member state compliance with the mandate.⁷²

In response, the Terrorism (Bombing and Financing) Bill was extensively amended in order to implement New Zealand's obligations under both the Bombings and Financing Convention and UNSC Resolution 1373. Uncharacteristically, the Select Committee then allowed for a second round of public submissions on the proposed amendments and received 143 submissions.⁷³ The Select Committee Report suggested a number of additions and amendments in response to submissions that were subsequently included in the TSA. Most notably these included the refining of the definition of "terrorist act" and the inclusion of exceptions within the offences proscribed under the Act for the purpose of clarity. Additionally, the Select Committee recommended the implementation of a terrorist designation system and, based on submitter concern, the availability of judicial review to those designated under the regime.⁷⁴ Subsequently, the TSA was enacted.

The TSA creates a number of terrorism-related offences and a system of designation whereby individuals, groups, and organisations may be designated as terrorist entities or associated entities. Designation has both criminal and financial implications, to be discussed further in the proceeding chapters. Since its inception, the TSA has undergone three substantive amendments.⁷⁵ The most noteworthy changes were implemented under the Terrorism Suppression Amendment Act 2007. The Act introduced the offence of committing a terrorist act.⁷⁶ Additionally and "somewhat controversially",⁷⁷ the Act removed the proviso within both ss 8 and 10 that exculpated the provision of funds and the making of property or services available in circumstances where it was intended or known that they were for the benefit of advocating democratic government or the protection of human rights.⁷⁸ The deletion of these provisions, originally included in order "to avoid doubt",⁷⁹ was justified on the basis that an accused could escape liability, despite intending to finance terrorism, by proving that their primary intention was to fund a humanitarian cause.⁸⁰ Additionally, the Act amended the designation process by allowing for automatic designation of UN-listed terrorist entities and removed the power to renew designations from the High Court, vesting this power with the Prime Minister instead.

⁷⁰ *United Nations Security Council S Res 1373* (2001).

⁷¹ Clause 6.

⁷² Clause 6.

⁷³ As opposed to the zero submissions on the first bill.

⁷⁴ Foreign Affairs, Defence and Trade Committee, above n 47.

⁷⁵ The Terrorism Suppression Amendment Act 2003, 2005, and 2007.

⁷⁶ Terrorism Suppression Act 2002, s 6A.

⁷⁷ Kevin Dawkins and Margaret Briggs "Criminal Law" (2008) NZLR 541 at 543.

⁷⁸ Foreign Affairs, Defence, and Trade Committee *Terrorism Suppression Amendment Bill* (27 September 2007).

⁷⁹ Terrorism Suppression Act, ss 8(2) and 10(2).

⁸⁰ Dawkins, above n 77, at 544.

This was justified on the basis that, like initial decisions to designate, the decision to renew involves judgments of national security best suited to the Executive.⁸¹

Since the Act's inception, no charges have been successfully framed against any individual under the terrorism-related offences set forth in the Act. However, since 2010, the Prime Minister has designated twenty non-UN listed entities in support of the UNSC Resolution 1373 and pursuant to s 22.⁸² Additionally, a number of other entities have been automatically designated in accordance with New Zealand's international obligations.⁸³

In 2007, the Police relied upon the TSA in conducting Operation Eight. The operation involved the surveillance of a group of environmental and Maori separatist activists in the remote Urewera Ranges.⁸⁴ Tama Iti, a well-known Maori activist, lead the group who Police claimed were orchestrating "military-style training camps and planning a guerrilla war to establish an independent state on traditional Tuhoe land."⁸⁵ The operation culminated in the "coordinated execution of 41 search warrants throughout the country, along with the establishment of road blocks at Ruataki and Taneatua."⁸⁶ The police originally arrested eighteen people, four of whom faced charges in connection with the raids, including Iti.⁸⁷

The police set to frame these charges under the TSA and sought the Solicitor General's authorisation to do so. The Solicitor General ultimately declined the request stating, "... in examining the relevant provisions of the TSA I have concluded that legislation is unnecessarily complex, incoherent, and, as a result, almost impossible to apply to the domestic circumstances observed by the Police in this case."⁸⁸ He further stated that the key reason for this outcome was the lack of sufficient evidence to establish the "very high standard that a group or entity was planning or preparing to commit a "terrorist act" as that term is defined in the legislation."⁸⁹ Ultimately, the four individuals facing charges under the TSA were convicted of comparatively minor firearms offences.

⁸¹ Foreign Affairs, Defence, and Trade Committee, above n 78, at 3.

⁸² New Zealand Police "Lists Associated with Resolution 1373"

<<http://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities/lists-associated-with-resolution-1373>>.

⁸³ Under UNSC Resolutions 1267, 1989, 2253, and 1988.

⁸⁴ Ministry for Culture and Heritage "Anti-Terror Raids in Urewera" (15 June 2016) New Zealand History <<http://www.nzhistory.net.nz/page/so-called-anti-terror-raids-ureweras>>.

⁸⁵ Ministry for Culture and Heritage.

⁸⁶ Rebecca Quilliam "Police Acted Lawfully During Urewera Raids" (22 May 2013) New Zealand Herald <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10885376>.

⁸⁷ Quilliam.

⁸⁸ Dr. David Collins QC "Media Statement: Solicitor General" (8 November 2007) Scoop Independent News <<http://img.scoop.co.nz/media/pdfs/0711/SolGenTerror.pdf>> at 2.

⁸⁹ At 2.

The aftermath of Operation Eight “exposed the complexity of the TSA and the confusion as to its domestic application.”⁹⁰ In 2008, the Act was tabled for Law Commission review. The review was placed on hold while the remaining criminal proceedings against the Urewera defendants were concluded. However, in 2012, it was reported that the Justice Minister had removed the review from the Commission’s work programme with further no plans to review the Act.⁹¹ On the contrary, the Law Commission listed “Criminal Offences in the Terrorism Suppression Act” as part of its law reform programme for 2013/2014.⁹² Yet, later that same year, Justice Minister Judith Collins ceased the review without elaboration beyond the explanation that “the initial concerns arising from the Urewera case have been addressed by the passage of the Search and Surveillance Act 2012, and there does not appear to be any substantial or urgent concerns arising from the operation of the Act.”⁹³

This short history is indicative of the increasingly preventive nature of the state response to ‘new terrorism’ since 9/11. There is a decisive trend in state legislative action, in both New Zealand and the wider Western world, towards preventive measures. This is explained largely by the challenges posed by ‘new terrorism’ discussed in Chapter I. The flaws of the TSA highlighted by Operation Eight were not concerned with the Act’s designation system, a primarily preventive measure, but only the traditional criminal law-type offences it proscribes. The trend towards prevention provides some explanation for the government’s indifference to the obvious defects of the terrorist-related offences under the Act, particularly when the implementation of the Search and Surveillance Act 2012 and the measures instituted under the CTFLB are taken into account. While the TSA stands in the foreground of New Zealand’s counter terrorism legislative endeavour, the institution of preventive measures such as designation and surveillance, that operate in the background, appear to have taken precedence in the state response to the threat of ‘new terrorism’.

2. Operation of the Act

a. “Terrorist act”

The definition of “terrorist act” contained within s 5 serves as a linchpin within the Act. It informs the scope of the terrorist-related offences proscribed and is integral to the operation of the designation regime. The statutory definition can be deconstructed into three essential elements that must be satisfied in order to meet the definition and fall within the scope of the Act. These are as follows:

⁹⁰ Dawkins, above n 77, at 543.

⁹¹ Adam Dudding “Review of Terror Laws Stopped” (15 September 2009) Stuff <<http://www.stuff.co.nz/national/politics/9166763/Review-of-terror-laws-stopped>>.

⁹² Law Commission “2013-2016 Statement of Intent” <<http://www.lawcom.govt.nz/sites/default/files/corporatePaperAttachments/NZLC%20Statement%20of%20Intent%202013-2016.pdf>>, at 11.

⁹³ Dudding, above n 91.

1. Intention to cause, in any one or more countries, any of the following outcomes:
 - a. Death or serious bodily injury to one or more persons;
 - b. Serious risk to the health and safety of a population;
 - c. The destruction of, or serious damage to, property of great value or importance, major economic loss, or major environmental loss, if likely to result in:
 - Death or serious bodily injury,
 - A serious risk to the health and safety of a population, or
 - Serious interference with or disruption to an infrastructure facility, if likely to endanger human life;
 - d. Serious interference with or disruption to an infrastructure facility, if likely to endanger human life;
 - e. Introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country;
2. Carried out for the purpose of advancing an ideological, political, or religious cause;
3. Intended to either induce terror in a civilian population or unduly compel or force a government or an international organisation to do or abstain from doing any act.⁹⁴

b. Terrorism-related offences

The Act creates a number of general terrorism-related offences as well as a number of offences that are triggered only after an entity has been designated as a “terrorist entity” or “associated entity” following the process set forth in the Act.⁹⁵

c. Designation as a terrorist entity or associated entity

The Terrorism Suppression Act institutes a system of designation governed by ss 20 – 42 of the Act. The Act empowers the Prime Minister to designate an individual, group, trust, partnership, fund, or organisation as a “terrorist entity” or an “associated entity”. The Prime Minister may make an interim or final designation if the respective statutory tests are satisfied⁹⁶ and may base the decision to designate upon “any relevant information including “classified security information”⁹⁷ as defined in s 32.

The Act distinguishes between “terrorist entities” and “associated entities”. Terrorist entities are those who the Prime Minister has good cause to suspect,⁹⁸ or believes on

⁹⁴ Terrorism Suppression Act, s 5.

⁹⁵ Refer to Appendix for full list of offences.

⁹⁶ Sections 20(1), 20(3), 22(1), 22(3).

⁹⁷ Section 30.

⁹⁸ Section 20.

reasonable grounds,⁹⁹ have knowingly carried out or participated in a “terrorist act”. This can include any action from planning and making other preparations or making a credible threat to carry out an act, regardless of whether the act is actually carried out, to an attempt to commit and the full commission of a “terrorist act”.¹⁰⁰ Associated entities are those who the Prime Minister has good cause to suspect,¹⁰¹ or believes on reasonable grounds,¹⁰² knowingly facilitate the terrorist entity in carrying out a “terrorist act”, act on its behalf, or are wholly owned or effectively controlled by the terrorist entity.¹⁰³ The associated entity must have knowledge of their facilitation of the terrorist entity but this does not extend to specific knowledge of any terrorist act that was planned, foreseen, or carried out at the time.¹⁰⁴

Once in force, interim designation expires after thirty days unless it is revoked or made final.¹⁰⁵ Prior to making an interim designation, the Prime Minister must consult both the Attorney General and the Minister of Foreign Affairs and Trade.¹⁰⁶ Once the designation is made the Prime Minister must also advise the Leader of the Opposition and, if requested, provide a briefing as to the factual basis for the designation.¹⁰⁷ Interim designation may only be made once and both the public and the entity itself must be notified.¹⁰⁸ However, failure to notify the entity will not render the designation invalid.¹⁰⁹

Final designation is subject to the same statutory language and restrictions as interim designation. The key difference between the two forms of designation is the standard of proof required in order to meet the statutory test. Interim designation required the Prime Minister have “good cause to suspect” while final designation elevates the standard of proof to “belief on reasonable grounds”. In its report on the Terrorism (Bombings and Financing) Suppression Bill, the Select Committee condoned “good cause to suspect” as an appropriate standard of proof for interim designation on the basis that “it is necessary, in developing the designation procedure, to take into account the need to protect potential victims of terrorism, whether in New Zealand or elsewhere...”¹¹⁰ The Select Committee was satisfied that “this threshold balances the need to be able to act quickly to designate persons and organisations against the impact of designation...”¹¹¹ on those subject to it. In relation the standard of proof for final designation, the Select Committee elaborated upon “believes on reasonable

⁹⁹ Terrorism Suppression Act, s 22.

¹⁰⁰ Section 25(1).

¹⁰¹ Section 20(3).

¹⁰² Section 22(3).

¹⁰³ Section 20(3).

¹⁰⁴ Section 25(2).

¹⁰⁵ Section 21.

¹⁰⁶ Section 20(4).

¹⁰⁷ Section 20(5).

¹⁰⁸ Section 21.

¹⁰⁹ Section 29.

¹¹⁰ Foreign Affairs, Defence and Trade Committee, above n 47, at 8.

¹¹¹ At 8.

grounds” describing it as a “common phrase in New Zealand law [that] requires the decision maker to have formed a ‘belief’ based on grounds that would satisfy a reasonable person and not just a suspicion.”¹¹² The Select Committee held that such a standard of proof was “appropriate terminology for a process that does not involve a person being convicted of an offence.”¹¹³

Designation precipitates the criminalisation of various conduct that would not otherwise be offences¹¹⁴ and effectively freezes the assets of a designated entity by placing a blanket prohibition on dealing with the property of that entity unless permission is granted by the Prime Minister.¹¹⁵ Once an entity has been designated, a duty is imposed upon financial institutions and others who are in possession or control of property to report suspicions relating to property belonging to a terrorist entity.¹¹⁶ Additionally, the Act grants Customs the power to seize and detain goods they have good cause to suspect are the property of a designated entity, including cash or cash equivalents.¹¹⁷ Following final designation, the Prime Minister may direct the Official Assignee to take custody and control of property in New Zealand believed to be property¹¹⁸ of a designated entity.¹¹⁹ Furthermore, the High Court may order that such property be forfeited to the Crown.¹²⁰ Final designation expires after three years but can be revoked¹²¹ and extended by the Prime Minister.¹²²

Counter terrorism measures have taken a decisively preventive focus in answering the challenges and demands posed by the threat of ‘new terrorism’. Despite its title, the TSA is not New Zealand’s predominant legislative response to ‘new terrorism’. Rather, the state’s preventive endeavour extends well beyond the TSA, including surveillance measures contained in other legislative sources. Notably, the definition of “terrorist act” contained within s 5 of the TSA informs these extraneous measures, particularly those instituted under the CTFLB.¹²³ However, unlike the terrorist-related offences criticised by the Solicitor General, the designation system instituted under the TSA does undoubtedly contribute to this preventive legislative endeavour.

