

Chapter 5

Counter-Terrorism Law in New Zealand

Building on the account in chapter 4 of the means by which international counter-terrorist obligations have been implemented in New Zealand, this chapter examines the particular items of domestic legislation through which those obligations have been implemented, as well as legislation that exists outside the scope of those obligations. An overview and explanation of seven items of legislation is provided: the Aviation Crimes Act 1972; the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980; the International Terrorism (Emergency Powers) Act 1987; Maritime Crimes Act 1999; the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001; the Terrorism Suppression Act 2002; and the Counter-Terrorism Bill 2003. Consideration is also given to the Terrorism Suppression Amendment Bill 2007, introduced in late March 2007.

It should be mentioned at this early stage that there are numerous other pieces of New Zealand's domestic legislation that might be seen as contributing to countering terrorism. Just as with international law, there are various matters that are relevant to the issue of countering terrorist activities.¹ This chapter restricts itself, however, to the items of legislation just mentioned, those having been identified by New Zealand (in its reports to the Counter-Terrorism Committee) as being part of its counter-terrorist legislative regime.

Aviation Crimes Act 1972

The Aviation Crimes Act 1972 was the vehicle through which New Zealand transformed its obligations under the four conventions concerning the safety of aviation, its preamble stating that it is:

An Act to give effect to the provisions of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the Montreal Protocol for the Suppression of Unlawful Acts of Violence at

¹ As discussed within chapter 2, *infra*.

Airports Serving International Civil Aviation, and the Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, and for matters incidental thereto.

The Act contains 21 sections and establishes the following offences relating to aircraft and international airports:

- *Hijacking*,² being the unlawful seizure of, or exercise of control over, an aircraft (while on board an aircraft “in flight”, which is from the time when all the aircraft’s external doors are closed after embarkation until any external door is opened for disembarkation)³ by force, intimidation or threat of force, whether in or outside New Zealand.⁴ Conviction on indictment renders a person liable to life imprisonment.⁵
- *Crimes in connection with hijacking*,⁶ which includes any act or omission that is an offence under New Zealand law and occurs while on board an aircraft in flight and “in connection with the crime of hijacking”.⁷ Section 4(2) deems such a connection to exist when the conduct facilitates a hijacking or is intended to avoid the detection or arrest of any person connected with the hijacking.
- *Crimes relating to aircraft*,⁸ being a list of specific offences under section 5 of the Act relating to conduct affecting an aircraft in flight or “in service” (as defined by section 2(3)). The offences relate to conduct that might damage an aircraft or otherwise put it at risk.

² Offences mandated by Articles 1(a) and 2 of the *Convention for the Suppression of Unlawful Seizure of Aircraft* (the Hague Convention), opened for signature 16 December 1970, 860 UNTS 105 (entered into force 14 October 1971).

³ This is in fact a wider definition than that provided under the *Convention on Offences and Certain Other Acts Committed on Board Aircraft* (the Tokyo Convention), opened for signature 14 September 1963, 704 UNTS 219 (entered into force 4 December 1969), which provides under Chapter I, Article 1(3) that “For the purposes of this Convention, an aircraft is considered to be in flight from the moment when power is applied for the purpose of take-off until the moment when the landing run ends”. The broader definition found in the *Aviation Crimes Act* is found, however, within Chapter III of the Convention, Article 5(2); Article 3(1) of the Hague Convention; and Article 2(a) of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (the Montreal Convention), opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973).

⁴ The offence is created under section 3 of the Act. The term “in flight” is defined by section 2(2) of the Act.

⁵ Section 3.

⁶ Offences mandated by Article 1(b) of the Hague Convention.

⁷ Section 4(1). Section 4 does not itself specify the maximum penalty for such offending.

⁸ Offences mandated by Article 1(2) of the Tokyo Convention and Article 1 of the Montreal Convention.

- *Crimes relating to international airports*,⁹ which again sets out a list of specific offences concerning the use of any “device, substance or weapon” which endangers the safety of an international airport through violence, damage of facilities or aircraft not in service, or disruption of services.¹⁰

The commission of any of these offences renders a person liable to prosecution under New Zealand law or, in the alternative, liable to extradition in accordance with the procedures under the Extradition Act 1999.¹¹ The Aviation Crimes Act also makes it an offence to take firearms, dangerous or offensive weapons or instruments, ammunition, or any explosive substance or device onto an aircraft without lawful authority or reasonable excuse.¹²

In terms of compliance with obligations, the Tokyo Convention requires contracting States to take measures necessary to establish jurisdiction over offences committed on board aircraft registered in their State.¹³ The more specific obligations imposed under the Tokyo Convention appear to have been fully implemented through sections 5 (offences), 15 to 17 inclusive (powers of the aircraft commander) and 19 (exemption of military, customs or police services) of the Aviation Crimes Act.

The Hague Convention, concerning the hijacking of aircraft, requires States parties to make hijacking an offence punishable by severe penalties.¹⁴ Again, the requirements of the convention appear to have been fully implemented. The position is also true of the Montreal Convention and its Protocol.

Sections 12 and 13 of the Act set out powers of search of passengers, baggage and cargo. Since search and seizure is a matter specifically addressed within both the International Covenant on Civil and Political Rights (ICCPR)¹⁵ and the New Zealand Bill of Rights Act 1990 (NZBORA), further consideration of these provisions will be had in chapter 19. Security of the person is also a matter impacted upon by the Aviation

⁹ Offences mandated by Article 2(1) of the *Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* (the Montreal Protocol), opened for signature 24 February 1988, ICAO Doc 9518 (entered into force 6 August 1989).

¹⁰ Section 5A.

¹¹ Sections 7 and 7A.

¹² Section 11, punishable by a maximum of 5 years' imprisonment.

¹³ Article 3(2).

¹⁴ Article 2.

¹⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Crimes Act, an aircraft commander holding powers of search and restraint under sections 15 and 17.¹⁶ Related to the powers of restraint are the provisions of Articles 6 to 10 and 13 to 15 inclusive of the Tokyo Convention, and Article 6 of the Hague Convention.

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

The Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980 incorporates the two treaties on terrorism concerning the safety of persons, as well as the Convention on the Safety of United Nations and Associated Personnel.¹⁷ Its preamble reads:

An Act to give effect to—

- (a) The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents 1973; and
- (b) The Convention Against the Taking of Hostages 1979; and
- (c) The Convention on the Safety of United Nations and Associated Personnel 1994;—

and for matters incidental to the implementation of those Conventions.

The discussion that follows focuses on the first two conventions, the Protected Persons and Hostages Convention, these having been identified by the Terrorism Prevention Branch as terrorism-related conventions. The Act establishes three categories of offending:

- *Hostage-taking*,¹⁸ defined as the unlawful seizure or detention of any person, whether in or outside New Zealand, with intent to compel the government of any country or any international intergovernmental organisation to do or abstain from doing something.¹⁹ Section 8(2)

¹⁶ Also to be addressed within chapter 19.

¹⁷ The *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* (the Protected Persons Convention), opened for signature 14 December 1973, 1035 UNTS 167 (entered into force 20 February 1977); the *International Convention against the Taking of Hostages* (the Hostages Convention), opened for signature 18 December 1979, 1316 UNTS 205 (entered into force 3 June 1983); and the *Convention on the Safety of United Nations and Associated Personnel*, opened for signature 9 December 1994, 2051 UNTS 363 (entered into force 15 January 1999).

¹⁸ As mandated by Article 1 of the Hostages Convention.

¹⁹ Section 8(1).

excludes conduct that would essentially amount to the domestic-based offence of kidnapping.

- *Crimes against persons protected by a convention*,²⁰ which includes conduct in or outside New Zealand in relation to a person who is known to be a protected person that would amount to certain crimes listed in the first Schedule to the Act (section 3), or threats of such conduct (section 5).²¹
- *Crimes against premises or vehicles of persons protected by a convention*,²² again including conduct within or outside New Zealand this time in relation to the official premises of, or vehicles used by, protected persons that would amount to certain crimes listed in the second Schedule to the Act (section 4), or threats of such conduct (section 6).²³

As for the Aviation Crimes Act, any offence against the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act renders an offender liable to prosecution in New Zealand or, in the alternative, to extradition. To that end, the international obligations under the two conventions identified appear to have been fully implemented into national law. There do not appear to be any issues of potential concern relating to civil and political rights within the 17 sections of the Act.

International Terrorism (Emergency Powers) Act 1987

The International Terrorism (Emergency Powers) Act 1987 is an Act adopted by New Zealand in reaction to the Rainbow Warrior bombing, rather than in response to international counter-terrorist obligations, and in the realisation that New Zealand was not safe from terrorist activity within

²⁰ As mandated by Article 1(a), (c), (d) and (e) of the Protected Persons Convention.

²¹ Including homicide, violent offending, sexual offending and kidnapping.

²² As mandated by Article 1(b), (c), (d) and (e) of the Protected Persons Convention.

²³ Arson, attempted arson, intentional damage and endangering transport – sections 267, 268, 269 and 270 respectively of the *Crimes Act 1961*.

its borders.²⁴ In the Parliamentary debates concerning the Bill, the then Minister of Justice Geoffrey Palmer said:²⁵

Sadly, it can no longer be assumed that New Zealand will remain immune from acts of international terrorism.

The Act establishes emergency powers, which can be authorised by a meeting of at least three Ministers of the Crown if they reasonably believe (based on advice to the Prime Minister from the Commissioner of Police) that an international terrorist emergency is occurring and that the exercise of emergency powers is necessary to deal with that emergency.²⁶ This authority must be given by way of a notice in writing (within the terms specified under section 6(3)) and tabled before the House of Representatives with reasons for giving the notice.²⁷ The House then has the authority to either revoke the notice or, if necessary, to extend it at any time and for any reason.²⁸ The emergency authority otherwise remains valid for seven days, unless extended by a resolution of Parliament under section 7(2) of the Act – each resolution only enabling an extension of a maximum of seven days.

Where an international terrorist emergency is declared, certain emergency powers are vested in the police under section 10 of the Act, also exercisable by members of the armed forces acting as an aid to the civil power and where requested to act by a member of the police:²⁹

- (2) Subject to this Act, any member of the Police may, for the purpose of dealing with any emergency to which this section applies, or of preserving life or property threatened by that emergency,—
 - (a) Require the evacuation of any premises or place (including any public place), or the exclusion of persons or vehicles from any premises or place (including any public place), within the area in which the emergency is occurring;
 - (b) Enter, and if necessary break into, any premises or place, or any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle, within the area in which the emergency is occurring;

²⁴ Although it should be recognised that not all agreed at the time that this was the case and that specific anti-terrorism legislation was necessary: see, for example, New Zealand Human Rights Commission, *Report on the International Terrorism (Emergency Powers) Bill 1987*, 1987.

²⁵ New Zealand, *New Zealand Parliamentary Debates*, No 482, 10115, 30 June 1987.

²⁶ Sections 5 and 6.

²⁷ Section 7. The notice must be tabled immediately if the House is at that time sitting, or otherwise at the earliest practicable opportunity – section 7(1).

²⁸ Sections 7(2) and 8.

²⁹ Section 12.

- (c) Totally or partially prohibit or restrict public access, with or without vehicles, on any road or public place within the area in which the emergency is occurring:
 - (d) Remove from any road or public place within the area in which the emergency is occurring any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle impeding measures to deal with that emergency; and, where reasonably necessary for that purpose, may use force or may break into any such aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle:
 - (e) Destroy any property which is within the area in which the emergency is occurring and which that member of the Police believes, on reasonable grounds, constitutes a danger to any person:
 - (f) Require the owner or person for the time being in control of any land, building, vehicle, boat, apparatus, implement, or equipment (in this paragraph referred to as requisitioned property) that is within the area in which the emergency is occurring forthwith to place that requisitioned property under the direction and control of that member of the Police, or of any other member of the Police:
 - (g) Totally or partially prohibit or restrict land, air, or water traffic within the area in which the emergency is occurring.
- (3) Notwithstanding anything in any other Act, but subject to this Act, any member of the Police may, for the purpose of preserving life threatened by any emergency to which this section applies,—
- (a) Connect any additional apparatus to, or otherwise interfere with the operation of, any part of the telecommunications system; and
 - (b) Intercept private communications—
in the area in which the emergency is occurring.

The latter power of interception is exercisable by police only.³⁰ The Act also provides an emergency power to requisition any property, with compensation later payable to the owner of the property.³¹ The powers thus far have the potential to impact upon rights pertaining to search and seizure, detention and privacy. Added to this is the exemption from liability of the police or members of the armed forces exercising powers under the Act.

Most controversial is section 14 of the Act which allows the Prime Minister to restrict or prohibit the publication or broadcasting of the identity (or any information capable of identifying) of any person involved in dealing with an international terrorist emergency, as well as restricting or prohibiting information about any piece of equipment used to deal with the emergency that could prejudice measures used to resolve an international terrorist emergency. In effect these powers could be used for a ban on all

³⁰ Section 10(4).

³¹ Sections 11 and 13.

media for up to twenty-one days. Criticisms that the censorship provisions amounted to an unjustified encroachment on the right to freedom of expression³² led to the New Zealand Law Commission recommending that the Act be repealed.³³ The Act remains in force without amendment. This feature of the Act is examined in chapter 12, concerning counter-terrorism and media control.

The Act also creates offences for failure to comply with directions issued by police or military under the powers under section 10,³⁴ or for breach of a section 14 media gag.³⁵

A “terrorist emergency” is defined under the Act as:

Section 2 Interpretation

“International terrorist emergency” means a situation in which any person is threatening, causing, or attempting to cause—

- (a) The death of, or serious injury or serious harm to, any person or persons; or
 - (b) The destruction of, or serious damage or serious injury to,—
 - (i) Any premises, building, erection, structure, installation, or road; or
 - (ii) Any aircraft, hovercraft, ship or ferry or other vessel, train, or vehicle; or
 - (iii) Any natural feature which is of such beauty, uniqueness, or scientific, economic, or cultural importance that its preservation from destruction, damage or injury is in the national interest; or
 - (iv) Any chattel of any kind which is of significant historical, archaeological, scientific, cultural, literary, or artistic value or importance; or
 - (v) Any animal—
- in order to coerce, deter, or intimidate—
- (c) The Government of New Zealand, or any agency of the Government of New Zealand; or
 - (d) The Government of any other country, or any agency of the Government of any other country; or
 - (e) Any body or group of persons, whether inside or outside New Zealand,—
- for the purpose of furthering, outside New Zealand, any political aim.

³² Discussed in the report of the Advisory Council of Jurists, *Reference on the Rule of Law in Combating Terrorism*, Final Report to the Asia Pacific Forum of National Human Rights Institutions, May 2004, 116.

³³ New Zealand Law Commission, *Final Report on Emergencies*, NZLC Report 22 (Wellington, 1991), 7.139. The Commission’s recommendations are discussed when considering the impact and legitimacy of section 4 of the Act within chapter 18.

³⁴ Section 21(1)(a), qualified by the defences under subsection (4).

³⁵ Section 21(1)(b), qualified by the defences under subsection (4).

There are two main things to note about this definition. Although, at first sight, it appears to be detailed, it is in fact relatively broad. A wide range of criminal conduct, accompanied by coercive or intimidatory elements, will satisfy the definition and might thereby invoke the powers discussed. The second aspect of the definition to note is the final sentence, which qualifies that the conduct in question is done for the purpose of furthering any political aim *outside New Zealand*. In other words, if a bombing (or other criminal act) was committed with the aim of changing the New Zealand Government's policy and/or conduct within New Zealand, this would not give rise to an "international terrorist emergency". The reasoning must be that this would be "national" rather than "international", although it is not clear why the State should want to have emergency powers to deal with international terrorists and not domestic ones.

Maritime Crimes Act 1999

The two maritime safety conventions relating to terrorism (the Rome Convention and Protocol)³⁶ were incorporated into New Zealand law through the final piece of pre-September 11 legislation, the Maritime Crimes Act 1999, being an Act:³⁷

...to give effect to the provisions of the Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the Rome Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf.

Similar in nature to the Aviation Crimes Act 1972, the Maritime Crimes Act establishes offences mandated by the Rome Convention and Protocol and aimed at securing the safety of ships (other than warships, customs or police vessels)³⁸ and maritime platforms:

- *Crimes relating to ships*,³⁹ prohibiting the unlawful seizure of ships and acts that damage ships or place their safe navigation in danger.⁴⁰ It also

³⁶ The *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (the Rome Convention), opened for signature 10 March 1988, 1678 UNTS 221 (entered into force 1 March 1992); and the *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* (the Rome Protocol), opened for signature 10 March 1988, 1678 UNTS 304 (entered into force 1 March 1992).

³⁷ See the preamble to the *Maritime Crimes Act 1999*.