The following chapters will critically analyse these two particular features of the TSA that contribute to the composition of New Zealand’s broader preventive endeavour in response to the global threat of ‘new terrorism’ – the statutory definition of “terrorist act” and the designation regime instituted under the Act. This analysis will be

¹¹² Foreign Affairs, Defence and Trade Committee, above n 47, at 9.

¹¹³ At 9.

¹¹⁴ See Appendix.

¹¹⁵ Terrorism Suppression Act, s 9.

¹¹⁶ Section 43.

¹¹⁷ Section 47A.

¹¹⁸ Broadly defined in s 4.

¹¹⁹ Section 48.

¹²⁰ Section 55.

¹²¹ Section 23.

¹²² Section 35.

¹²³ Countering Terrorist Fighters Legislation Bill, s 7 and Schedule.

approached from a liberal perspective and will endeavour to explore the wider ramifications of these particular features of the TSA.

CHAPTER III

A Critique of The Definition of “Terrorist Act”

“... ”the tyranny of the majority” is now generally included among the evils against which society requires to be on its guard.”¹²⁴

I A ‘Dilemma of Consensus’

As discussed in Chapter II, ‘new terrorism’ is not only a domestic concern. It is a concern for the collective international community. In recognition of this, the international community has responded through various channels, such as the UNSC, and mandated universal action against the threat of terrorism. However, despite the universality of the challenge of ‘new terrorism’, “the international community has been unable to reach consensus on a concise and comprehensive legal definition of the term “terrorist”.”¹²⁵

Finding a universally agreeable legal definition for the concept has been something of a ‘dilemma of consensus’. At the crux of the issue is a dichotomy in the characterisation of terrorist conduct. Simply put, “one person’s terrorist is another’s freedom fighter.”¹²⁶ Additionally, conceptions of terrorism and what amounts to a terrorist act are apt to change with time and circumstance. A poignant example is found in the fact that the United States’ list of most wanted terrorists has periodically featured both Nelson Mandela and Yassir Arafat, both subsequent recipients of the Nobel Peace Prize.¹²⁷

This dilemma does nothing to detract from the global consensus that terrorism warrants criminalisation. However, the criminalisation of any conduct necessarily requires clear and concise articulation of what amounts to an offence. The “principles of maximum certainty and fair labelling require an unambiguous definition that appropriately labels the conduct in question”¹²⁸ so as to clearly identify the wrong penalised and guide individual conduct accordingly.¹²⁹ This is intrinsically linked to the principle of individual autonomy – the idea that the law should regard individuals as responsible agents, who if fully informed of the potential implications of their actions, are capable of making truly meaningful and autonomous choices.¹³⁰ In this regard, individual autonomy is predicated on the concept of fair opportunity to understand what conduct will warrant penal consequences and respond accordingly.

¹²⁴ Mill, above n 16, at 9.

¹²⁵ Alex Conte *Counter-Terrorism and Human Rights in New Zealand* (New Zealand Law Foundation, Wellington, 2007) at 18.

¹²⁶ Matthew Palmer “Counter-Terrorism Law” (2002) NZLJ 456 at 457.

¹²⁷ Conte, above n 125, at 6.

¹²⁸ Zedner, above n 2, at 113.

¹²⁹ See Ashworth, above n 9, for further discussion.

¹³⁰ Ashworth, above n 13, at 23-26.

The global dilemma of definitional consensus has led to “widely varying and sometimes vaguely specified definitions of terrorism deployed in different jurisdictions and at international and domestic levels”¹³¹ and this in turn has spawned “confusion about what precisely constitutes the legitimate target”¹³² of these counter terrorism laws. At first blush, this undermines the principles of criminalisation outlined in Chapter I. However, these principles “are predicated on the assumption that offenders are autonomous rational agents who may be deterred by the threat of censure and punishment.”¹³³ As already discussed, the characteristics of ‘new terrorism’ challenge these assumptions. In particular, the self-sacrifice typical of acts of ‘new terrorism’ severely undermines the traditional deterrent-based justifications for liberal principles such as maximum certainty and fair labelling.

The proliferation of expansive legal measures in the aftermath of 9/11 has led to the cession of liberties in exchange for security. Perceived through a liberal lens, this exchange concedes further power to the state, power that it may in turn utilise against its enemies – a class that could conceivably include any citizen. Legal definitions are instrumental in determining the boundaries of the criminal law and delineating the scope of a given provision. They are a powerful limit on the exercise of legislative power. The clear and concise articulation of what amounts to a terrorist act is crucial, not only in order to limit the power afforded to the state and vulnerable to exploitation, but also to ensure counter terrorism legislative measures operate on the basis of principled justifications. Given the proliferation of extensive and powerful counter terrorism legislative measures, “ensuring that terrorist offence definitions meet the basic criteria for criminalisation is a potentially powerful limit on the outlawing of activities whose relationship to the ultimate harm is too attenuated or too remote to satisfy the ascription of criminal liability.”¹³⁴ Therefore, arguably, “failure to agree on a definition of terrorism is a luxury that can no longer be afforded in the present context of increased anti terrorism laws and activities.”¹³⁵

II The Statutory Definition in the Terrorism Suppression Act 2002

In reviewing the Terrorism (Bombing and Financing) Bill in the aftermath of 9/11, the Select Committee recognised that a definition of terrorist act was needed in order to implement Resolution 1373 and identify the individuals and entities that may be subject to designation.¹³⁶ However, Resolution 1373 failed to define “terrorist act”, despite the mandate’s overarching influence on the various counter terrorism laws enacted by member states and consistent use of the phrase. Consequently, in the slurry

¹³¹ Ashworth, above n 9, at 174.

¹³² At 174.

¹³³ At 179.

¹³⁴ Zedner, above n 2, at 110.

¹³⁵ Lynch, above n 4, at 41.

¹³⁶ Foreign Affairs, Defence and Trade Committee, above n 47, at 3.

of domestic legislative action in the wake of 9/11, the pivotal task of defining what amounts to terrorist conduct was left at the discretion of individual nations.

Resolution 1373's failure to define terrorism for the purpose of national criminalisation resulted "in decentralised and haphazard national implementation."¹³⁷ The national definitions implemented in New Zealand, and beyond, were "influenced by both international definitions and definitions in like-minded national legal systems."¹³⁸ Many followed an emerging trend to seek to frame the concept of terrorism broadly, "to err on the side of over-inclusion in order to account for all possible future manifestations of terrorist violence."¹³⁹ In implementing the TSA's definition, the Select Committee justified a broader approach on the basis that "the Security Council appears to have intended it to be broader in scope than the range of particular terrorist acts covered by the existing terrorism conventions."¹⁴⁰ The New Zealand definition is closely based upon the legal definitions implemented in the United Kingdom, Australia, and Canada. However, in comparison to its common law counterparts, namely the United Kingdom and Australia, New Zealand's legal definition is arguably more limited in its application.

In the United Kingdom in particular, the legislative definition of "terrorist act"¹⁴¹ is quite clearly of the same genus as the New Zealand definition. The definitions are analogous in many respects. Fundamentally, they both require that the same three elements, outlined in Chapter II, be satisfied. However, the language employed in the United Kingdom's definition is ostensibly broader than that of its New Zealand relative. For example, where the New Zealand definition requires "death or serious bodily injury",¹⁴² its British counterpart requires "serious violence against a person or endangerment of a person's life"¹⁴³ – a much lower threshold of harm to the victim. Furthermore, where s 5 of the TSA requires significant damage to a very specific class of property,¹⁴⁴ s 1 of the United Kingdom's Act merely requires "serious damage to property".¹⁴⁵ Additionally, the United Kingdom's definition makes provision for racial motivation in addition to the ideological, political, and religious motivations contained within s 5 of the TSA.

The inclusion of a motive element within the New Zealand definition, as well as the legal definitions of in number of common law jurisdictions including the aforementioned countries as well as South Africa, Pakistan, and Belize¹⁴⁶, is

¹³⁷ Genevieve Lennon and Clive Walker *Routledge Book of Law and Terrorism* (Routledge, London, 2015) at 32.

¹³⁸ At 20.

¹³⁹ Ashworth, above n 9, at 174.

¹⁴⁰ Foreign Affairs, Defence and Trade Committee, above n 47, at 3.

¹⁴¹ Contained within s 1 of the Terrorism Act 2000 (UK).

¹⁴² Terrorism Suppression Act, s 5(3)(a).

¹⁴³ Terrorism Act (UK), ss 1(2)(a) and 1(2)(c).

¹⁴⁴ Terrorism Suppression Act, s 5(3)(c).

¹⁴⁵ Terrorism Act (UK), s 1(2)(b).

¹⁴⁶ Lennon, above n 137, at 35.

noteworthy. Traditionally, the criminal law deems motive irrelevant to criminal responsibility and proof of motive is not typically required “...instead it is normally an offender’s intention to commit a prohibited act that is essential to criminal responsibility.”¹⁴⁷

The justification for the inclusion of a motive element is that “ideological motivations are... the primary distinguishing feature of terrorist conduct from ordinary criminal offending”¹⁴⁸ and that “political violence or violence done for some other public-orientated reason (such as religion, ideology, race, or ethnicity) is conceptually and morally different to violence perpetrated for private ends.”¹⁴⁹ However, it is not the foreign nature of motive to the traditional criminal law that is the key objection to inclusion of a motive element. Rather, it is the damaging impact its inclusion is argued to have on basic human rights.¹⁵⁰ In the Canadian case of *R v Khawaja* the court examined the motive element in the Canadian statutory definition, analogous to New Zealand’s definition.¹⁵¹ It held that its inclusion would chill constitutionally protected freedoms and promote fear and suspicion of targeted groups as well as racial profiling by government authorities.¹⁵² However, it has been argued that the fears articulated in *Khawaja* are not well founded; that there is little objective evidence to support a human rights-based argument against the inclusion of a motive element. Arguably, the “risks identified in *Khawaja* seem more like speculative or predictive assertions not underpinned by empirical evidence to suggest that those risks will actually materialise.”¹⁵³ Additionally, the inclusion of a motive element in fact serves to create a further hurdle in the prosecution of terrorist offenders. It limits the breadth and utility of coercive counter terrorism provisions subject to the definition, disadvantaging the state in their pursuit of prosecution. This contention is supported by the Solicitor General’s damning conclusions regarding the TSA’s definition following the Urewera raids discussed in Chapter II. Nonetheless, the inclusion of a motive element in New Zealand and other statutory definitions is concerning on the basis that it can validate discrimination and encourage delineation on the basis of religion and, arguably, race in particular.

The inclusion of a motive element provides a degree of substance to the religious and, ergo, racial narrative that already informs popular understanding of ‘new terrorism’. It transposes the racialised framing, typical of media reporting and political rhetoric, into the official state conception of terrorism. This in turn provides “official” endorsement of the popular association between terrorism and religion and,

¹⁴⁷ Lynch, above n 4, at 31.

¹⁴⁸ Conte, above n 125, at 28.

¹⁴⁹ Lynch, above n 4, at 29.

¹⁵⁰ At 34.

¹⁵¹ *R v Khawaja* [2006] OJ 4245. See Appendix for respective statutory definitions.

¹⁵² At [45] – [80].

¹⁵³ Lynch, above n 4, at 36.

consequently, between terrorism and race.¹⁵⁴ As discussed above, racialised framing is a stigmatising mechanism. It serves to marginalise the targeted group. A lack of specific empirical or objective evidence should not detract from the reality of human nature. Historical examples such as the Salem Witch Trials and McCarthyism illustrate how hysteria breeds suspicion which in turn leads to the alienation and persecution of those deemed “Other”. A recent example is found in the discriminatory, yet domestically under-controversial, “burkini ban” enforced in many regions of France. The ban is, in part, the spawn of a national French law prohibiting covering one’s face in public (known as the “burka ban” for its clear targeting of Muslim women) and has led to humiliating displays in its enforcement. These include the forced public disrobing of Muslim women wearing burkinis by law enforcement officers and the issuing of fines on the basis of wearing an outfit that fails to respect “good morals and secularism...”¹⁵⁵

Racial, religious, and ideological framing in legislative provisions operates as a state endorsement of an “us and them” mentality. As the French example illustrates, state endorsement of this dangerous mentality heightens its ability to metastasise beyond reasonable limits and metamorphosise into legal measures that are blatantly discriminatory in nature. A sense of dissociation informs popular acceptance of these discriminatory and liberty-eroding measures - the idea that they target the perpetrators of ‘new terrorism’ as opposed to everyday citizens. However, privileging the majoritarian subjective sense of security by trading off the objective security of the minority may in fact create risks where none formerly existed. Furthermore, as will be discussed in Chapter IV in relation to the designation system, the surrender of these liberties in exchange for security necessarily entails bolstering state power, thus, heightening the inherent risk posed by the state towards individual citizens.

III The Creation of Risks Where None Formerly Existed

Religious and, ergo, racialised framing is typical of legislative definitions, media reporting, and political rhetoric surrounding ‘new terrorism’. This in turn condones wider discriminatory practices and the marginalisation of minority culture as evidenced by the “burkini ban” in France. This marginalisation can in turn give rise to its own perils by operating to create risks where none formerly existed. Individuals who practice a particular religion or happen to be of a particular race associated with the popular conception of ‘new terrorism’ stand to experience alienation which, in turn, can spawn resentment and lead an individual to behave in ways they would not have otherwise. In other words, the discriminatory attitudes of the majority and the

¹⁵⁴ Unlike the United Kingdom’s definition the New Zealand definition does not explicitly refer to racial motivations. However, given popular association between race and religion, particularly in relation to Islam, the reference is arguably implicit.