³⁸ Section 3.

³⁹ As mandated by Article 3 of the Rome Convention.

⁴⁰ Section 4(1) and (2).

renders a person liable to prosecution if, in the commission of the latter acts, s/he injures or causes death to any person.⁴¹

- *Crimes relating to fixed platforms*,⁴² prohibiting the same conduct, but relating to fixed platforms (any artificial island, installation or structure permanently attached to the seabed for the purpose of exploration or resources exploitation).⁴³

Such conduct, whether within or outside New Zealand,⁴⁴ renders a person liable to prosecution within New Zealand or arrest and surrender to a State party to the Rome Convention or Protocol, as applicable.⁴⁵

The Act also provides the master of a ship with powers of detention and surrender, as well as search and seizure, of any person on board a ship, incorporating the obligations under Article 8 of the Rome Convention.⁴⁶ The Convention and Protocol are in all other respects implemented into New Zealand law. As rights of arrest and detention, as well as search and seizure, are involved, those provisions of the Act require further examination in the context of human rights.⁴⁷

United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and Amending Regulations

The obligations imposed by the Security Council upon New Zealand under Resolution 1373 were, by way of interim measure, incorporated into domestic law under the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001 and Amending Regulations of 2002 – the Terrorism Regulations. The Terrorism Regulations were made pursuant to the empowering provision of the United Nations Act 1946, that enactment established to permit the New Zealand Government to implement directions of the Security Council by Order in Council.

The Terrorism Regulations did four things.⁴⁸ First, they prohibited certain conduct relating to the financing of terrorist activities (the provision

⁴¹ Section 4(2).

⁴² As mandated by Article 2 of the Rome Protocol.

⁴³ As defined under section 2.

⁴⁴ See sections 8 and 9.

⁴⁵ Sections 13 to 16 inclusive.

⁴⁶ Sections 11 and 12.

⁴⁷ See, *infra*, chapter 19 concerning search and seizure, and arrest and detention.

⁴⁸ Mark Gobbi, "Treaty Action and Implementation", (2004) 1 *New Zealand Yearbook of International Law* 277.

of funds to specified entities, the dealing with property of such entities and the making services and property available to entities).⁴⁹ The Regulations also imposed duties upon any person in possession or control of property suspected to be owned or controlled by a specified entity to report this to the police.⁵⁰ Third, the Regulations prohibited the recruitment of any person as a member of a specified entity, or the participation by any person in such an entity.⁵¹ Finally, the Regulations identified al-Qaida, the Taliban and Usama bin Laden as “specified entities” under the Regulations.⁵² The prohibitions potentially impact upon the freedom of association, to be discussed within chapter 14.

Quite apart from the prohibitions mentioned, the Terrorism Regulations also raise the interesting and complex issue concerning the relationship between the Executive and Parliament pertaining to subordinate law-making authority and the potential to limit rights. This matter is addressed further in chapter 10.

Terrorism Suppression Act 2002

The Terrorism Suppression Act 2002 was enacted to achieve two purposes: first to allow New Zealand to become party to the conventions on the suppression of terrorist bombings and the suppression of the financing of terrorism; and also to give effect to obligations upon New Zealand under Security Council Resolution 1373.⁵³ Because of the timing of New Zealand’s decision to pursue each objective, and the intervening attacks of September 11, the process from Bill to Act was a rather unusual one. The Act is also now subject to further proposed amendments, under the Terrorism Suppression Amendment Bill 2007. The Bill was introduced just three weeks prior to the completion of this text.

⁴⁹ Regulations 6, 7 and 9 of the *United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001*.

⁵⁰ Regulation 8. Regulation 8(2) excludes, from application of this duty, any “privileged communication” with a lawyer, as defined under the *Financial Transactions Reporting Act 1996*.

⁵¹ Regulations 11 and 12.

⁵² Regulation 4(1) and 5 and the Schedule to the *United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001*, and Regulation 3 of the *United Nations Sanctions (Afghanistan) Amendment Regulations 2001*.

⁵³ Discussed below. See also Gobbi (n 48). Note that the Act does not contain any preambular statement setting out the purpose of the legislation, but that the purpose of the legislation is addressed within section 3 of the Act.

From Bill to the Current Act

This piece of legislation has undergone a long and somewhat unusual transformation from its original form and content as the Terrorism (Bombings and Financing) Bill to the *current* form and content of the Terrorism Suppression Act 2002. The first two stages reflect the dual purposes of the legislation as noted above. First, the Bill was introduced as simple incorporating legislation for the bombings and financing conventions. Next, the Bill was significantly amended to incorporate obligations under Security Council Resolution 1373. A further set of substantive provisions were added to the Act through the Counter-Terrorism Act 2003 (which created the Terrorism Suppression Amendment Act 2003). Further minor amendments took place under the Terrorism Suppression Amendment Bill (No 2) was introduced in December 2004. The most recent changes have been proposed under the Terrorism Suppression Amendment Bill 2007.

1. Treaty implementation

The Terrorism Suppression Act 2002 began its life as the Terrorism (Bombings and Financing) Bill, introduced in early 2001 (prior to the September 11 attacks) following the Executive's decision to become party to the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism.⁵⁴ As discussed in chapter 4, National Interest Analyses were prepared, with the Foreign Affairs, Defence and Trade Committee subsequently lodging treaty examination reports with the House on 1 December 2000. The reports did not bring any matters to the attention of the House, but the Analyses each noted that domestic implementing legislation would be needed to create new criminal offences, establish extra-territorial jurisdiction and facilitate the prosecution or extradition of alleged offenders.⁵⁵

⁵⁴ The *International Convention for the Suppression of Terrorist Bombing* (the Bombing Convention), opened for signature 12 January 1998, 2149 UNTS 286 (entered into force 23 May 2001); and the *International Convention for the Suppression of the Financing of Terrorism* (the Financing Convention), opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992).

⁵⁵ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, International Convention for the Suppression of Terrorist Bombings*, para 9, and *National Interest Analysis, International Convention for the Suppression of the Financing of Terrorism*, para 12.

The most recent addition to the international legal framework on counter-terrorism is the International Convention for the Suppression of Acts of Nuclear Terrorism.⁵⁶ New Zealand is an original signatory State to the Nuclear Terrorism Convention, which was adopted in April 2005.⁵⁷ At the same time as the negotiation of the Convention, work was being undertaken by the International Atomic Energy Agency (IAEA) towards adopting amendments to the Convention on the Physical Protection of Nuclear Material.⁵⁸ One of the purposes of the Terrorism Suppression Amendment Bill 2007 is to allow New Zealand to implement obligations under, and take treaty action in respect of, both the Nuclear Terrorism and Nuclear Materials Conventions.⁵⁹

2. Security Council Resolution 1373

After the preparation of the National Interest Analyses and the presentation of reports required by Parliamentary Standing Orders, the horrific events of September 11, 2001, transpired. The Security Council subsequently adopted resolution 1373 (2001),⁶⁰ imposing both binding and non-binding obligations upon New Zealand (as a member of the United Nations).⁶¹ The Resolution was adopted when the Terrorism (Bombings and Financing) Bill was in its final stages of the select committee process.⁶² Compliance with the obligations under the resolution was the second aim of the 2001 Bill, as amended. To achieve that objective, the reasonably unusual step was taken of adding a considerable number of new substantive provisions to the Bill, seeing the Bill almost double in size.⁶³ Due to these circumstances, the Foreign Affairs Defence and Trade Committee presented to the House an

⁵⁶ *International Convention for the Suppression of Acts of Nuclear Terrorism* (the Nuclear Terrorism Convention), adopted and opened for signature on 15 April 2005 under General Assembly resolution 58/290 (2005), UN GAOR, 58th Sess, 91st Plen Mtg, UN Doc A/Res/58/290 (2005).

⁵⁷ See *New Zealand national report to the United Nations Security Council Counter-Terrorism Committee*, UN Doc S/2006/384 (2006), 11.

⁵⁸ *Convention on the Physical Protection of Nuclear Material* (the Nuclear Material Convention), opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987).

⁵⁹ New Zealand Parliamentary Library, *Bills Digest. Terrorism Suppression Amendment Bill 2007* (Bills Digest 1498, 21 March 2007), 2.

⁶⁰ SC Res 1373, UN SCOR, 4385th Mtg, UN Doc S/Res/1373 (2001).

⁶¹ Considered in chapters 3 and 4, *infra*.