¹⁵⁵ Ben Quinn “French Police Make Woman Remove Clothing on Nice Beach Following Burkini Ban” (24 August 2016) The Guardian <<https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach>>.

ways in which these attitudes manifest may in turn drive harmless individuals to inflict harm. Mill famously articulated that in a liberal democratic society, the “tyranny of the majority” should garner equal caution to that of the suspicion traditionally directed towards the state.¹⁵⁶

Dissociative rationalisation acts to justify the type of ‘inter-personal trade offs’ “that counter terrorism policies typically involve...”¹⁵⁷ ‘Inter-personal trade offs’ involve sacrificing the liberty of a few in our midst so that the majority may be, or at least feel, safer.¹⁵⁸ In contrast, ‘intra-personal trade offs’ involve an individual deciding to restrict their personal freedom in order to enhance their own security. ‘Inter-personal trade offs’ are concerning because “they require the sacrifice of some people’s liberty for the sake of others, notwithstanding the fact that rights are supposed to set limits upon the sacrifices that individuals are called upon to make in the interests of others.”¹⁵⁹ A rebuttal may be that the individuals who stand to lose their liberty at the expense of majoritarian security are only those who actually threaten or intend to inflict terrorist harm. Yet, as discussed above, the racial and religious framing typical of ‘new terrorism’ distorts and overextends this concept. Furthermore, “in a precautionary climate we are more likely to over-predict potential terrorist, causing hardship to those wrongly identified as posing a risk.”¹⁶⁰

Compounding this is the concept of security itself, the exact breed of security that is being enhanced at the expense of individual liberties. Security is a “slippery and open-ended concept.”¹⁶¹ In relation to counter terrorism law, “security is used to refer to a state of being or end goal that can be subdivided into distinct objective and subjective conditions.”¹⁶² Objective security is the degree of actual or tangible safety from risk of harm.¹⁶³ While subjective security is the individual’s psychological perception or sense of safety.¹⁶⁴ In regards to ‘new terrorism’, “the fact that terrorists seek to instil terror, quite as much as do damage to life and property, elicits demands for subjective security that may be poorly, or even inversely, correlated with objective security.”¹⁶⁵ Consequently, the threat of ‘new terrorism’ renders subjective security equal to, if not more important than, the amelioration of objective risk from a majoritarian perspective.¹⁶⁶

¹⁵⁶ Mill, above n 16, at 8-9.

¹⁵⁷ Zedner, above n 2, at 103.

¹⁵⁸ Waldron, above n 19, at 12.

¹⁵⁹ Zedner, above n 2, at 103.

¹⁶⁰ Lynch, above n 4, at 60.

¹⁶¹ Lucia Zedner “Securing Liberty in the Face of Terror: Reflections from Criminal Justice” (2005) 32(4) *Journal of Law and Society* 507 at 516.

¹⁶² At 517.

¹⁶³ At 517.

¹⁶⁴ At 517.

¹⁶⁵ Zedner, above n 2, at 104.

¹⁶⁶ At 103.

Preventive measures in counter terrorism laws, such as the designation regime, undoubtedly privilege a subjective sense of security. They reassure the general public that the state has some grasp on those individuals and groups who pose the greatest risks of terrorist activity and is able to quash their endeavours to inflict harm before they commence. Furthermore, they delineate those risky individuals from the public at large so as to alleviate the sense of menacing ubiquity associated with the phenomenon of ‘new terrorism’. However, privileging subjective security bears its own risks, particularly when, as is typical of counter terrorism measures, the tangible liberties of the minority are traded off for the subjective security of the majority. In this regard, “to the extent that counter terrorism laws and policies appear unwarranted, they alienate those we target.”¹⁶⁷ As discussed above, the alienation and marginalisation of those deemed to be of a suspicious class may in fact act to create objective risks where none formerly existed. These risks may be more detrimental than any other hazard otherwise encountered.

As mentioned above, the definition of “terrorist act” contained in s 5 is not only integral to the operation of the TSA, it also informs other more pervasive measures instituted under the CTFLB. The Solicitor General’s criticisms highlight the question of whether the definition as it currently stands is fit for purpose. Arguably, the inclusion of a motive element renders the applicability of the TSA, and other legislative measures informed by the definition, unduly limited. Yet, it remains in place and, according to the Justice Minister, meets the standards set by the current government. However, given the implications of racialised framing outlined above, there is strength in the contention that a definition that is minimally functional and may, in practice, only serve to condone a discriminatory understanding of the concept of terrorism is an insufficient and detrimental response to the threat posed by ‘new terrorism’.

This chapter has sought to highlight the concerns arising out of the definition of “terrorist act” instituted under the TSA. In particular, it has sought to emphasise the potentially troubling consequences of the inclusion of a motive element in the statutory definition - the hazard that majoritarian privilege and minority scrutiny may serve to generate risks where none formerly existed. However, the “tyranny of the majority” is not the only threat to the individual. The surrender of these liberties in exchange for security necessarily entails bolstering state power. This consequently heightens the inherent risk posed by the state towards individual citizens. This concern is particularly pertinent in relation to the designation regime instituted under the TSA and informed by the definition of “terrorist act” discussed in this Chapter.

¹⁶⁷ Zedner, above n 2, at 104.

CHAPTER IV

A Critique of The Designation Regime

“This is to think, that Men are so foolish, that they take care to avoid what Mischiefs may be done by Pole-Cats, or Foxes, but are content, nay think it Safety, to be devoured by Lions.”¹⁶⁸

I Is the Designation System Really a Cause for Concern?

As discussed in Chapter II, the designation system instituted under the TSA exemplifies the preventive endeavour motivating the legislative response to the threat posed by ‘new terrorism’. While the designation process triggers retrospective punitive measures, it is primarily concerned with “the need to protect potential victims of terrorism, whether in New Zealand or elsewhere”¹⁶⁹ and identifying “the individuals and groups to which New Zealand anti-terrorism provisions... are to apply.”¹⁷⁰ It is therefore most aptly described as a “coercive preventive measure”¹⁷¹ – preventive in the sense that “it is created in order to avert, or reduce the frequency or impact of, behaviour that is believed to present an unacceptable risk of harm” and coercive in the sense that “it involves state-imposed restrictions on liberty of action, backed by a coercive response, or the threat of a coercive response, to the restricted individual.”¹⁷² The use of such measures has become typical of legislative action in the Western world in the aftermath of 9/11. Notably, Australia, Canada, the United Kingdom, and the European Union also have designation processes in place.¹⁷³ The institution of these measures reflects the predominantly preventive focus of recent criminalisation in counter terrorism law and beyond.¹⁷⁴

As discussed above, ‘new terrorism’ challenges the modus operandi of the traditional criminal law. It threatens grave potential harm, yet, its perpetrators are concurrently uninhibited by the punitive threat posed by the criminal law given martyrdom is often the ultimate goal. These unique challenges establish a persuasive justificatory basis for preventive, rather than punitive, measures considering “the more catastrophic the potential consummate offence, the greater the imperative to prevent, and the more it can justly be said that prosecution and punishment of the completed offence comes too late...”¹⁷⁵ However, the decidedly preventive focus of counter terrorism laws “has had the effect of expanding the substantive scope of the criminal law in ways that distort its remit and confound basic principles of criminalisation...”¹⁷⁶ Terrorist

¹⁶⁸ John Locke *The Treatise of Government II* (InteLex Group, United States of America, 1995) at 93.

¹⁶⁹ Foreign Affairs, Defence and Trade Committee, above n 47, at 3.

¹⁷⁰ At 7.

¹⁷¹ Ashworth, above n 9, at 20.

¹⁷² At 20.

¹⁷³ Foreign Affairs, Defence and Trade Committee, above n 47, at 7.

¹⁷⁴ See Zedner, above n 2, at 100.

¹⁷⁵ Ashworth, above n 9, at 180.

¹⁷⁶ Zedner, above n 2, at 115.

offences characteristically criminalise pre-inchoate, preparatory, facilitative, and associative offences¹⁷⁷ and, thus, extend the remit of the traditional criminal law considerably. This in turn contributes substantially to the modern phenomena of ‘overcriminalisation’. The designation system goes further than this, however. It is a “hybrid criminal-civil” measure. It possesses the capacity to institute criminal repercussions but it operates primarily in the civil realm and is, thus, capable of imposing significant restrictions on an individual without first requiring they contravene any given offence. Thus, rather than expanding the boundaries of the criminal law beyond their justifiable limits, such measures effectively sidestep the boundaries altogether. This is a novel breed of overcriminalisation. However, the use of this tactic is a burgeoning trend, examples of which are identifiable beyond the realm of counter terrorism law, such as the Criminal Proceeds (Recovery) Act 2009.¹⁷⁸ This legislative strategy effectively avoids criticism for distorting the remit of the criminal law by circumventing its confines altogether. This in turn leads to far less favourable conditions for the individuals exposed while concurrently advantaging the state by removing restrictions and guaranteed protections imposed by the criminal law. These implications will be discussed further below.

The TSA’s designation regime has thus far been inoperative in the domestic context and given the international nature of those entities who have been designated under the system, the consequences of designation have not had any practical application. This lack of empirical evidence surrenders any attempt to understand the full operational scope of the designation regime to a purely theoretical analysis. What follows is an imagined scenario designed to illustrate the potential remit of the designation regime beyond its identified target of ‘new terrorism’ and provide a not wholly implausible account of the breadth of the powers endowed under the Act, informed by the liberal conception of the state.

II An Illustration By Way of An Imagined Scenario

Picture this: A government holds power in New Zealand and has for consecutive terms on the basis of rebuilding and strengthening the nation’s economy following a sharp and unprecedented economic decline. As part of their strategic plan, the government has sought to secure national economic prosperity through international trade agreements. Such agreements have been justified on the premise of wider access to international markets and the diversification of revenue streams from exports and imports. However, the most recent agreement has been highly controversial. It is a trade agreement between New Zealand and the United States which critics argue effectively limits the sovereignty of New Zealand by making the government and its agencies accountable to corporations and international tribunals vis-a-vis its

¹⁷⁷ Ashworth, above n 9, at 180.

¹⁷⁸ For further discussion of the Criminal Proceeds (Recovery) Act 2009 see Dr Heather McKenzie *Proceeds of Crime Law in New Zealand* (LexisNexis NZ Limited, Wellington, 2015).

regulatory decisions. The repercussions of entry into the agreement extend into both the public and private sector and, consequently, opposition is widespread. Despite this hostile reception and significant protest action, the government has ignored public opinion and continued in secret negotiations with the explicitly stated intention of ratifying the agreement.

Leaked negotiation documents have revealed a particularly contentious aspect of the agreement that threatens to alter New Zealand's pharmaceutical landscape to the potential detriment of everyday citizens. The documents reveal that the agreement will hugely affect the operation of PHARMAC, the government agency tasked with determining the publicly funded pharmaceuticals available in New Zealand. The agreement will render PHARMAC accountable to large American pharmaceutical corporations by way of an international review tribunal who can effectively overrule PHARMAC's funding decisions. It will also limit the availability of the generic drugs by altering domestic intellectual property laws. Overall, it is contended that the agreement will effectively reconstruct the New Zealand healthcare system to the extent that it can no longer be described as free for all citizens. The move has been described as a shift towards a United States-esque health care system whereby individuals must self-fund their healthcare through private insurance.

In response to public demand for answers, the Prime Minister has released a press statement acknowledging this aspect of the agreement, yet, nonetheless affirming the government's on-going commitment to ratification in its original form. A variety of concerned groups have continued to take protest action but tensions have since escalated and various heated protests have resulted in acts of vandalism, violence, and arrest. Threats of a state boycott have circulated in media coverage and civil unrest appears to be surging.

Amidst this unrest, a prominent national association of medical professionals held its annual forum. The forum was largely focused on the trade agreement and all members concurred in strong concern at the potential impact of the agreement on healthcare in New Zealand. Members collectively agreed that, as medical professionals, they have a duty to take action and ensure that the opposition of the association is plainly articulated. A large number of members feel that the situation has escalated to a stage where only radical action will have any impact. This view proves to be divisive and the association, reticent to be affiliated with protest action analogous to the recent unrest, refuses to take any further action.

A divergent group of medical professionals from across the country decide to proceed with action. The group adopts the name "Medical Activists for Democracy" ("MAD"). Their stated purpose is to seek to compel the government to act democratically, that is, make decisions for New Zealand based upon majority public opinion, as opposed to minority ministerial preference. MAD decide that, in order to be effective, their actions should speak to the outcome of the agreement if ratified and

symbolise the undue restrictions on the availability of health care that will result. The group decides that individual members will not attend their rostered shifts at various public hospitals across New Zealand. Instead, they will conduct a sit-in on hospital grounds. Non-MAD hospital staff will be available to tend to patients, thus the affected hospitals will not be completely deprived of medical staff, but their resources will be limited. The protesting medical professionals will be present but “unavailable”. The group intend that this should symbolise the impact of the agreement on the availability of pharmaceuticals in New Zealand.