⁶² *Report to the Counter-Terrorism Committee pursuant to paragraph 6 of Security Council resolution 1373 (2001) of 28 September 2001, New Zealand*, UN Doc S/2001/1269 (2002), 3.

⁶³ As noted in New Zealand's first report to the Counter-Terrorism Committee, *ibid*.

interim report on the Bill, drawing to the attention of the House the new provisions in the Bill, with explanatory notes.⁶⁴ The Committee also called for public submissions on the draft amendments⁶⁵ and received 143 submissions from interest groups and individuals.⁶⁶ In contrast, the Committee had received no submissions on the original Terrorism (Bombings and Financing) Bill.⁶⁷

3. Counter-Terrorism Bill 2003

The next stage in the development of the Terrorism Suppression Act came through amendments to the legislation enacted under the Counter-Terrorism Bill 2003. The latter legislation is discussed in more detail below, concerning the purpose of the legislation and the nature of legislative amendments achieved under it. What should be noted at this stage is that Part 2 of the Counter-Terrorism Bill was directed towards amendment of the Terrorism Suppression Act. The primary purpose of these amendments was to incorporate obligations under the Convention on the Physical Protection of Nuclear Material and the Convention on the Marking of Plastic Explosives for the Purpose of Detection.⁶⁸ The amendments also added substantive provisions concerning the search and seizure, and related issues, by the Customs Service of goods owned or controlled by terrorist entities or associated persons.⁶⁹

4. Terrorism Suppression Amendment Bill (No 2) 2004

On 14 December 2004, further amending legislation was introduced to the House: the Terrorism Suppression Amendment Bill (No 2). The amendments to the principal Act under this Bill achieved two things: the creation of a new offence of providing financial support to all terrorist

⁶⁴ Foreign Affairs, Defence and Trade Committee, *Interim Report on the Terrorism (Bombings and Financing) Bill*, 8 November 2001.

⁶⁵ *Ibid*, cover page.

⁶⁶ Foreign Affairs, Defence and Trade Committee, *Final Report on the Terrorism <(Bombings and Financing)> Suppression Bill*, 22 March 2002, 2.

⁶⁷ See the Committee's interim report (n 64) 2.

⁶⁸ The *Convention on the Marking of Plastic Explosives for the Purpose of Detection* (the Plastic Explosives Convention), opened for signature 1 March 1991, ICAO Doc 9571 (entered into force 21 June 1998); and the *Convention on the Physical Protection of Nuclear Material* (the Nuclear Materials Convention), opened for signature 3 March 1980, 1456 UNTS 124 (entered into force 8 February 1987). See clauses 10 to 14 and 16 to 23 of the *Counter-Terrorism Bill 2003*.

⁶⁹ Clause 15 of the *Counter-Terrorism Bill 2003*.

organisations (including those that might not yet be formally designated under the TSA); and extend the length of time that designations remain in force without further extension by High Court order (from three years to five). These features of the Terrorism Suppression Act are considered in detail in chapters 14 and 15.

5. Terrorism Suppression Amendment Bill 2007

The recently introduced Terrorism Suppression Amendment Bill 2007 looks to make changes for the three main purposes:

- As mentioned, the Bill will facilitate New Zealand's ratification of the Nuclear Terrorism Convention, and treaty action in respect of amendments adopted in respect of the Nuclear Materials Convention. The Bill will, as a consequence of the obligations under this treaty action, create new offences concerning the use of radioactive material and radioactive devices, and amend existing offences concerning the physical protection of nuclear material.⁷⁰
- The next set of amendments concern the regime under the principal Act for the designation of terrorist and associated entities. These proposed amendments will be considered in chapters 14 and 15.
- The final set of amendments concern reasonably minor changes to existing offences, relating to 'avoidance of doubt' provisions and the offence of participating in a terrorist group. The Bill will also introduce a new offence of committing a 'terrorist act'. The offence of participation in a terrorist group, and the proposed amendments to it, is considered in chapter 14. The remaining amendments proposed under the Bill are considered in chapter 16.

6. Attorney-General's advice

As will be discussed in chapter 8, the New Zealand Bill of Rights Act 1990 (NZBORA) requires the Attorney-General to advise the House of any inconsistency between any provision of a Bill before the House and the NZBORA.⁷¹ In practical terms, this in turn relies on advice given to the Attorney-General by the New Zealand Crown Law Office. In the case of the Terrorism (Bombings and Financing) Bill, the Solicitor-General examined the Bill⁷² and concluded that it was consistent with the Bill of

⁷⁰ See discussion below and chapter 16, *infra*.

⁷¹ New Zealand Bill of Rights Act 1990, section 7.

⁷² As contained within the interim report of the select committee (n 64).

Rights Act.⁷³ The proposed changes to the principal Act under the 2007 Amendment Bill have also, according to advice from the Crown Law Office to the Attorney-General, been assessed as ‘not inconsistent’ with the NZBORA.⁷⁴ These items of advice are considered in chapter 15.

Counter-Terrorist Framework under the Act

The Terrorism Suppression Act 2002 is a significant piece of legislation, currently containing 81 sections, five schedules and running to over 120 pages. It contains definitions of the term terrorism. It creates offences and provides for associated issues of jurisdiction, prosecution and extradition. It establishes a process by which persons or entities may be designated as terrorists and contains various provisions aimed at suppressing the financing of terrorist activities. The discussion that follows identifies the current status and regime under the Act, with proposed amendments under the 2007 Amendment Bill identified also.

1. Definition of “terrorist act”

As discussed within chapter 2, there has been no overwhelming consensus within the international community on a definition of terrorism, resulting in the lack of a definition within relevant Security Council and General Assembly resolutions. The result has been that individual States have been required to formulate their own definitions of the term. In the New Zealand context, this is addressed within sections 4 and 5 of the Terrorism Suppression Act.

Section 5 of the Act, combined with definitions contained within section 4(1) and conventions listed in Schedule 3, provides for three distinct types of “terrorist acts”. The term is significant for three reasons.⁷⁵ First, it is linked to offences such as the financing of terrorist acts.⁷⁶ Its also plays a role in the designation of terrorist or associated entities, which

⁷³ Letter from the Solicitor-General to the Attorney-General, “re Terrorism Suppression Bill: Slip Amendments – PCO 3814B/11 Our Ref: ATT114/1048 (15)”, 9 November 2001. It should be noted, as pointed out by the Solicitor-General in his letter, that his office was only provided with the Slip Amendments (which amended the original form of the Bill to incorporate the Resolution 1373 obligations) on the previous day, 8 November 2001.

⁷⁴ Letter from the Crown Law Office to the Attorney-General, “Legal Advice. Consistency with the New Zealand Bill of Rights Act 1990: Terrorism Suppression Amendment Bill. Our Ref: ATT395/24”, 4 December 2006, online: <<http://www.justice.govt.nz/bill-of-rights/bill-list-2006/t-bill/terrorism-suppression-amend-bill.html>> (last accessed on 15 March 2007).

⁷⁵ As highlighted in the Interim Report on the Bill (n 64) 5.

⁷⁶ Section 8.

include those entities that have perpetrated terrorist acts. Finally, if enacted without change, the 2007 Amendment Bill will create a new offence of engaging in a terrorist act (as defined in section 5(1)), punishable by a maximum of life imprisonment.⁷⁷ The 2007 Bill does not, however, make any changes to the current definition of terrorist acts.

The first type of terrorist act defined reflects the international obligations assumed by New Zealand under the various international terrorism-related conventions. Sections 4(1)⁷⁸ and 5(1)(b) prohibit acts that constitute an offence under one of the nine terrorism conventions listed in Schedule 3 to the Act. Interestingly, Schedule 3 does not list the Convention for the Suppression of the Financing of Terrorism, the Convention on the Marking of Plastic Explosives for the Purpose of Detection, nor the Convention on Offences and Certain Other Acts Committed On Board Aircraft. In submissions to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill, the author of this text notified the Committee of this omission.⁷⁹ Clause 22 of the Counter-Terrorism Bill proposed to amend Schedule 3 to the Terrorism Suppression Act by including in the list of treaties the Convention on the Physical Protection of Nuclear Material. The author submitted to the Committee that this was not sufficient since, upon the enactment of the Counter-Terrorism Act, New Zealand was to become party to all twelve of the international conventions on counter-terrorism. The Terrorism Suppression Act should therefore include in its definition of a “terrorist act”, it was submitted, any act against *any* of those twelve conventions.⁸⁰ The Committee did not, however, recommend amendment of clause 22, nor did it report on the reasons for this.

The second type of terrorist act defined is that of terrorist acts in armed conflict, established under sections 5(1)(c) and 4(1) as conduct:⁸¹

- (a) that occurs in a situation of armed conflict; and
- (b) the purpose of which, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or abstain from doing any act; and
- (c) that is intended to cause death or serious bodily injury to a civilian or other person not taking an active part in the hostilities in that situation; and

⁷⁷ Clause 6 of the *Terrorism Suppression Amendment Bill 2007*.

⁷⁸ Through its definition of “act against a specified terrorism convention” and “specified terrorism convention”, and through the associated list of conventions contained in Schedule 3 to the Act.

⁷⁹ Alex Conte, *Submissions to the Foreign Affairs, Defence and Trade Committee on the Counter-Terrorism Bill (27-1, 2003)*, 12 May 2003, part IIIA.

- (d) that is not excluded from the application of the Financing Convention by article 3 of that Convention.

Finally, a more general (albeit complex) definition is provided within the balance of section 5. A terrorist act is:

- conduct intended to advance an ideological, political, or religious cause,⁸²
- *and* with the following intention:⁸³
 - (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,
- *and* with the intention to cause:⁸⁴
 - (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.

This general definition of terrorist acts is examined in chapter 16, where it will be tested against the approach advocated on the subject by the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism.

2. Offences

The Act establishes the following offences:

- *Terrorist bombing*,⁸⁵ prohibiting the intentional and unlawful delivery, placement, discharge or detonation of an explosive or other lethal

⁸⁰ Ibid, paras 23 and 24.

⁸¹ As defined by section 4(1).

⁸² Section 5(2).

⁸³ Sections 5(2)(a) and (b).

⁸⁴ Section 5(3).

device with the intention to cause death (or serious injury) or extensive destruction. Of interest, the provision does not specify that such conduct be aimed at inducing fear or influencing an organisation or government, nor does it specify that this be for the advancement of any particular cause. It only holds one of the common characteristics of terrorism (targeting). If one considers the definition of the offence closely, however, it is not one of “terrorist bombing”, it is simply one of “bombing” where death or serious injury results, or where extensive damage to public facilities results. Conviction renders an offender liable to imprisonment for life.

- *Financing of terrorism*,⁸⁶ prohibiting the wilful provision or collection of funds (directly or indirectly), intending (or knowing) that those funds are to be used to carry out a “terrorist act” (as defined above), without lawful justification or reasonable excuse. The maximum penalty, upon conviction, is 14 years’ imprisonment.

This prohibition was added to by the Terrorism Suppression Amendment Bill (No 2) 2004.⁸⁷ The explanatory notes to the Bill referred to doubt that the current offence, just described, was enough to prohibit general financial support to an organisation involved in terrorism (whether designated or not), such as the payment of routine expenses (e.g., rent).⁸⁸ In explaining the need for this, the Bills Digest and General Policy Statement for the Bill pointed to the requirement to comply with international standards set by the Financial Action Task Force on Money Laundering. Minister of Justice Phil Goff added:⁸⁹

Given the fluidity of terrorist movements, and the unpredictable emergence of new terrorist groups, this change is the most workable way of ensuring that New Zealand will always remain compliant with international obligations prohibiting the funding of terrorist organisations.

This may well be problematic in its application, since there will not be the same element of notice to the public as is achieved through the Gazetting of designations under the Act. Prosecution of such offending,

⁸⁵ Section 7.

⁸⁶ Section 8.

⁸⁷ By creating an offence provision and amendment of the definition of the term “financing of terrorism” under section 2 of the *Terrorism Suppression Act 2002* (through clauses 3 and 4 of the 2004 Bill).

⁸⁸ New Zealand Ministry of Justice, *Terrorism Suppression Amendment Bill (No 2), Government Bill, 242-1, Explanatory Note*, presented to the House 14 December 2005, 1. Clause 4 of the Bill proposes to create this offence through a new section 8(2A) of the *Terrorism Suppression Act 2002*.

where the entity is not designated, will have the added difficulty of establishing knowledge in the mind of the accused that the entity was a terrorist entity, within the terms of the Act.

The 2007 Amendment Bill proposes removal of the ‘avoidance of doubt’ provisions in the terrorist financing offences. Sections 8(2) and 10(2) currently provide that, for the avoidance of doubt, the provisions of sections 8 and 10 do not make it an offence to provide or collect funds intending that they be used, or knowing that they be used, for the purpose of advocating democratic government or the protection of human rights and that is not involved in any way in the carrying out of terrorist acts. The Explanatory Note to the Bill explains that these provisions have created uncertainty and that removal of the provisions will remove ambiguity.⁹⁰ The author is a little sceptical about this proposal however, particularly since neither the Explanatory Note nor the Bills Digest provide reasons as to how or why the avoidance of doubt provisions have created uncertainty.

- *Dealing with terrorist property*,⁹¹ making it an offence to deal with property known to be owned, controlled or derived by a “terrorist entity”, without lawful justification or reasonable excuse. Conviction renders a person liable to a maximum of seven years’ imprisonment. To “deal with” terrorist property:⁹²
 - (a) means to use or deal with the property, in any way and by any means (for example, to acquire possession of, or a legal or equitable interest in, transfer, pay for, sell, assign or dispose of (including by way of gift) the property); and
 - (b) includes allowing the property to be used or dealt with, or facilitating the use of it of dealing with it.
- *Making property, or financial or related services, available*,⁹³ prohibiting the provision (direct or indirect) of any property, or any financial or related services, to (or for the benefit of) a terrorist entity,

⁸⁹ Press Release, ‘Amendments to Tighten Terrorism Suppression Act’, URL <<http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=21825>> at 8 January 2005. New Zealand Ministry of Justice, *Terrorism Suppression Amendment Bill (No 2) 2004*, Government Bill, 242-1, Explanatory Note, presented to the House 14 December 2004, 2.

⁹⁰ *Terrorism Suppression Bill. Government Bill 105-1. Explanatory Note*, presented to the House on 21 March 2007, 2.

⁹¹ Section 9.

⁹² This term is currently defined under section 9(5) of the Act. The *Terrorism Suppression Amendment Bill 2007* proposes removal of the definition from section 9 to the general definitions provision of section 4: see clause 5 of the Bill.

⁹³ Section 10.

without lawful justification or reasonable excuse. Section 11 limits the operation of this prohibition, where the Prime Minister permits, by notice in writing, any particular dealing. Otherwise, the offence renders a convicted person liable to up to seven years' imprisonment. The terms "make available"⁹⁴ and "property"⁹⁵ are defined within the Act, but the phrase "financial or related services" is not.

As considered in the above discussion of the financing of terrorism offence, the Terrorism Suppression Amendment Bill 2007 proposes removal of the 'avoidance of doubt' provision in section 10(2) of the Act.

- *Recruiting members of terrorist groups*,⁹⁶ making it an offence to recruit another person into an organisation or group, knowing that the organisation or group is either a "terrorist entity" or participates in "terrorist acts". This is much broader in its scope than the previous three offences, since it goes beyond conduct relating to a "terrorist entity" as designated under the Act by also prohibiting conduct relating to entities that participate in "terrorist acts". As seen already, there are three categories and definitions of terrorist acts under the combination of sections 4 and 5, the more general of which is reasonably complex.
- *Participating in terrorist groups*,⁹⁷ prohibiting participation in an organisation or group, knowing that the organisation or group is either a "terrorist entity" or participates in "terrorist acts" and for the purpose of enhancing the ability of the group to carry out terrorist acts. The maximum penalty is fourteen years imprisonment.
- *Harbouring or concealing terrorists*,⁹⁸ making the intended assistance of a person to avoid arrest, escape custody, or avoid conviction an offence where it is known (or ought to be known) that the person has carried out, or intends to commit, a "terrorist act". Seven years' imprisonment can result from conviction. Clause 12 of the Terrorism Suppression Amendment Bill 2007 seeks to amend this offence by including the element of recklessness.

⁹⁴ Section 10(6).

⁹⁵ Section 4(1).

⁹⁶ Section 12.

⁹⁷ Section 13.

⁹⁸ Section 13A, added to the *Terrorism Suppression Act* by section 12 of the *Counter-Terrorism Bill 2003*.