MAD begin their protest and, after several days of disruption to the health care systems of all major centres, the Prime Minister reacts by invoking his powers under the TSA. He makes an interim designation against MAD as a terrorist entity on the basis that he has good cause to suspect that MAD knowingly carried out a “terrorist act” within the meaning of s 5.¹⁷⁹ The Prime Minister notifies MAD that the actions taken by the group constitute a “terrorist act” on the basis that they are intended to cause serious interference or disruption to an infrastructure facility¹⁸⁰ – various public hospitals and, in turn, the public health care system. The nature of this interference is likely to endanger human life on the basis that it deprives both seriously ill patients and those seeking urgent medical care of ready access to necessary treatment given the hospital is severely understaffed.¹⁸¹ Furthermore, MAD carried out these actions for a political purpose¹⁸² and did so with the intention of compelling the government to abstain from entering the proposed trade agreement.¹⁸³

Following the designation, it immediately becomes an offence for the individual members of MAD to participate in the group’s protest action. To do so carries the threat of imprisonment for up to 14 years.¹⁸⁴ The Prime Minister issues a public statement notifying the nation of MAD’s interim status as a terrorist entity. His statement outlines the criminal implications of association with the group, however tenuous.¹⁸⁵ In addition, it affirms the government’s unrelenting intention to proceed with the prosecution of any person who contravenes the prohibitions deriving from MAD’s designation.

In response, a collective of major retailers issue their own statement expounding their intention to refuse custom from any member of MAD, in order to avoid the repercussions outlined by the Prime Minister, effective immediately. Minor retailers quickly follow suit. Meanwhile, banks across New Zealand freeze the accounts of MAD members in order to avoid “dealing with the property owned or controlled,

¹⁷⁹ Terrorism Suppression Act, s 20(1).

¹⁸⁰ Section 5(3)(c).

¹⁸¹ Section 5(3)(c).

¹⁸² Section 5(2).

¹⁸³ Section 5(2)(b).

¹⁸⁴ Section 13.

¹⁸⁵ See ss 8, 10, 12, 13, 13A in Appendix.

directly or indirectly by a designated terrorist entity”.¹⁸⁶ They also freeze the respective mortgages of MAD members as well as any other credit facilities made available to them.¹⁸⁷ Furthermore, the banks adhere to their duty and report suspicions relating to property they believe to be owned or controlled by MAD members.¹⁸⁸ The Commissioner of Police is consequently notified of the various property interests and debts owned by MAD members.

With their finances frozen, the threat of foreclosure on their properties looming, and access to basic commercial resources cut, a number of members abruptly leave the group and return to work absolving themselves of any association with the group. However, one hundred or more members, steadfast in their conviction, are more outraged than fearful. The recent actions of the government are highly undemocratic. To label their actions a terrorist act is preposterous and a blatant misuse of the TSA. They decide that ceasing action and returning to their work will only act to validate an unjustifiable use of Executive power and render similar future uses acceptable. Instead, they will continue with their protest in order to expose the government’s undemocratic actions to the world and to international scrutiny. While the members may be effectively starved of financial and social resources, supportive family members are able to legally provide them with food and clothing to satisfy their “essential human needs”¹⁸⁹ and they will therefore proceed.

The plight of the MAD members garners sympathy amongst a small group of activists, known as Social Activists for Democracy (“SAD”), associated with a far-left wing political group known for public, and occasionally unruly, displays of dissent against the current government. The group begins an online fundraising campaign in order to provide aide to MAD. The plan is to use the funds raised to secure supplies for the group, including food and clothing. However, the funds will also be used to create a social media campaign in order to bolster publicity and international awareness of MAD’s plight. Additionally, SAD offers its headquarters to MAD members for rest and recuperation.

The government quickly becomes aware of SAD’s actions and the Prime Minister makes an interim designation against the group as an “associated entity” of MAD. He does so on the basis that he has “good cause to suspect” that SAD is “acting on behalf” of MAD, knowing that MAD has committed the terrorist act it is designated for.¹⁹⁰ Concurrently, the Prime Minister makes a final designation against MAD on the basis that he “believes on reasonable grounds” that MAD has knowingly carried out the terrorist act which attracted interim designation.¹⁹¹

¹⁸⁶ Terrorism Suppression Act, s 9.

¹⁸⁷ Section s 10.

¹⁸⁸ Section s 43.

¹⁸⁹ Section 10(2).

¹⁹⁰ Section 20(3)(b)(i).

¹⁹¹ Section 22.

In the aftermath, a number SAD members instrumental to the fundraising campaign are arrested and charged with financing terrorism.¹⁹² Additionally, the Police announce their intention to pursue those individuals who donated to SAD's online fundraising campaign and charge those identified with financing terrorism. The owners of the headquarters are also charged with making property available to a terrorist entity.¹⁹³ A number of additional consequences ensue for those related to MAD members. For example, the spouses of two MAD members respectively own import and export dependent businesses. One business imports clothing and other goods from international wholesalers to sell in a small chain of retail shops in the North Island while the other exports New Zealand crafted natural beauty products to various retailers in Asia for resale. Customs seizes and detains the imports and exports of both businesses on the basis that they have good cause to suspect they are the property of MAD, a designated entity.¹⁹⁴ Following this, the Prime Minister threatens to direct the Official Assignee to take control of all property belonging to members of MAD¹⁹⁵ and cautions that this property may be subject to forfeiture to the Crown.¹⁹⁶

Under this mounting pressure, the remaining members of MAD concede to cease their actions and return to work, submitting an application to the Prime Minister for revocation of their designation status.¹⁹⁷

III The Designation Regime – A Hybrid Civil-Criminal Measure

The preceding imagined events were intended to illustrate the potential remit of the designation regime and highlight the capability of these measures to be utilised by the state for the coercion of those who are not terrorists in the conventional sense. Such a scenario should not be hastily disregarded as an implausible fantasy when both the liberal conception of the state and the recent empirical example of state action in the Waterfront Strikes are taken into account. This example sought to illustrate the reach of the TSA's designation regime but it also indirectly highlights another aforementioned concern– the hybrid civil-criminal operational nature of the regime.

A. The Modern Trend Towards Civil Measures

As mentioned earlier, recourse to civil, rather than criminal, measures is a growing trend in Western law-making that extends into all areas of legislative action.¹⁹⁸

¹⁹² Terrorism Suppression Act, s 8.

¹⁹³ Section 10.

¹⁹⁴ Section 47A.

¹⁹⁵ Section 48.

¹⁹⁶ Section 55.

¹⁹⁷ Section 34.

However, as will be discussed further below, constructing penalties in the civil context is hugely advantageous to the state at the expense of the individual concerned.

In the context of counter terrorism law, the characteristics of ‘new terrorism’ challenge the assumptions underpinning the operation of traditional criminal law and, concurrently, threaten extensive harm. The threat of grave harm has been realised in the various attacks inflicted in the United States, the United Kingdom, Europe, Iraq, and beyond. Consequently, a persuasive impetus to prioritise prevention over punishment exists. The novel challenges ‘new terrorism’ poses also generate justification for looking to other measures outside the criminal process to order to secure prevention. The “catastrophic scale of the 9/11 attacks was deemed to change the legal landscape”¹⁹⁹ and, consequently, recourse to civil measures was deemed acceptable, if not favourable, by the majority who regarded the legal protections of the criminal process “as too favourable to suspects and as obstacles in the pursuit of security.”²⁰⁰ However, as discussed above, the utilisation of civil measures, and more specifically hybrid civil-criminal measures, conflates the clear delineation between civil and criminal law and spawns a novel breed of overcriminalisation in the process. This new form of overcriminalisation does not distort and overextend the limits of the criminal law like its predecessor. Rather, it sidesteps the boundaries of the criminal law altogether, advantaging the state to the distinct disadvantage of the individual.

The designation regime implemented under the TSA is one of a variety of hybrid civil-criminal measures that have been instituted across different jurisdictions. In the direct aftermath of 9/11, the United Kingdom imposed legislation that made provision for the indefinite detention of non-British citizens suspected of terrorist activity.²⁰¹ Seventeen individuals were detained on this basis between 2001 and 2004²⁰² before both the House of Lords²⁰³ and the European Court of Human Rights²⁰⁴ held that the provisions were unlawful and in derogation of the basic human rights of detainees.²⁰⁵ In response, the government introduced Control Orders²⁰⁶, a hybrid criminal-civil measure applicable to citizens and non-citizens alike for whom prosecution or deportation was not possible.²⁰⁷ A Control Order could impose:

... lengthy curfews of up to 16 hours per day, significant restrictions on place of residence and on movement, on communication, use of internet, and association with

¹⁹⁸ See Ashworth, above n 8, for further discussion.

¹⁹⁹ At 182.

²⁰⁰ At 182.

²⁰¹ Anti-Terrorism, Crime and Security Act 2001, Part IV.

²⁰² Ashworth, above n 9, at 183.

²⁰³ *A and others v Secretary of State for the Home Department* [2004] UKHL 56.

²⁰⁴ *A v UK* (2009) 49 EHRR 29.

²⁰⁵ Ashworth, above n 9, at 183.

²⁰⁶ Prevention of Terrorism Act 2005 (UK).

²⁰⁷ Section 2(1)(a).

others, restrictions on work and other occupation, the breach of which resulted in criminal conviction and sanction by up to five years imprisonment.²⁰⁸

Those subject to an Order were also liable to electronic monitoring, surrender of passport, and other intrusive surveillance measures.²⁰⁹ Following sustained judicial criticism²¹⁰ and a damning report by the Joint Committee on Human Rights,²¹¹ Control Orders were abolished and replaced with Terrorism Prevention Investigation Measures (“TPIMs”).²¹² These new measures were “swiftly branded ‘Control Orders-lite’.”²¹³

Like the TSA’s designation regime, TPIMs impose significant restrictions upon individuals who have not been charged with any criminal offence. The standard of proof required under the TPIMs regime is “reasonable belief”. This is notably analogous to the standard of proof required for final designation under the TSA. TPIMs can impose residential restrictions and restrictions on freedom of movement, curfews, electronic monitoring, and more.²¹⁴ The TPIMs regime has thus been labelled “only slightly less onerous than its predecessor.”²¹⁵ The implications of being subject to TPIMs are ostensibly more onerous than designation under the TSA. Arguably, in contrast, the designation regime is less concerning than measures implemented in the likes of the United Kingdom in response to the threat of ‘new terrorism’. However, there are discernable similarities between the operation of the two regimes. As noted above, both systems implement significant restrictions without requiring contravention of any criminal offence and require analogous standards of proof. Furthermore, the power to impose the respective regimes is vested in a single member of the Executive with limited accountability or scrutiny.

The similarities between the United Kingdom and New Zealand’s hybrid civil-criminal measures are notable and possibly more significant than any consequential differences, particularly given New Zealand has yet to designate a domestic entity or make any outward use of the regime beyond bare designation of UN designated and other international entities. In contrast, “ten men – nine of them British nationals – were under TPIMs” in their first year of operation.”²¹⁶ While TPIMs *prima facie* appear more onerous in their consequences, this difference is purely theoretical given there has been no practical application of the designation regime within New Zealand. Consequently, there is no empirical foundation upon which to be satisfied that these

²⁰⁸ Ashworth, above n 9, at 184.

²⁰⁹ At 184.

²¹⁰ See At 185-186 for further discussion.

²¹¹ Joint Committee on Human Rights *Counter-Terrorism Policy and Human Rights* (HL Paper 64, HC 395, 2010).

²¹² Under the Terrorism Prevention and Investigation Measures Act 2011 (UK).

²¹³ Ashworth, above n 9, at 186.

²¹⁴ See Ashworth, above n 9, for further discussion.

²¹⁵ At 186.

²¹⁶ BBC “Q & A: TPims Explained” (4 November 2013) BBC <<http://www.bbc.com/news/uk-24803069>>.

apparent differences are in fact palpable. Furthermore, it is worth noting circumstantial differences between New Zealand and the United Kingdom. The United Kingdom has been the victim of a direct act of ‘new terrorism’ – the London bombings in July of 2007. In contrast, New Zealand has not encountered a direct act of ‘new terrorism’ on domestic soil and threats of such attacks have only been directed towards the country generally on the basis of its membership to the global coalition against ISIL. This is unlike other Western countries who have received direct threats and witnessed the realisation of these threats in form of catastrophic domestic attacks. If the designation system was set into operation in New Zealand by the event of a domestic attack then the actual repercussions of its operation may be more tangible and possibly more onerous. However, fortunately at the present time, mere speculation is our only tool.

B. The Implications for the Individual Concerned

A number of consequences flow from this shift into the civil realm that seemingly advantage the state at the expense of the individual subject to these measures. These may be justified on the basis that the civil law provides a practical solution to the challenges posed by ‘new terrorism’.

Firstly, the procedural safeguards guaranteed for individuals exposed to the criminal law via human rights instruments such as the New Zealand Bill of Rights Act 1990 and the International Covenant on Civil and Political Rights are impotent in the civil realm. There are no equivalent minimum rights for an individual subject to state civil action as exist for individuals charged with a criminal offence.²¹⁷ Nevertheless, the Select Committee did not find this perturbing on the basis that the procedural safeguards of the criminal law are available once the designation related offences are contravened.²¹⁸ However, designation alone is both stigmatising and restrictive. For example, the combined effect of ss 8, 10, 12, 13, and 13A limits an entity’s freedom of association as well as the freedom of others to associate with that entity.²¹⁹ This is only one example of the onerous implications of designation sole.

The civil standard of proof is significantly lower than the criminal standard of beyond reasonable doubt and designation is effective if the Prime Minister alone is satisfied that this lower standard of proof is met. Thus, a single member of the Executive assumes the role of both judge and executioner in this process with only limited duties of consultation.²²⁰ Furthermore, the principles of criminalisation underpinning any

²¹⁷ New Zealand Bill of Rights Act 1990, s 25.

²¹⁸ Foreign Affairs, Defence and Trade Committee, above n 47, at 7.

²¹⁹ Conte, above n 125, at 297.

²²⁰ The Prime Minister is required to consult with the Attorney General in regards to interim (s 20(4)) and final designation (s 22(5)) and the decision to deny an application for revocation (s 34(4)). The Prime Minister must also consult the Minister of Foreign Affairs and Trade in regards to interim designation (s 20(4)) and advise the Leader of the Opposition of the making of a designation and, if requested, provide a brief of the factual basis for the designation (s 20(5)).

justifiable penalisation of conduct, discussed in Chapter I, are all but redundant in the civil realm.

Compounding these factors are the review mechanisms available to a designated entity under the TSA. The Act makes provision for two methods of review. The first is by application directly to the Prime Minister requesting revocation.²²¹ The Prime Minister must consult with the Attorney General before refusing an application but, aside from this low standard of mediation, the process is entirely partisan and fails to provide the entity with independent and impartial scrutiny of their status. Additionally, the Act provides that designation is subject to judicial review.²²² This appears to provide an impartial alternative. However, this mechanism is severely limited when the proceedings concern “classified security information”.²²³ The phrase is subject to an extensive statutory definition with the breadth to encompass the entire substantive evidential basis for an entity’s designation. The Court is required to receive such evidence in the absence of the designated entity concerned, its legal representatives, and the public.²²⁴ Even a summary of this evidence is disallowed if it is likely to prejudice national security or defence, international relations, the maintenance of the law, or endanger any person.²²⁵ New Zealand courts routinely regard issues of national security, defence, and international relations as matters pertaining solely to the determination of the Executive, not the judiciary.²²⁶ Self-evidently, this ostensibly independent review mechanism is infected by implicit state influence to the extent that the impartiality of the procedure is questionable. This is especially so when the reality that almost all designations will be based, at least in part, on classified security information is taken into account. The Act expressly provides that this procedure applies despite any rule of law to the contrary.²²⁷ Closed material proceedings are not unique to New Zealand. However, they have attracted consistent criticism across jurisdictions on the basis that they contravene principles of natural justice, denying an individual the right to be informed of the case against them and the ability to provide a meaningful response.²²⁸

IV The Threat of the State

The “clear policy preference for prevention over cure”²²⁹ in counter terrorism legislative measures, including the designation process instituted under the TSA, is

²²¹ Terrorism Suppression Act, s 34.

²²² Terrorism Suppression Act, s 33.

²²³ Defined in s 32.

²²⁴ Section 38(3)(b).

²²⁵ Section 38(4).

²²⁶ This is supported by the reasoning relied upon by the Foreign Affairs, Defence, and Trade Committee in justifying removing the power to renew designation from the High Court and, instead, vesting this power with the Prime Minister.

²²⁷ Terrorism Suppression Act 2002, s 38(6).

²²⁸ See Conte, above n 125, at Chapter 15 for full discussion.

²²⁹ Lynch, above n 4, at 59.

advocated for by rhetoric of balancing individual security and liberty - the notion that “we always have to strike a balance between the individual’s liberty to do as he pleases and society’s need for protection against the harm that may accrue from some of the things it might please an individual to do.”²³⁰ However, reducing liberty necessarily involves an enhancement of state power²³¹ and while enhancing the power of the state may be deemed a kind of necessary evil in the eradication of the threat of ‘new terrorism’ “there is a corresponding risk that this enhanced power may also be used to cause harm or diminish liberty in other ways.”²³² These other uses can conceivably encompass conduct and individuals far removed from what is conventionally understood as terrorism. As discussed in Chapter III, the concept of terrorism is troublingly malleable. It is evolutionary and apt to change with time and circumstance. Its elusive nature renders it vulnerable to manipulation by the state. The imagined scenario above illustrates the viably wide ambit of the statutory definition of “terrorist act” which in turn informs the designation regime, rendering it susceptible to application beyond the target of ‘new terrorism’. Perceived through a liberal lens, this legitimates the concern that such measures may in fact be surrendering too much power to the state and placing too much faith in government and law enforcement officers to exercise these enhanced powers with principled restraint. Suspicion of state power is not only important in theory, it also arguably bears practical importance in light of the relatively recent example of undesirable state behaviour during the Waterfront Strikes in 1951. When considered alongside the coercive conduct of the state during the Waterfront Strikes, the concern that bolstered state powers could be utilised in unintended and oppressive ways should not seem overly implausible. A government in New Zealand’s recent history has proven itself willing to utilise legislative tools to act oppressively towards citizens when they behave contrary to its will. This is particularly so when trade and commerce are involved. It would be folly to consider the powers endowed under the TSA as somehow severable in this respect, especially given devastation of the national economy is specifically contemplated in the TSA’s definition of “terrorist act”.

²³⁰ Waldron, above n 19, at 21.

²³¹ At 26.

²³² At 39.

Conclusion

Recognising the coercive nature of the state and the malleability of the concept of terrorism is imperative from a liberal perspective. It is necessary to retain a “.... suspicion of power, an apprehension that power given to the state is seldom ever used for the purposes for which it is given, but is always and endemically liable to abuse.”²³³ It is crucial to question whether it is desirable to accept these extensive, power-endowing measures as a necessary evil in the “war on terror” and to question whether ceding tangible liberties in exchange for an undeterminable, and potentially minute, degree of heightened security is the ideal solution to the threat of ‘new terrorism’. In doing so, we necessarily place a degree of blind faith in the state and law enforcers. We trust they will exercise these enhanced powers in a measured manner, guided by good sense and restraint, as well as such principles as minimal criminalisation discussed in Chapter I.

Any analysis of counter terrorism measures must proceed on the assumption that the net threat from the state goes up as the power accorded to the state increases.²³⁴ It is fallacious to operate on the presumption that the increased risk to the individual from ‘new terrorism’ has somehow countered and diminished the risk that the state persistently poses.²³⁵ To proceed on a liberal premise we must be wary of lending too much weight to the idea of security at the disadvantage of individual liberty because privileging security necessarily entails the bolstering of state arsenal. In turn, this bolstered power is vulnerable to misuse and overextended application beyond the contemplated target of ‘new terrorism’.

Despite these concerns, the attitude of the majoritarian population in New Zealand, and many other Western countries, has been conducive to the use of coercive, liberty-eroding preventive measures in the pursuit of the extermination of the threat of ‘new terrorism’. Realistically, prevention, rather than punishment, is more effective in placating public concern. However, this attitude is also likely to be informed by the sense of disassociation discussed in Chapter III. The idea that these measures target terrorists, not I, makes them condonable from a majoritarian perspective on the basis that they enhance security while having little impact on liberties. However, privileging the majority can serve to terrorise the minority in another distinct sense and this, in turn, can spawn risks where none formerly existed. Furthermore, in proceeding with a liberal conception of the state we must accept that such dissociative justification is inherently fallible. The state’s inherently coercive nature does not necessarily distinguish between citizens on the basis of religion or race.

²³³ Waldron, above n 19, at 40.

²³⁴ At 40.

²³⁵ At 40.

The imagined scenario illustrates the susceptibility of the designation system to manipulation and the conceivably wide scope of the definition of “terrorist act” beyond that of conventional terrorism. The Water Front Strikes provide an empirical example of oppressive and undesirable exploitation of state power by a New Zealand government in the nation’s recent history. When viewed in conjunction, there appears to be justifiable grounds for wariness of the liberty-eroding, power-endowing measures implemented under the TSA and other counter terrorism legislative instruments. In this regard, it is particularly pertinent that the measures instituted under the TSA have never been applied domestically and their full extent remains unknown. If the occasion arose through domestic attack, the breadth of New Zealand’s measures may well be more tangibly apparent. They may plausibly be as concerning as the measures taken in the United Kingdom given the guiding influence our former sovereign state sustains over New Zealand’s legal system.

In light of these concerns, we must carefully consider whether we are content to set aside any speculative issues pertaining to New Zealand’s counter terrorism legislative framework and permit these measures to prevail in their current form. Conversely, we may deem it desirable, or indeed necessary, in consideration of the coercive state responses of victimised nations like the United Kingdom and France, to curb these powers presently while they remain a mere theory. Should we cautiously anticipate a totalitarian-esque future government and limit state powers in advance, or simply have faith that the state will exercise principled self-restraint perpetually? Whatever the conclusion, contemporaneous and careful consideration of New Zealand’s response to the threat of ‘new terrorism’ is as much of a protrusive concern as the threat of terrorism itself.

Bibliography

A Cases

1 United Kingdom

A and others v Secretary of State for the Home Department [2004] UKHL 56.

A v UK (2009) 49 EHRR 29.

2 Canada

R v Khawaja [2006] OJ 4245.

B Legislation

1 New Zealand

Aviation Crimes Act 1972.

Crimes Act 1961.

Crimes (Internationally Protected Persons and United Nations and Associated Personnel, and Hostages) Act 1980.

Criminal Proceeds (Recovery) Act 2009.

Custom and Excise Act 1996.

International Terrorism (Emergency Powers) Act 1987.

Maritime Crimes Act 1999.

Misuse of Drugs Act 1978.

New Zealand Bill of Rights Act 1990.

New Zealand Security Intelligence Service Act 1969.

Passports Act 1992.

Public Safety Conservation Act 1932.

Sentencing Act 2002.

Summary Proceedings Act 1957.

Terrorism Suppression Act 2002.

Terrorism Suppression Amendment Act 2003.

Terrorism Suppression Amendment Act 2005.

Terrorism Suppression Amendment Act 2007.

2 United Kingdom

Anti-Terrorism, Crime and Security Act 2001.

Terrorism Act 2000.

Prevention of Terrorism Act 2005.

3 Canada

Criminal Code (R.S.C. 1985).

4 *Australia*

Criminal Code 1995.

C *Treaties*

The International Convention for the Suppression of Terrorist Bombings.

The International Convention for the Suppressions of Financing of Terrorism.

D *Books*

Andrew Ashworth and Lucia Zedner *Preventive Justice* (Oxford University Press, Oxford, 2014).

Andrew Ashworth and Jeremy Horder *Principles of Criminal Law* (7th ed, Oxford University Press, Great Britain, 2013).

Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds) *Prevention and the Limits of the Criminal Law* (Oxford University Press, United Kingdom, 2013).

Alex Conte *Counter-Terrorism and Human Rights in New Zealand* (New Zealand Law Foundation, Wellington, 2007).

Alex Conte *Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom, Canada, Australia, and New Zealand* (Springer, Heidelberg, 2010).

Oren Gross, Fionnuala Ni Aolain, and James Crawford *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, Cambridge, 2006).

Douglas Husak *Overcriminalization: The Limits of the Criminal Law* (Oxford Scholarship Online, 2008).

Randall David Law *The Routledge History of Terrorism* (Routledge, Abingdon Oxon, 2015).

Genevieve Lennon and Clive Walker *Routledge Book of Law and Terrorism* (Routledge, London, 2015).

John Locke *The Treatise of Government II* (InteLex Group, United States of America, 1995).

Andrew Lynch, Edwina MacDonald, and George Williams (eds) *Law and Liberty in the War on Terror* (The Federation Press, Sydney, 2007).

Dr Heather McKenzie *Proceeds of Crime Law in New Zealand* (LexisNexis NZ Limited, Wellington, 2015).

John Stuart Mill *On Liberty; Representative Government; The Subjection of Women* (Oxford University Press, Great Britain, 1912).

Geoffrey Palmer *Unbridled Power: An Interpretation of New Zealand's Constitution and Government* (2nd ed, Oxford University Press, Auckland, 1987).

AP Simester and Andreas von Hirsch *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing Ltd, Oxford, 2011).

Jessica Stern and J.M. Berger *ISIS: The State of Terror* (HarperCollins, New York, 2015).

AP Simester and Warren J Brookbanks *Principles of the Criminal Law* (3rd ed, Thomson Reuters, Wellington, 2007).

G R Sullivan and Ian Dennis (eds) *Seeking Security: Pre-Empting the Commission of Criminal Harms* (Hart Publishing, Oxford, 2012).

Jeremy Waldron *Torture, Terror, and Trade-offs: A Philosophy for the White House* (Oxford University Press Inc, United States, 2010).

E Journal Articles

Andrew Ashworth and Lucia Zedner “Prevention and Criminalization: Justification and Limits” (2012) 15.4 *New Criminal Law Review* 542.

Jennifer Caldwell “International Terrorism (Emergency Powers) Act 1987 (New Zealand)” (1988) 6(1) *AULR* 108.

Alex Conte “A Clash of Wills: Counter Terrorism and Human Rights” (2003) 20 *NZULR* 338.

Kevin Dawkins and Margaret Briggs “Criminal Law” (2008) *NZLR* 541.

Douglas Husak “Reservations About Overcriminalization” (2011) 14(1) *New Criminal Law Review* 97.

Matthew Palmer “Counter-Terrorism Law” (2002) *NZLJ* 456.

K.J. Patterson “The Spectre of Censorship Under The International Terrorism (Emergency Powers) Act 1987” (1988) 18(3) *VUWLR* 259.

John Smith “New Zealand’s Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, And International Responsibilities” (December 2003) *Fulbright New Zealand* <<http://www.fulbright.org.nz/publications/2003-smith/>>.

Lucia Zedner “Terrorizing Criminal Law” (2014) 8(1) *Criminal Law and Philosophy* 99.

Lucia Zedner “Securing Liberty in the Face of Terror: Reflections from Criminal Justice” (2005) 32(4) *Journal of Law and Society* 507.

F Parliamentary and Governmental Materials

Countering Terrorist Fighters Legislation Bill 2014 (1 – 1) introduction.

G Reports

Foreign Affairs, Defence, and Trade Committee *Terrorism Suppression Amendment Bill* (26 September 2007).

Foreign Affairs, Defence and Trade Committee *Terrorism (Bombings and Financing) Suppression Bill* (23 March 2002).