- *Using or moving unmarked plastic explosives*,⁹⁹ prohibiting the possession, use, manufacture, importation or export of unmarked plastic explosives, except as allowed by the Hazardous Substances and New Organisms Act 1996 or by the Environmental Risk Management Authority. The maximum penalties are a fine of \$500,000 or imprisonment of no more than ten years.
- *Offences involving nuclear material*,¹⁰⁰ prohibiting a range of conduct relating to nuclear material, including its importation and its use to intimidate. As a result of changes adopted by the IAEA to the Nuclear Materials Convention, the 2007 Amendment Bill will make corresponding changes to applicable offences under the Act.

A further set of offences, involving radioactive material and radioactive devices, is to be introduced under clauses 14 to 16 of the Terrorism Amendment Bill 2007. These offences reflect obligations under the Nuclear Terrorism Convention, which was signed by New Zealand in April 2005.¹⁰¹ The Bill will also create a new offence of engaging in a terrorist act (linked to the definition, in section 5(1), of “terrorist acts”).¹⁰²

3. Designation of “terrorist entities”

As seen from the foregoing discussion, a number of offences under the Terrorism Suppression Act concern conduct in support of or related to a “terrorist entity” or “associated entity”. The Act establishes a regime by which organisations, groups, or even individuals may be designated as such. The designation process, governed by sections 20 to 42 inclusive, empowers the Prime Minister to designate terrorist entities based on information from the United Nations Security Council or “any relevant information, including classified security information”.¹⁰³

The Prime Minister may make an interim designation, after consulting with the Attorney-General and the Minister of Foreign Affairs and Trade, if s/he has good cause to believe that the entity has in the past undertaken one or more “terrorist acts” or is knowingly facilitating such acts.¹⁰⁴ An interim

⁹⁹ Section 13B, added to the *Terrorism Suppression Act* by section 12 of the *Counter-Terrorism Bill 2003*.

¹⁰⁰ Sections 13C and 13D, added to the *Terrorism Suppression Act* by section 12 of the *Counter-Terrorism Bill 2003*.

¹⁰¹ *Explanatory Note* (n 90), 4.

¹⁰² See, *infra*, chapter 16.

¹⁰³ See sections 30 to 32 inclusive.

¹⁰⁴ Section 20.

designation automatically expires after 30 days, during which time certain notice must be given about the designation.¹⁰⁵ The Act contemplates that a final designation, if appropriate, will be made prior to the expiry of the interim designation.¹⁰⁶ Again, steps are required to notify and, in addition, publish the designation.¹⁰⁷

A final designation currently expires after three years, unless the High Court extends the designation.¹⁰⁸ The period of final designation was extended under the Terrorism Suppression Amendment Bill (No 2) 2004. To allow consideration of the Select Committee's review of the Terrorism Suppression Act (as required under section 70 of the Act), part of which was to address the designation process, current designations are to continue for two years after presentation of the Committee's report to the House.¹⁰⁹ Minister of Justice Phil Goff explained:¹¹⁰

At the time the original Bill was first introduced, there was uncertainty as to the nature and extent of the terrorism phenomenon. An assumption that some designations might be short-lived has since proved false.

He continued:

Provisions in the existing Act mean that New Zealand's designations of terrorist organisations – including the 318 organisations listed by the United Nations Security Council – expire after three years unless renewed by order of the High Court.

Drafting of that provision created the unintended need for each designation to be renewed individually, meaning it will be impossible to renew all the 318 UNSC-listed designations before they expire next October. That would put New Zealand in breach of Security Council Resolution 1373 – which was passed unanimously by the UN in the wake of September 11 – and related resolutions.

Both the interim and final designation processes are open to judicial review.¹¹¹ A designated entity may at any time apply to the Prime Minister to revoke the designation.¹¹²

Currently, New Zealand has only designated as terrorist entities those identified by the United Nations 1267 Committee¹¹³ in its most recent

¹⁰⁵ Sections 21 and 26 to 29.

¹⁰⁶ Section 22.

¹⁰⁷ Section 23 and 26 to 29

¹⁰⁸ Sections 23(g) and 35 to 41.

¹⁰⁹ Due 1 December 2005, under section 70(3) of the *Terrorism Suppression Act 2002*.

¹¹⁰ See also the *Explanatory Note* to the Bill (n 64) 2.

¹¹¹ Section 33.

¹¹² See sections 34 and 42.

consolidated list.¹¹⁴ The lack of use by New Zealand of this procedure for the designation of non-UN listed terrorist entities has been criticised as a failure by New Zealand to “add its considerable moral and symbolic voice to the international chorus against terrorist violence”.¹¹⁵

The Terrorism Suppression Amendment Bill 2007 proposes the following three main changes to the regime just described:

- The first main substantive change concerns entities that have been designated by the Security Council 1267 Sanctions Committee as terrorist or associated entities. The listing of such entities by the Committee is currently subject to subsequent designation by the Prime Minister before they are prohibited entities under New Zealand law. The Bill is to remove the designation process, as it applies to entities listed by the 1267 Sanctions Committee, instead applying the provisions of the Act automatically to those that are listed by the Committee. Clause 20 therefore proposes repeal of current section 31 of the Act, which relates to United Nations Security Council information. Security Council listed entities will instead be automatically designated.¹¹⁶
- The next set of changes relates to the extension of designations made by the Prime Minister. Final designations currently expire after 3 years, unless extended by the High Court. The Bill proposes that this extension be made by the Prime Minister, instead of the High Court, and that the extension procedure only apply to non-UN-designated entities. Clause 21 will thus replace current sections 35 to 37 with a new section 35.
- The final change proposed under the 2007 Amendment bill concerns the protection of classified security information. The current Act sets out two procedures by which such information may be protected,

¹¹³ Formally known as the “Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities”.

¹¹⁴ See *New Zealand response to the questions and comments of the Security Council Counter-Terrorism Committee contained in the Chairman’s letter of 30 May 2003*, UN Doc S/2003/860 (2003), 4. The consolidated list is available at URL <<http://www.un.org/Docs/sc/committees/1267/tablelist.htm>>. For more details, see also New Zealand’s report to the United Nations 1267 Committee, *Response of New Zealand to the Security Council Committee under Security Council resolution 1455 (2003)*, 17 April 2003, 2-4.

¹¹⁵ Smith JE, *New Zealand’s Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities*, Ian Axford New Zealand Fellowship in Public Policy, December 2003, 3.

¹¹⁶ *Bills Digest* (n 59), 1; and *Explanatory Note* (n 90), 5.

whereas the Bill is to establish one single procedure under new section 38 (clause 22 of the Bill).

As already indicated, these proposed changes are examined in chapter 15.

4. Forfeiture of terrorist property

In aiming to suppress the financing of terrorism, the Terrorism Suppression Act impacts upon both individuals and institutions in two ways. First, by the creation of offences (financing of terrorism, dealing with terrorist property, and making property, or financial or related services, available) and by the designation of individuals or groups as terrorist or associated entities (resulting in prohibited dealings with such entities as a result of the offences just mentioned). The second means by which the Act seeks to suppress the financing of terrorist activities is through the establishment of a financial transactions reporting regime and providing for the forfeiture of terrorist property. The power of forfeiture is one vested in the High Court under section 55 of the Terrorism Suppression Act, allowing the Attorney-General to apply for an order for forfeiture in respect of property owned by an entity in respect of which a final designation has been made and where the mere prohibition against dealing with such property is not enough, by itself.¹¹⁷

The Terrorism Suppression Amendment Bill 2007 is to change the freezing and forfeiture provisions so that they are automatic upon interim or final designation.¹¹⁸

5. Financial transactions reporting

In terms of financial transactions reporting, section 43 of the Terrorism Suppression Act requires financial institutions and other persons in possession or control of suspected terrorist property to report that suspicion to the Police. The provision was enacted, explained the Select Committee, to ensure that the mere *holding* of terrorist property, without necessarily dealing in it, is detected and made unlawful.¹¹⁹ The process for reporting suspicious property is aligned with the process for reporting suspicious transactions in the Financial Transactions Reporting Act 1996, which is limited to reporting for the purposes of money laundering offences or for

¹¹⁷ See section 55(2)(b).

¹¹⁸ See *Explanatory Note* (n 90), 2.