Law Commission *Final Report on Emergencies* (NZLC R22, 1991).

H Internet Resources

BBC “Q & A: TPims Explained” (4 November 2013) BBC
<<http://www.bbc.com/news/uk-24803069>>.

Dr. David Collins QC “Media Statement: Solicitor General” (8 November 2007)
Scoop Independent News
<<http://img.scoop.co.nz/media/pdfs/0711/SolGenTerror.pdf>>.

Adam Dudding “Review of Terror Laws Stopped” (15 September 2009) Stuff
<<http://www.stuff.co.nz/national/politics/9166763/Review-of-terror-laws-stopped>>.

Law Commission “2013-2016 Statement of Intent”
<<http://www.lawcom.govt.nz/sites/default/files/corporatePaperAttachments/NZLC%20Statement%20of%20Intent%202013-2016.pdf>>.

Carolyn Meng-Yee “Terrorist Attack in NZ ‘not if but when’” (6 August 2016) New Zealand Herald
<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11688188>.

Ministry for Culture and Heritage “Anti-Terror Raids in Urewera” (15 June 2016)
New Zealand History < <http://www.nzhistory.net.nz/page/so-called-anti-terror-raids-ureweras>>.

New Zealand Police “Lists Associated with Resolution 1373”
<<http://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities/lists-associated-with-resolution-1373>>.

New Zealand Police “Lists Associated with Resolutions 1267/1989/2253 and 1988” <
<http://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities/lists-associated-with-resolutions-1267-1989-2253-1988>>.

Jock Phillips “Suicide – Preventing Suicide” (21 January 2015) Te Ara – the Encyclopedia of New Zealand < <http://www.teara.govt.nz/en/suicide/page-6%3E>>.

Rebecca Quilliam “Police Acted Lawfully During Urewera Raids” (22 May 2013)
New Zealand Herald
<http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10885376>.

Ben Quinn “French Police Make Woman Remove Clothing on Nice Beach Following Burkini Ban” (24 August 2016) The Guardian
<<https://www.theguardian.com/world/2016/aug/24/french-police-make-woman-remove-burkini-on-nice-beach>>.

I Other Resources

United Nations Security Council SC Res 1373 (2001).

Joint Committee on Human Rights *Counter-Terrorism Policy and Human Rights* (HL Paper 64, HC 395, 2010).

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1. Relevant Provisions of the Terrorism Suppression Act 2002

A. General

5 Terrorist act defined

(1) An act is a **terrorist act** for the purposes of this Act if—

- (a) the act falls within subsection (2); or
- (b) the act is an act against a specified terrorism convention (as defined in section 4(1)); or
- (c) the act is a terrorist act in armed conflict (as defined in section 4(1)).

(2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:

- (a) to induce terror in a civilian population; or
- (b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.

(3) The outcomes referred to in subsection (2) are—

- (a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act);
- (b) a serious risk to the health or safety of a population;
- (c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d);
- (d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:

(e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

(4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person—

(a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or

(b) intends to cause an outcome specified in subsection (3).

B. Terrorism-Related Offences

6A Terrorist act

(1) A person commits an offence who engages in a terrorist act.

(2) A person who commits a terrorist act is liable on conviction to imprisonment for life or a lesser term.

8 Financing of terrorism

(1) A person commits an offence who, directly or indirectly, wilfully and without lawful justification or reasonable excuse, provides or collects funds intending that they be used, or knowing that they are to be used, in full or in part, in order to carry out 1 or more acts of a kind that, if they were carried out, would be 1 or more terrorist acts.

(2) *[Repealed]*

(2A) A person commits an offence who, directly or indirectly, wilfully and without lawful justification or reasonable excuse, provides or collects funds intending that they benefit, or knowing that they will benefit, an entity that the person knows is an entity that carries out, or participates in the carrying out of, 1 or more terrorist acts.

(3) In a prosecution for financing of terrorism, it is not necessary for the prosecutor to prove that the funds collected or provided were actually used, in full or in part, to carry out a terrorist act.

(4) A person who commits financing of terrorism is liable on conviction to imprisonment for a term not exceeding 14 years.

9 Prohibition on dealing with property of, or derived or generated from property of, designated terrorist entity

(1) A person commits an offence who, without lawful justification or reasonable excuse, deals with any property knowing that the property is—

(a) property owned or controlled, directly or indirectly, by a designated terrorist entity; or

(b) property derived or generated from any property of the kind specified in paragraph (a).

(2) For the purposes of subsection (1), examples of a reasonable excuse for dealing with property referred to in those provisions are—

(a) where the dealing with the property comprises an act that does no more than satisfy essential human needs of (or of a dependant of) an individual designated under this Act:

(b) where a financial institution acts to freeze assets of a designated terrorist entity.

(3) Subsection (1) does not apply—

(a) if the Prime Minister has, under section 11, authorised the dealing with the property; or

(b) if the property concerned is the subject of a direction under section 48 and the dealing concerned forms part of the exercise by the Official Assignee of his or her powers under section 80 of the Criminal Proceeds (Recovery) Act 2009 (as modified and applied by section 51(a)).

(4) A person who commits an offence against subsection (1) is liable on conviction to imprisonment for a term not exceeding 7 years.

(5) *[Repealed]*

(6) A reference in the definition of deal with in section 4 to the transfer of property that is a security includes a reference to a transfer of the security by way of loan, mortgage, pledge, or bailment, whether in respect of a legal or an equitable interest.

10 Prohibition on making property, or financial or related services, available to designated terrorist entity

(1) A person commits an offence who makes available, or causes to be made available, directly or indirectly, without lawful justification or reasonable excuse, any property, or any financial or related services, either to, or for the benefit of, an entity, knowing that the entity is a designated terrorist entity.

(2) *[Repealed]*

(3) An example of making property available with a reasonable excuse, for the purposes of subsection (1), is where the property (for example, items of food, clothing, or medicine) is made available in an act that does no more than satisfy essential human needs of (or of a dependant of) an individual designated under this Act.

(4) Subsection (1) does not apply if the Prime Minister has, under section 11, authorised the making available of the property or services.

(5) A person who commits an offence against subsection (1) is liable on conviction to imprisonment for a term not exceeding 7 years.

(6) In this section, **make available**, in relation to any property or services, means to make the property or services available in any way and by any means (for example, to send, transfer, deliver, or provide the property or services).

(7) A reference in subsection (6) to the transfer of property that is a security includes a reference to a transfer of the security by way of loan, mortgage, pledge, or bailment, whether in respect of a legal or an equitable interest.

12 Recruiting members of terrorist groups

(1) A person commits an offence who recruits another person as a member of a group or organisation, knowing that the group or organisation is—

(a) a designated terrorist entity; or

(b) an entity that carries out, or participates in the carrying out of, 1 or more terrorist acts.

(2) A person who commits an offence against subsection (1) is liable on conviction to imprisonment for a term not exceeding 14 years.

13 Participating in terrorist groups

(1) A person commits an offence who participates in a group or organisation for the purpose stated in subsection (2), knowing that or being reckless as to whether the group or organisation is—

(a) a designated terrorist entity; or

(b) an entity that carries out, or participates in the carrying out of, 1 or more terrorist acts.

(2) The purpose referred to in subsection (1) is to enhance the ability of any entity (being an entity of the kind referred to in subsection (1)(a) or (b)) to carry out, or to participate in the carrying out of, 1 or more terrorist acts.

(3) A person who commits an offence against subsection (1) is liable on conviction to imprisonment for a term not exceeding 14 years.

13A Harbours or concealing terrorists

(1) A person commits an offence who, with the intention of assisting another person to avoid arrest, escape lawful custody, or avoid conviction, harbours or conceals that person,—

(a) knowing, or being reckless as to whether, that person intends to carry out a terrorist act; or

(b) knowing, or being reckless as to whether, that person has carried out a terrorist act.

(2) A person who commits an offence against subsection (1) is liable on conviction to a term of imprisonment not exceeding 7 years.

47G Offences in relation to certain detained goods

(1) Every person commits an offence who, having custody of goods pursuant to section 47F(1), acts in breach of any requirement of, or imposed pursuant to, section 47F(2) or (3).

(2) Every person who commits an offence against subsection (1) is liable on conviction to a fine not exceeding \$5,000.

(3) Every person commits an offence who, without the permission of the Chief Executive, takes or carries away or otherwise converts to his or her own use goods to which section 47F(2) and (3) applies.

(4) Every person who commits an offence against subsection (3) is liable on conviction to imprisonment for a term not exceeding 12 months, or to a fine not

exceeding an amount equal to 3 times the value of the goods to which the offence relates.

C. Designation

20 Interim designation as terrorist or associated entity

(1) The Prime Minister may designate an entity as a terrorist entity under this section if the Prime Minister has good cause to suspect that the entity has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts.

(2) On or after designating an entity as a terrorist entity under this Act, the Prime Minister may designate 1 or more other entities as an associated entity under this section.

(3) The Prime Minister may exercise the power given by subsection (2) only if the Prime Minister has good cause to suspect that the other entity—

(a) is knowingly facilitating the carrying out of 1 or more terrorist acts by, or with the participation of, the terrorist entity (for example, by financing those acts, in full or in part); or

(b) is acting on behalf of, or at the direction of,—

(i) the terrorist entity, knowing that the terrorist entity has done what is referred to in subsection (1); or

(ii) an entity designated as an associated entity under subsection (2) and paragraph (a), knowing that the associated entity is doing what is referred to in paragraph (a); or
(c) is an entity (other than an individual) that is wholly owned or effectively controlled, directly or indirectly, by the terrorist entity, or by an entity designated under subsection (2) and paragraph (a) or paragraph (b).

(4) Before designating an entity as a terrorist or associated entity under this section, the Prime Minister must consult with the Attorney-General and the Minister of Foreign Affairs and Trade about the proposed designation.

(5) After an entity is designated as a terrorist or associated entity under this section, the Prime Minister and the Attorney-General must, if practicable before the making of the designation is publicly notified under section 21(c) and, if not so practicable, as soon as possible after that notification,—

(a) advise the Leader of the Opposition of the making of the designation; and

(b) if requested to do so by the Leader of the Opposition, brief that Leader as to the factual basis for the making of the designation.

21 Further provisions relating to interim designation

A designation under section 20—

(a) may be made in respect of an entity only once, and therefore may not be made in respect of an entity who—

(i) is the subject of an earlier designation made under section 20 that has not yet expired or been revoked; or

(ii) was the subject of a designation under section 20 that has expired or been revoked:

(b) takes effect on being made, and must be made in writing signed by the Prime Minister:

(c) must be publicly notified—

(i) by a notice (in the prescribed form (if any)) indicating that it has been made being published in the *Gazette* as soon as practicable; and

(ii) in any other way the Prime Minister directs under section 28(1):

(d) must also be notified—

(i) by a notice (in the prescribed form (if any)) indicating that it has been made being given (in the prescribed manner (if any)) with all reasonable speed to the designated entity, if practicable, where that entity or a representative of it is in New Zealand; and

(ii) by a notice indicating that it has been made being given to any other persons or bodies, as the Prime Minister directs under section 28(2):

(e) expires on the close of the 30th day after the day on which it is made, unless it has earlier been revoked by the Prime Minister under section 34, or by the making of a final designation in respect of the entity concerned, under section 22:

(f) operates until it expires or is revoked but, if it is made the subject of any judicial review (whether under Part 1 of the Judicature Amendment Act 1972 or otherwise) or other proceedings before a court and is not sooner revoked under section 23(b) or section 34, continues to operate until those proceedings are withdrawn or finally determined.

22 Final designation as terrorist or associated entity

(1) The Prime Minister may designate an entity as a terrorist entity under this section if the Prime Minister believes on reasonable grounds that the entity has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts.

(2) On or after designating an entity as a terrorist entity under this Act, the Prime Minister may designate 1 or more other entities as an associated entity under this section.

(3) The Prime Minister may exercise the power given by subsection (2) only if the Prime Minister believes on reasonable grounds that the other entity—

(a) is knowingly facilitating the carrying out of 1 or more terrorist acts by, or with the participation of, the terrorist entity (for example, by financing those acts, in full or in part); or

(b) is acting on behalf of, or at the direction of,—

(i) the terrorist entity, knowing that the terrorist entity has done what is referred to in subsection (1); or

(ii) an entity designated as an associated entity under subsection (2) and paragraph (a), knowing that the associated entity is doing what is referred to in paragraph (a); or

(c) is an entity (other than an individual) that is wholly owned or effectively controlled, directly or indirectly, by the terrorist entity, or by an entity designated under subsection (2) and paragraph (a) or paragraph (b).

(4) Before designating an entity as a terrorist or associated entity under this section, the Prime Minister must consult with the Attorney-General about the proposed designation.

23 Further provisions relating to final designation

A designation under section 22—

(a) may be made in respect of an entity who—

(i) has never been the subject of a designation made under section 20; or

(ii) is the subject of a designation under section 20 that has not yet expired or been revoked; or

(iii) was the subject of a designation under section 20 that has expired or been revoked:

(b) if it is made in respect of an entity who is the subject of a designation made under section 20 and that has not yet expired or been revoked, revokes that designation under section 20:

(c) may be made in respect of an entity who was earlier the subject of a designation made under section 22 and that has expired or been revoked (the **earlier designation**) only if it is based on information that became available after the expiry or revocation of the earlier designation and is significantly different from the information on which the earlier designation was based:

(d) takes effect on being made, and must be made in writing signed by the Prime Minister:

(e) must be publicly notified—

(i) by a notice (in the prescribed form (if any)) indicating that it has been made being published in the *Gazette* as soon as practicable; and

(ii) in any other way the Prime Minister directs under section 28(1):

(f) must also be notified—

(i) by a notice (in the prescribed form (if any)) indicating that it has been made being given (in the prescribed manner (if any)) with all reasonable speed to the designated entity, if practicable, where that entity or a representative of it is in New Zealand; and

(ii) by a notice indicating that it has been made being given to any other persons or bodies, as the Prime Minister directs under section 28(2):

(g) *[Repealed]*

(h) operates until it expires or is revoked but, if it is made the subject of any judicial review (whether under Part 1 of the Judicature Amendment Act 1972 or otherwise) or other proceedings before a court and is not sooner revoked under section 34, continues to operate until those proceedings are withdrawn or finally determined.

25 Carrying out and facilitating terrorist acts

(1) For the purposes of this Act, a terrorist act is *carried out* if any 1 or more of the following occurs:

(a) planning or other preparations to carry out the act, whether it is actually carried out or not:

(b) a credible threat to carry out the act, whether it is actually carried out or not:

- (c) an attempt to carry out the act:
- (d) the carrying out of the act.
- (2) For the purposes of this Act, a terrorist act is facilitated only if the facilitator knows that a terrorist act is facilitated, but this does not require that—
 - (a) the facilitator knows that any specific terrorist act is facilitated:
 - (b) any specific terrorist act was foreseen or planned at the time it was facilitated:
 - (c) any terrorist act was actually carried out.

26 Content of notice to designated entity

A notice under section 21(d)(i) or section 23(f)(i) (to notify the designated entity of the making of the designation under section 20 or section 22)—

- (a) must state the section under which the designation is made, and whether the entity concerned is designated as a terrorist entity or as an associated entity:
- (b) may describe the entity concerned by reference to any name or names or associates or other details by which the entity may be identified:
 - (ba) must state that any person who deals with the entity’s property may be liable to prosecution for an offence under section 9:
- (c) must state the maximum period for which the designation may have effect or, if it is made under section 22, the maximum period for which it may have effect without being renewed under section 35:
- (d) must include general information about how it may be reviewed and revoked:
- (e) must include any other information specified for the purposes of this paragraph by regulations made under this Act.

27 Content of notice to public and others

(1) Subsection (2) applies to—

- (a) a notice under section 21(c)(i) or section 23(e)(i) (to notify publicly the making of a designation under section 20 or section 22); and
- (b) a notice under section 21(d)(ii) or section 23(f)(ii) (to notify specified persons or bodies of the making of a designation under section 20 or section 22).

(2) The notice—

- (a) must state the section under which the designation is made, and whether the entity concerned is designated as a terrorist entity or as an associated entity:
- (b) may describe the entity concerned by reference to any name or names or associates or other details by which the entity may be identified:
 - (ba) must state that any person who deals with the entity’s property may be liable to prosecution for an offence under section 9:
- (c) must state the maximum period for which the designation may have effect or, if it is made under section 22, the maximum period for which it may have effect without being renewed under section 35:
- (d) must include any other information specified for the purposes of this paragraph by regulations made under this Act:

(e) may include details of all earlier designations under this Act that have not yet expired or been revoked, so as to provide details of all entities currently designated under this Act.

28 Further notification of making of designation

(1) The Prime Minister may, for the purposes of section 21(c)(ii) or section 23(e)(ii), direct that the making of a designation under section 20 or section 22 be publicly notified (other than by notice in the *Gazette*, and either in the prescribed manner or form or both (if any) or in any other manner or form or both that the Prime Minister thinks fit).

(2) The Prime Minister may, for the purposes of section 21(d)(ii) or section 23(f)(ii), direct that notice of the making of a designation under section 20 or section 22 be given (either in the prescribed manner or in any other manner that the Prime Minister thinks fit) to any persons or bodies that the Prime Minister thinks fit (for example, to any registered banks or other persons—

- (a) who may possess property which may be property to which section 9(1) relates; or
- (b) who may make available property or services to which section 10(1) may relate).

29 Designations not invalid for certain reasons

No designation under section 20 or section 22 is invalid just because—

- (a) the entity concerned was not, before the designation was made, given notice that it may be made, or a chance to comment on whether it should be made, or both;
- (b) the making of it has not been notified, or notice of the making of it has not been given, in the manner or form required by section 21 or section 23.

30 Information available to Prime Minister

In considering whether to make or to revoke a designation under section 20 or section 22 or section 34, the Prime Minister may take into account any relevant information, including classified security information.

32 Classified security information defined

(1) In this Act, *classified security information* means information—

- (a) relevant to whether there are or may be grounds for designating an identifiable entity under this Act as a terrorist entity or as an associated entity; and
- (b) held by a specified agency (as defined in section 4(1)); and
- (c) that the head of the specified agency certifies in writing (in the prescribed form (if any)) cannot be disclosed except to the extent provided in section 38 or section 39 because, in the opinion of the head of the specified agency—
 - (i) the information is information of a kind specified in subsection (2); and
 - (ii) disclosure of the information would be disclosure of a kind specified in subsection (3).

(2) Information falls within subsection (1)(c)(i) if it—

(a) might lead to the identification of, or provide details of, the source of the information, the nature, content, or scope of the information, or the nature or type of the assistance or operational methods available to the specified agency; or

(b) is about particular operations that have been undertaken, or are being or are proposed to be undertaken, in pursuance of any of the functions of the specified agency; or

(c) has been provided to the specified agency by the government of another country or by an agency of a government of another country or by an international organisation, and is information that cannot be disclosed by the specified agency because the government or agency or organisation by which the information has been provided will not consent to the disclosure.

(3) Disclosure of information falls within subsection (1)(c)(ii) if the disclosure would be likely—

(a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or

(b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of another country or any agency of such a government, or by any international organisation; or

(c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or

(d) to endanger the safety of any person.

33 Judicial review of designations

Nothing in this Act prevents a person from bringing any judicial review (whether under Part 1 of the Judicature Amendment Act 1972 or otherwise) or other proceedings before a court arising out of, or relating to, the making of a designation under this Act.

34 Revocation of designations

(1) The Prime Minister may at any time revoke a designation made under section 20 or section 22, either on the Prime Minister's own initiative or on an application in writing for the purpose—

(a) by the entity who is the subject of the designation; or

(b) by a third party with an interest in the designation that, in the Prime Minister's opinion, is an interest apart from any interest in common with the public.

(2) Without limiting subsection (1)(b), a party may have an interest in a designation apart from any interest in common with the public through—

(a) possessing or controlling, or having an interest in, property to which section 9 applies as a result of the designation; or

(b) making available property or services to which section 10 applies as a result of the designation; or

(c) having an especially close association with the designated entity or its interests or objectives.

(3) An application under subsection (1) for revocation of a designation must be based on the grounds—

(a) that the designation should not stand because the entity concerned does not satisfy the test stated in section 20(1) or (3) or, as the case requires, in section 22(1) or (3); or

(b) that the entity concerned is no longer involved in any way in acts of the kind that made, or that would make, the entity eligible for designation.

(4) However, the Prime Minister may not refuse an application to revoke a designation under section 20 or section 22 without having first consulted with the Attorney-General about the proposed refusal.

(5) Except as provided in subsection (4), subsection (1) overrides every other provision of this Act.

35 Designations under section 22 to expire after 3 years unless renewed by Prime Minister

(1) A designation under section 22 expires 3 years after the date on which it takes effect, unless it is earlier—

(a) revoked under section 34; or

(b) renewed by an order under subsection (2) or (3).

(2) The Prime Minister may order that a designation made under section 22 remain in force for a further 3 years after the making of the order if the Prime Minister is satisfied that there are still reasonable grounds as set out in section 22 for an entity to be designated under that section.

(3) Before the expiry of an order under subsection (2), the Prime Minister may make another order renewing the designation concerned for a further 3 years.

(4) After making an order under subsection (2) or (3), the Prime Minister must report to the Intelligence and Security Committee on the renewal of the designation.

(5) The Prime Minister may make any number of orders under subsection (3) in respect of the same designation.

38 Procedure in proceedings involving classified security information

(1) This section applies to any proceedings in a court arising out of, or relating to, the making of a designation under this Act.

(2) The court must determine the proceedings on the basis of information available to it (whether or not that information has been disclosed to or responded to by all parties to the proceedings).

(3) If information presented, or proposed to be presented, by the Crown includes classified security information,—

(a) except where proceedings are before the Court of Appeal, the proceedings must be heard and determined by the Chief High Court Judge, or by 1 or more Judges nominated by the Chief High Court Judge, or both; and

(b) the court must, on a request for the purpose by the Attorney-General and if satisfied that it is desirable to do so for the protection of (either all or part of) the classified security information, receive or hear (the relevant part or all of) the classified security information in the absence of—

- (i) the designated entity concerned; and
 - (ii) all barristers or solicitors (if any) representing that entity; and
 - (iii) members of the public.
- (4) Without limiting subsection (3), if the designated entity concerned participates in proceedings,—
- (a) the court must approve a summary of the information of the kind referred to in section 32(2) that is presented by the Attorney-General except to the extent that a summary of any particular part of the information would itself involve disclosure that would be likely to prejudice the interests referred to in section 32(3); and
 - (b) on being approved by the court a copy of the statement must be given to the entity concerned.
- (5) Nothing in this section limits section 27 of the Crown Proceedings Act 1950 or any rule of law that authorises or requires the withholding of a document or the refusal to answer a question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.
- (6) Subsections (2) to (5) apply despite any enactment or rule of law to the contrary.

43 Suspicions that property owned or controlled by designated terrorist entities to be reported

- (1) This section applies to—
- (a) property owned or controlled, directly or indirectly, by a designated terrorist entity; and
 - (b) property derived or generated from any property of the kind specified in paragraph (a).
- (2) A financial institution or other person in possession or immediate control of property that the financial institution or other person suspects on reasonable grounds is or may be property to which this section applies must, as soon as practicable after forming that suspicion, report it to the Commissioner of Police, in accordance with section 44.
- (3) Nothing in subsection (2) requires any lawyer to disclose any privileged communication (as defined in section 45).
- (4) Every person who knowingly contravenes subsection (2) commits an offence, and is liable on conviction to imprisonment for a term not exceeding 1 year.
- (5) In this section, *financial institution* has the meaning referred to in section 44(5).

47A Detention of goods suspected to be terrorist property

- (1) A Customs officer or authorised person may, without warrant, seize and detain goods if—
- (a) the goods came to his or her attention, or into his or her possession, during a search, inspection, audit, or examination under—
 - (i) the Customs and Excise Act 1996; or
 - (ia) subpart 6 of Part 2 and sections 114 and 115 of the Anti-Money Laundering and Countering Financing of Terrorism Act 2009; or

(ii) Part 5 of the Financial Transactions Reporting Act 1996 (which relates to reporting of imports and exports of cash); and

(b) the goods are in New Zealand and he or she is satisfied that they either—

(i) are being, or are intended to be, exported from New Zealand; or

(ii) are being, or have been, imported into New Zealand; and

(c) he or she has good cause to suspect—

(i) that the goods are property of any kind owned or controlled, directly or indirectly, by an entity; and

(ii) that the entity is a designated terrorist entity; or

(d) he or she has good cause to suspect—

(i) that the goods are cash or cash equivalents owned or controlled, directly or indirectly, by an entity; and

(ii) that the entity is an entity that carries out, or participates in the carrying out of, 1 or more terrorist acts.

(2) In this section and sections 47B to 47G,—

authorised person, Chief Executive, the Customs, Customs officer or officer, exportation, goods, and importation have the meanings given to them in section 2(1) of the Customs and Excise Act 1996

cash equivalents includes (without limitation) bearer bonds, gemstones, money orders, postal notes, precious metals, and travellers cheques.

47B Return of cash necessary to satisfy essential human needs

(1) The power to detain goods under section 47A does not extend to, and the Customs must if practicable return immediately, cash seized under section 47A if the Customs is satisfied that the cash is (or that things for which it might be exchanged are) necessary to satisfy the essential human needs—

(a) of (or of a dependant of) an individual from whom the cash has been seized; and

(b) arising on, or within 7 days after, the date on which the detention would otherwise be effected.

(2) Nothing in subsection (1) requires the Customs to return any cash that the Customs is satisfied is not necessary for the purpose specified in that subsection.

(3) If the 7-day period referred to in section 47D(1)(a) is extended under section 47E, subsection (1) applies to the extension, and the reference in subsection (1)(b) to 7 days must be read as a reference to the number of days (not exceeding 21) of that 7-day period as extended.

47C Further provisions about detention under section 47A

(1) Reasonable force may be used if it is necessary for any of the following purposes:

(a) to seize goods under section 47A;

(b) to detain goods under section 47A.

(2) If the person from whom goods have been seized and detained under section 47A is identified but is not present when the seizure and detention occurs (for example, because the goods concerned are in mail or cargo or in unaccompanied

baggage), the Customs must make all reasonable efforts to notify that person of the detention and seizure as soon as practicable.

(3) Goods detained under section 47A must be taken to such place of security as a Customs officer or authorised person directs, and there detained, unless section 47F applies.

(4) Section 175 of the Customs and Excise Act 1996 (which protects persons acting under authority of that Act) applies, with all necessary modifications, in relation to the exercise of a power under any of sections 47A to 47F of this Act.

(5) Nothing in section 47A limits or affects powers under the following Acts:

(a) Customs and Excise Act 1996:

(ab) Anti-Money Laundering and Countering Financing of Terrorism Act 2009:

(b) Financial Transactions Reporting Act 1996:

(c) Mutual Assistance in Criminal Matters Act 1992:

(d) Criminal Proceeds (Recovery) Act 2009.

47D Return of goods detained under section 47A

(1) In this section, **investigation period**, in relation to goods seized and detained under section 47A,—

(a) means the period of 7 days after the date on which the goods were seized and detained; and

(b) includes any extension of that period granted by the High Court under section 47E.