¹¹⁹ See the final report on the 2004 Bill (n 66) 13.

proceeds of crime action.¹²⁰ “Double-reporting” is avoided by deeming a report under the Terrorism Suppression Act to be notice under section 15 of the Financial Transactions Reporting Act.¹²¹

The provision applies to property directly, or indirectly, owned or controlled by any entity that has been designated a terrorist or associated entity. Two main points arise from that general statement of operation. Firstly, “property” is defined within the Act in such a way as to include any form of real or personal property or interest therein. Secondly, it applies to such property within the ownership or control of a “terrorist” entity, as designated, such designation resulting in public notification of both interim and permanent designations in the Gazette.¹²² There is, from that perspective, a small level of certainty for financial and other institutions in knowing the extent to which the reporting procedures apply: institutions need not bother themselves with the question of whether any particular organisation or person is a terrorist.¹²³ They will be informed of this through the Gazetted designation. However, the reporting procedures apply not only to property within the ownership or control of a “terrorist” entity (section 43(1)(a)), but also to any property derived or generated from any such property (section 43(1)(b)). It will be interesting to see the extent to which the Government reviews, or even requires, compliance with these reporting provisions given their potentially wide application. It is suggested that if one was to apply the provisions to their full extent, such compliance

¹²⁰ Reporting under the *Terrorism Suppression Act* operates, however, independently of section 15 of the *Financial Transactions Reporting Act* – the latter Act being limited to reporting for the purposes of the investigation or prosecution of money laundering offences or for *Proceeds of Crime Act* action

¹²¹ See sections 44(4) and 77 of the *Terrorism Suppression Act* and the (amended) section 15(1) of the *Financial Transactions Reporting Act*.

¹²² See sections 21(a), pertaining to interim designations, and 23(e) as to permanent designations. Upon permanent designation, such designation remains in force for a period of three years, unless earlier revoked or later extended by Court order: see section 35. Notification of revocation, expiry or invalidity is also subject to notification through the Gazette: see section 42.

¹²³ It has to be said, however, that the New Zealand Bankers’ Association had in fact asked for an even greater level of notice to financial institutions when the Bill was being considered before the Select Committee. The Association requested that its members receive automatic direct notice of interim and final designations, thereby achieving a more effective reporting regime and ensuring that members did not unwittingly assist in the financing of terrorism through ignorance. See *Submissions by the New Zealand Bankers’ Association to the Foreign Affairs, Defence and Trade Committee on the Terrorism <Bombings and Finance> Suppression Bill*, TERRO/133, Parliamentary Library, paragraph 2.2. By way of compromise, the Act contains a provision whereby the Prime Minister can direct that notice of designations be made to any persons or bodies that the Prime Minister thinks fit (see section 28(2)). No such directions have yet been made.

would involve a level of financial regulation and investigation that is not commonly seen within New Zealand's deregulated environment.¹²⁴

Once these preliminary issues are dealt with, it is then a question of what obligations are in fact imposed upon financial institutions. Having just made the criticism that proper compliance would be burdensome, this is countered by what is in the author's view a low threshold. The test for determining whether an institution is obliged to report to the Commissioner of Police is that of "suspicion, on reasonable grounds" that the institution is in possession or control of "property" within the jurisdiction of section 43.¹²⁵ Of use, the OECD¹²⁶ Financial Action Task Force on Money Laundering has issued guidelines on how financial institutions can detect terrorist financing.¹²⁷

Review Mechanism

Following receipt of public submissions on the November 2001 version of the Terrorism (Bombings and Financing) Bill, the Foreign Affairs, Defence and Trade Committee recommended inclusion of a review mechanism pertaining to provisions through which Resolution 1373 was implemented.¹²⁸ Section 70 of the Terrorism Suppression Act was the result, requires a select committee to consider the operation of those provisions and whether they should be retained or amended.¹²⁹ The review was to take place as soon as practicable after 1 December 2004, with the committee required to report to the House by no later than 1 December

¹²⁴ On that point, a high-level official within the New Zealand Ministry of Foreign Affairs and Trade advised the author of their view that New Zealand could, for that very reason, find itself receiving harsh criticism from the Organisation for Economic Co-operation & Development (OECD) Financial Action Task Force (which is in the process of consulting with member States on the suppression of terrorist financing).

¹²⁵ See section 43(2). Where such suspicion exists, a report is to be made as soon as practicable in accordance with section 44 and Schedule 5 to the Act. Failure to report constitutes an offence under section 43(4) of the Act, punishable by up to one year's imprisonment. Note that section 43(2) does not require a lawyer to disclose any "privileged communication" (although the term is restricted somewhat by statutory definition in section 45). For a more detailed examination of the reporting provisions of the Terrorism Suppression Act, see Conte A, "New Challenges for Financial Regulation: The Suppression of the Financing of Terrorism" in *Essays in Commercial Law. A New Zealand Collection*, Centre for Commercial & Corporate Law Inc 2003, Hawes & Rowe (Eds.), 63.

¹²⁶ Organisation for Economic Co-operation and Development, of which New Zealand is a member.

¹²⁷ OECD Financial Action Task Force on Money Laundering, *Guidance for Financial Institutions in Detecting Terrorist Financing*, 24 April 2002.

¹²⁸ See the Committee's Interim Report (n 64) 16.

¹²⁹ Section 70(2).

2005.¹³⁰ Due again to the timing of elections and the consequent uncertainty as to membership in the Foreign Affairs, Defence and Trade Committee, the Committee was unable to undertake a comprehensive review of the Act, the Committee recording in the opening section of its report that:¹³¹

...We have had limited opportunity to consider the evidence and advice that has been received on the review.

...We have not made specific recommendations on how the legislation might be amended. In the time available to us we have focussed on recording those issues that we consider warrant further scrutiny.

This is a most unfortunate result and undermines the integrity of legislative review mechanisms such as this. The intention of review mechanisms is to allow Parliamentary committees, made up of elected representatives, to review the operation of legislation based on public submissions and advice from relevant government departments. What instead happened was that the Committee was forced to speedily consider issues and note them within just eight substantive pages, without proper debate and commentary. Albeit that the Committee will have an opportunity to examine the issues again in its consideration of the Terrorism Suppression Amendment Bill 2007, the reality is that the proposed amendments have now been drawn up entirely by government officials without input from the Committee, whereas a proper review process would have seen the opposite occur. Rather than leaving the Committee with the limited time it was given, section 70 of the Act should instead have been amended to allow the Committee to undertake a proper review of the legislation.

Of interest, neither section 70 nor the Select Committee recommendation for inclusion of the provision identify which provisions of the Terrorism Suppression Act are “provisions of this Act that are to implement New Zealand’s obligations under the Anti-terrorism Resolution”.¹³² This can, however, be gleaned through close examination of New Zealand’s reports to the Counter-Terrorism Committee in which New Zealand has had to report on how it has given effect to the provisions of resolutions 1373 (2001):

- Offences created under sections 8, 9, 10, 12, 13, 13A, 13B, 13C and 13D.

¹³⁰ Section 70(2) and (3).

¹³¹ Foreign Affairs, Defence and Trade Select Committee, *Review of the Terrorism Suppression Act 2002* (48th Parliament, November 2005), 1.

¹³² Section 70(1).

- The definition of the term “terrorist act”, through the combination of sections 4(1) and 5.
- The authority of the Prime Minister under section 11 to allow financial or related services to be provided to terrorist or associated entities.
- The designation process under sections 20 to 42 inclusive.
- The financial reporting obligations under sections 43 to 47.
- The terrorist property forfeiture provisions within sections 55 to 61 inclusive.

Interestingly, New Zealand’s first report to the Counter-Terrorism Committee identifies compliance with paragraph 2(b) of resolution 1373 as being achieved through legislation other than the Terrorism Suppression Act. This was achieved through amendments to the Crimes Act 1961 and Summary Proceedings Act 1957 (under the Counter-Terrorism Bill 2003), which created the authority to obtain interception warrants, warrants to attach tracking devices to persons or things, deterrence through more severe penalties, and requiring a computer owner or user to provide information to access data subject to security codes and the like.¹³³ Under section 70 of the Terrorism Suppression Act, however, those provisions would not have been the subject of review, since section 70 only required the review of “provisions of this Act that are to implement New Zealand’s obligations under the Anti-Terrorism Resolution” [emphasis added].

Counter-Terrorism Bill 2003

The Counter-Terrorism Bill 2003 was also a multi-purpose piece of legislation: primarily enacted to allow New Zealand to become party to the Plastic Explosives and Nuclear Materials Conventions;¹³⁴ to implement the remaining obligations under Security Council Resolution 1373;¹³⁵ and to establish supplementary powers and investigative measures “designed to combat terrorism and address problems encountered by agencies in the investigation and enforcement of [terrorism-related] offences”.¹³⁶

¹³³ Discussed below, concerning the *Counter-Terrorism Bill*.