(2) Goods seized and detained under section 47A must be returned to the person from whom they were seized as soon as practicable after whichever of the following occurs first:

(a) the completion of all relevant investigations, if they show either—

(i) that the goods are not property of the kind referred to in section 47A(1)(c)(i) or (d)(i); or

(ii) that the entity is not an entity of the kind referred to in section 47A(1)(c)(ii) or (d)(ii):

(b) the expiry of the investigation period.

(3) However, the Customs need not return the goods as provided in subsection (2), and may continue to detain them pending a direction by the Prime Minister under section 48 that the Official Assignee take custody and control of them, if the Customs is advised by, or on behalf of, the Prime Minister—

(a) that the goods are property of any kind owned or controlled, directly or indirectly, by an entity; and

(b) that the entity is a designated terrorist entity.

47E Extension of 7-day period in section 47D(1)(a)

(1) The 7-day period in section 47D(1)(a) may be extended (once only) by order of the High Court for a reasonable period up to a further 14 days if, on an application for the purpose made before the expiry of that 7-day period, that court is satisfied—

(a) that the good cause to suspect required by section 47A(1)(c) or (d) exists; and

(b) that the extension to be granted is necessary to enable investigations in or outside New Zealand in relation to the goods or entity to be completed.

(2) The application must be made in writing and served on the person from whom the goods were seized (if that person can be identified and located), and must include the following particulars:

(a) a description of the goods detained:

(b) the date on which the detention commenced:

(c) a statement of the facts supporting the good cause to suspect required by section 47A(1)(c) or (d); and

(d) a statement of reasons why the extension sought is necessary to enable investigations in or outside New Zealand in relation to the goods or entity to be completed.

(3) The person from whom the goods were seized is entitled to appear and be heard on the application.

(4) The Customs must make all reasonable efforts to notify the person from whom the goods were seized, at least 24 hours before the hearing of the application, of the time and place of that hearing.

47F Custody of certain goods detained under section 47A

(1) If goods detained under section 47A are a craft, vehicle, or animal, a Customs officer may leave those goods in the custody of either—

(a) the person from whom the goods have been seized; or

(b) any other person authorised by the Customs officer and who consents to having such custody.

(2) Every person who has the custody of goods under subsection (1) must, until a final decision is made under section 47D as to whether or not they are to be returned, hold them in safekeeping, without charge to the Crown and in accordance with any reasonable conditions that may be imposed by the Customs.

(3) A person to whom subsection (2) applies must also—

(a) make the goods available to a Customs officer on request; and

(b) not alter, or dispose of, or remove the goods from New Zealand, unless he or she is authorised to do so by a Customs officer; and

(c) return the goods on demand to the custody of the Customs.

48 Direction that Official Assignee take control of property

(1) The Prime Minister may, if satisfied that it is desirable to do so, direct the Official Assignee to take custody and control of property in New Zealand, if an entity is subject to a designation under section 22 or is a United Nations listed terrorist entity and the Prime Minister believes on reasonable grounds that the property is—

(a) property owned or controlled, directly or indirectly, by the entity; or

(b) property derived or generated from property of the kind referred to in paragraph

(a).

(2) The direction—

(a) must be in writing signed by the Prime Minister; and

- (b) must specify the property concerned; and
 - (c) may be subject to any terms and conditions the Prime Minister specifies.
- (3) A person who has custody or control of property specified in the direction must allow the Official Assignee to take custody and control of that property in accordance with the direction.

52 Third parties may apply for relief

- (1) A person who claims an interest in specified property that is subject to the prohibition in section 9 (not being property to which subsection (2) applies) may apply to the High Court for an order under section 54.
- (2) A person who claims an interest in specified property that is the subject of an application, under section 55(1), for an order under section 55 (an order that the property is forfeited to the Crown) may, before the order under section 55 is made, apply to the High Court for an order under section 54.
- (3) If not prevented by section 53, a person who claims an interest in specified property forfeited to the Crown under an order under section 55 may apply to the High Court for an order under section 54—
- (a) within 6 months after the date on which the order under section 55 is made; or
 - (b) within any further time the court allows on an application for that purpose made before or after the end of that 6-month period.
- (4) No entity who is the subject of the designation concerned may make an application under this section.
- (5) A person who makes an application under this section must serve notice of the application on the Attorney-General, who is a party to any proceedings on the application.

55 Forfeiture of property by order of High Court

- (1) The High Court may, on an application by the Attorney-General for the purpose, order that specified property is forfeited to the Crown if it is in New Zealand and is—
- (a) property owned or controlled, directly or indirectly, by an entity who is the subject of a designation under section 22 or is a United Nations listed terrorist entity; or
 - (b) property derived or generated from property of the kind referred to in paragraph (a).
- (2) However, an order of that kind may only be made if the court considers it appropriate that the specified property not remain subject to the prohibition in section 9, but be forfeited to the Crown.
- (3) In considering whether to make an order under this section in respect of particular property, the court may have regard to—
- (a) any undue hardship that is reasonably likely to be caused to any person by the operation of such an order;
 - (b) the nature and extent of the entity's interest in the property, and the nature and extent of other interests in it (if any).

58 Appeal against decision on application under section 55

- (1) A party to an application under section 55 may appeal to the Court of Appeal against the decision of the High Court.
- (2) Subject to sections 38 and 40, the procedure for the appeal must be in accordance with rules of court.
- (3) For the avoidance of doubt, an appeal under subsection (1) is a civil proceeding for the purposes of the Supreme Court Act 2003.

D. Designation-Related Offences

8 Financing of terrorism

(1) A person commits an offence who, directly or indirectly, wilfully and without lawful justification or reasonable excuse, provides or collects funds intending that they be used, or knowing that they are to be used, in full or in part, in order to carry out 1 or more acts of a kind that, if they were carried out, would be 1 or more terrorist acts.

(2) *[Repealed]*

(2A) A person commits an offence who, directly or indirectly, wilfully and without lawful justification or reasonable excuse, provides or collects funds intending that they benefit, or knowing that they will benefit, an entity that the person knows is an entity that carries out, or participates in the carrying out of, 1 or more terrorist acts.

(3) In a prosecution for financing of terrorism, it is not necessary for the prosecutor to prove that the funds collected or provided were actually used, in full or in part, to carry out a terrorist act.

(4) A person who commits financing of terrorism is liable on conviction to imprisonment for a term not exceeding 14 years.

9 Prohibition on dealing with property of, or derived or generated from property of, designated terrorist entity

(1) A person commits an offence who, without lawful justification or reasonable excuse, deals with any property knowing that the property is—

(a) property owned or controlled, directly or indirectly, by a designated terrorist entity; or

(b) property derived or generated from any property of the kind specified in paragraph (a).

(2) For the purposes of subsection (1), examples of a reasonable excuse for dealing with property referred to in those provisions are—

(a) where the dealing with the property comprises an act that does no more than satisfy essential human needs of (or of a dependant of) an individual designated under this Act;

(b) where a financial institution acts to freeze assets of a designated terrorist entity.

(3) Subsection (1) does not apply—

(a) if the Prime Minister has, under section 11, authorised the dealing with the property; or

(b) if the property concerned is the subject of a direction under section 48 and the dealing concerned forms part of the exercise by the Official Assignee of his or her powers under section 80 of the Criminal Proceeds (Recovery) Act 2009 (as modified and applied by section 51(a)).

(4) A person who commits an offence against subsection (1) is liable on conviction to imprisonment for a term not exceeding 7 years.

(5) *[Repealed]*

(6) A reference in the definition of deal with in section 4 to the transfer of property that is a security includes a reference to a transfer of the security by way of loan, mortgage, pledge, or bailment, whether in respect of a legal or an equitable interest.

10 Prohibition on making property, or financial or related services, available to designated terrorist entity

(1) A person commits an offence who makes available, or causes to be made available, directly or indirectly, without lawful justification or reasonable excuse, any property, or any financial or related services, either to, or for the benefit of, an entity, knowing that the entity is a designated terrorist entity.

(2) *[Repealed]*

(3) An example of making property available with a reasonable excuse, for the purposes of subsection (1), is where the property (for example, items of food, clothing, or medicine) is made available in an act that does no more than satisfy essential human needs of (or of a dependant of) an individual designated under this Act.

(4) Subsection (1) does not apply if the Prime Minister has, under section 11, authorised the making available of the property or services.

(5) A person who commits an offence against subsection (1) is liable on conviction to imprisonment for a term not exceeding 7 years.

(6) In this section, **make available**, in relation to any property or services, means to make the property or services available in any way and by any means (for example, to send, transfer, deliver, or provide the property or services).

(7) A reference in subsection (6) to the transfer of property that is a security includes a reference to a transfer of the security by way of loan, mortgage, pledge, or bailment, whether in respect of a legal or an equitable interest.

12 Recruiting members of terrorist groups

(1) A person commits an offence who recruits another person as a member of a group or organisation, knowing that the group or organisation is—

(a) a designated terrorist entity; or

(b) an entity that carries out, or participates in the carrying out of, 1 or more terrorist acts.

(2) A person who commits an offence against subsection (1) is liable on conviction to imprisonment for a term not exceeding 14 years.

13 Participating in terrorist groups

(1) A person commits an offence who participates in a group or organisation for the purpose stated in subsection (2), knowing that or being reckless as to whether the group or organisation is—

(a) a designated terrorist entity; or

(b) an entity that carries out, or participates in the carrying out of, 1 or more terrorist acts.

(2) The purpose referred to in subsection (1) is to enhance the ability of any entity (being an entity of the kind referred to in subsection (1)(a) or (b)) to carry out, or to participate in the carrying out of, 1 or more terrorist acts.

(3) A person who commits an offence against subsection (1) is liable on conviction to imprisonment for a term not exceeding 14 years.

43 Suspicions that property owned or controlled by designated terrorist entities to be reported

(1) This section applies to—

(a) property owned or controlled, directly or indirectly, by a designated terrorist entity; and

(b) property derived or generated from any property of the kind specified in paragraph (a).

(2) A financial institution or other person in possession or immediate control of property that the financial institution or other person suspects on reasonable grounds is or may be property to which this section applies must, as soon as practicable after forming that suspicion, report it to the Commissioner of Police, in accordance with section 44.

(3) Nothing in subsection (2) requires any lawyer to disclose any privileged communication (as defined in section 45).

(4) Every person who knowingly contravenes subsection (2) commits an offence, and is liable on conviction to imprisonment for a term not exceeding 1 year.

(5) In this section, *financial institution* has the meaning referred to in section 44(5).

47G Offences in relation to certain detained goods

(1) Every person commits an offence who, having custody of goods pursuant to section 47F(1), acts in breach of any requirement of, or imposed pursuant to, section 47F(2) or (3).

(2) Every person who commits an offence against subsection (1) is liable on conviction to a fine not exceeding \$5,000.

(3) Every person commits an offence who, without the permission of the Chief Executive, takes or carries away or otherwise converts to his or her own use goods to which section 47F(2) and (3) applies.

(4) Every person who commits an offence against subsection (3) is liable on conviction to imprisonment for a term not exceeding 12 months, or to a fine not

exceeding an amount equal to 3 times the value of the goods to which the offence relates

2. Relevant Provisions of International Counter Terrorism Legislation

A. United Kingdom

Terrorism Act 2000

1 Terrorism: interpretation.

- (1) In this Act “terrorism” means the use or threat of action where—
- (a) the action falls within subsection (2),
 - (b) the use or threat is designed to influence the government [F1 or an international governmental organisation] or to intimidate the public or a section of the public, and
 - (c) the use or threat is made for the purpose of advancing a political, religious [F2, racial] or ideological cause.
- (2) Action falls within this subsection if it—
- (a) involves serious violence against a person,
 - (b) involves serious damage to property,
 - (c) endangers a person’s life, other than that of the person committing the action,
 - (d) creates a serious risk to the health or safety of the public or a section of the public, or
 - (e) is designed seriously to interfere with or seriously to disrupt an electronic system.
- (3) The use or threat of action falling within subsection (2) which involves the use of firearms or explosives is terrorism whether or not subsection (1)(b) is satisfied.
- (4) In this section—
- (a) “action” includes action outside the United Kingdom,
 - (b) a reference to any person or to property is a reference to any person, or to property, wherever situated,
 - (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and
 - (d) “the government” means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom.
- (5) In this Act a reference to action taken for the purposes of terrorism includes a reference to action taken for the benefit of a proscribed organisation.

B. Canada

Criminal Code (R.S.C. 1985)

83.01 terrorist activity means

- ... (b) an act or omission, in or outside Canada,
- (i) that is committed

(A) in whole or in part for a political, religious or ideological purpose, objective or cause, and

(B) in whole or in part with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada, and

(ii) that intentionally

(A) causes death or serious bodily harm to a person by the use of violence,

(B) endangers a person's life,

(C) causes a serious risk to the health or safety of the public or any segment of the public,

(D) causes substantial property damage, whether to public or private property, if causing such damage is likely to result in the conduct or harm referred to in any of clauses (A) to (C), or

(E) causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C),

and includes a conspiracy, attempt or threat to commit any such act or omission, or being an accessory after the fact or counselling in relation to any such act or omission, but, for greater certainty, does not include an act or omission that is committed during an armed conflict and that, at the time and in the place of its commission, is in accordance with customary international law or conventional international law applicable to the conflict, or the activities undertaken by military forces of a state in the exercise of their official duties, to the extent that those activities are governed by other rules of international law. (activité terroriste)

C. Australia

Criminal Code 1995

100.1 *terrorist act* means an action or threat of action where:

(a) the action falls within subsection (2) and does not fall within subsection (3); and

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

(c) the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(i) intimidating the public or a section of the public.