¹³⁴ See the Foreign Affairs, Defence and Trade Committee, *Report on the Counter-Terrorism Bill, A Government Bill, 27-2, Commentary*, presented to the House 8 August 2003, 1.

¹³⁵ *Ibid*, 1.

Purposes of the Counter-Terrorism Act

As indicated, the Counter-Terrorist Bill was enacted to serve various purposes. Before considering those, and the status of the Bill, it is notable to mention that the Counter-Terrorism Bill was also subject to scrutiny by the New Zealand Crown Law Office, inherent in the execution of the Attorney-General's function under section 7 of the Bill of Rights Act. Again, the Attorney-General was advised that there appeared to be no inconsistency between the Bill and the Bill of Rights Act.¹³⁷

1. Treaty implementation

Within the scope of the first objective, to allow treaty accession, National Interest Analyses were presented to the House on 22 February 2002 with the accompanying reports of the Foreign Affairs, Defence and Trade Committee.¹³⁸ The Analyses noted that implementing legislation would need to create new criminal offences prohibiting the movement or use of unmarked plastic explosives and nuclear materials.¹³⁹ The Counter-Terrorism Bill achieved this through introduction into the Terrorism Suppression Act of sections 13B (use and movement of plastic explosives), 13C (physical protection of nuclear material) and 13D (importation and acquisition of radioactive material) of that Act.¹⁴⁰

The National Interest Analyses also considered the question of reporting, registration and monitoring obligations under the relevant treaties. It was noted that the transport safety standards within the Nuclear Materials Convention¹⁴¹ would not require implementation, since New Zealand had already incorporated International Atomic Energy Agency regulations, which contain more stringent requirements than those under

¹³⁶ Foreign Affairs, Defence and Trade Committee, *Counter-Terrorism Bill, A Government Bill, 27-1, Explanatory Note*, presented to the House 2 April 2003, 1. See also the report of the Foreign Affairs, Defence and Trade Committee (n 134) 2; and Gobbi (n 48) 265-266.

¹³⁷ Letter from Crown Counsel to the Attorney General, "re: Counter-Terrorism Bill PCO 4663/14 Our Ref: ATT114/1124 (15)", 10 December 2002.

¹³⁸ The *Counter-Terrorism Bill* was introduced on 17 December 2002.

¹³⁹ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 13, and *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 21.

¹⁴⁰ Note that the unlawful possession of nuclear material and nuclear explosive devices was already prohibited under New Zealand law under the *Hazardous Substances and New Zealand Organisms Act 1996* and the *New Zealand Nuclear Free Zone, Disarmament, and Arms Control Act 1987*.

¹⁴¹ Above n 110.

the Nuclear Materials Convention.¹⁴² The Analysis on the Plastic Explosives Convention reported:¹⁴³

A reporting and registration regime needs to be put in place adequately to control the existing stock of unmarked plastic explosives in New Zealand. This administrative function is already carried out in relation to other explosives under the Hazardous Substances and New Organisms Act 1996. Slight modifications to the operational procedures under that Act would be required to facilitate plastic explosives of the type covered by the Convention being captured by the tracking and reporting mechanisms of the HSNO Act.

The Counter-Terrorism Bill did not, however, address this issue. To that extent, the plastic explosives reporting and registration regime has not been fully implemented into New Zealand law.¹⁴⁴

2. Resolution obligations and investigative/supplementary powers

The Explanatory Notes to the Counter-Terrorism Bill identify two further objectives of implementing the remaining obligations under Security Council resolution 1373 (2001) and establishing investigative powers to assist in the detection of terrorists, terrorist acts and terrorist or associated entities. Within New Zealand's reports to the Counter-Terrorism Committee, New Zealand similarly identified the various new investigative powers as furthering New Zealand's compliance with resolution 1373.¹⁴⁵ The following provisions of the Counter-Terrorism Bill are relevant in that regard:

- Clauses 4, 5, 33 and 34 (pertaining to interception warrants, tracking devices and computer access – each discussed further below) were identified by New Zealand as adding to its compliance with paragraph 2(b) of the resolution.
- Creation of the offence of harbouring or concealing terrorists under clause 12 of the Bill was said to add to New Zealand's compliance with resolution 1373, paragraph 2(d).

¹⁴² New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Physical Protection of Nuclear Materials*, para 20. Incorporation was effected through the Radiation Protection Act 1965.

¹⁴³ New Zealand Ministry of Foreign Affairs and Trade, *National Interest Analysis, Convention on the Marking of Plastic Explosives for the Purpose of Detection*, para 14.

¹⁴⁴ This is not an issue that will be explored any further, since it does not impact upon the question of the interface between counter-terrorism and human rights.

¹⁴⁵ See, *infra*, chapter 4.

- Sentencing directions under clauses 30 and 31 (discussed below) were said to be in furtherance of the requirements of paragraph 2(e) of resolution 1373.

Status of the Counter-Terrorism Bill

What should be noted about this item of legislation is that it does not exist as an Act of Parliament with its own life. As introduced, the Bill was to become a stand-alone Act. Following submissions during the select committee process, however, its provisions were instead incorporated into other extant legislation, namely:

- The Crimes Act 1961, under Part 1 of the Counter-Terrorism Bill;
- The Terrorism Suppression Act 2002, including consequential amendments to the Mutual Assistance in Criminal Matters Act 1992, under Part 2 of the Counter-Terrorism Bill; and
- The Misuse of Drugs Amendments Act 1978, the New Zealand Security Intelligence Service Act 1969, the Sentencing Act 2002, and the Summary Proceedings Act 1957, under Part 3 of the Counter-Terrorism Bill.

What follows is an overview of the nature, and concerns with, amendments under Parts 1 and 3 of the Counter-Terrorism Bill. Any similar issues relating to Part 2 have been discussed under the above examination of the Terrorism Suppression Act.

Parts 1 and 3 of the Counter-Terrorism Bill

Reflecting the second and third stated purposes of the Counter-Terrorism Bill, to further implement resolution 1373 (2001) and to establish supplementary powers and investigative measures, Parts 1 and 3 of the Bill amended the various items of legislation identified to achieve six main things:

- First, new terrorism-related offences were created under the Crimes Act 1961. New sections 298A, 298B and 307A make it an offence to cause disease or sickness in animals; contaminate food, crops, water or other products; or make threats of harm to people or property to achieve terrorist ends.¹⁴⁶ Associated provisions provide extraterritorial

¹⁴⁶ Clauses 6 and 7 of the *Counter-Terrorism Bill 2003*.

jurisdiction over these offences and restrict the ability to prosecute by requiring the consent of the Attorney-General.¹⁴⁷

- The second feature of Parts 1 and 3 was to extend the ability of police to obtain warrants to intercept private communications relating to terrorist offences, by amending section 312 of the Crimes Act 1961 and section 26 of the Misuse of Drugs Act 1978.¹⁴⁸
- Next, a new section 198B was inserted into the Summary Proceedings Act 1957, allowing police to demand assistance to access computer data by providing police with any data protection codes necessary to effect access to that data.¹⁴⁹
- Fourth, the Summary Proceedings Act was further amended to authorise police or customs officers to obtain a warrant to attach a tracking device to any property or person where it is suspected that an offence has been, is being, or will be committed. The power, and restrictions thereon, was enacted through new sections 200A to 200O of the Summary Proceedings Act.¹⁵⁰ Notably, the suspected offence need not be limited to terrorism-related offences.¹⁵¹
- The fifth feature is a minor amendment of the New Zealand Security Intelligence Service Act 1969, but with major potential effect.¹⁵² The amendment concerns the definition of the term “security” within the Act. Terrorism was already a matter within the ambit of the Act, but not in as wide terms as it is now. Prior to the Counter-Terrorism Bill, “security” included the protection of New Zealand from acts of terrorism.¹⁵³ The term now includes:¹⁵⁴
 - (d) the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act.

Interception and seizure warrants may be authorised for the purpose of detecting activities prejudicial to “security” or for the purpose of gathering foreign intelligence information essential to “security”.¹⁵⁵

¹⁴⁷ Clauses 4 and 5 of the *Counter-Terrorism Bill 2003*.

¹⁴⁸ Clauses 7B, 8 and 26 of the *Counter-Terrorism Bill 2003*.

¹⁴⁹ Clause 33 of the *Counter-Terrorism Bill 2003*.

¹⁵⁰ Amendments effected under clause 34 of the *Counter-Terrorism Bill 2003*.

¹⁵¹ See section 200B(2) of the *Summary Proceedings Act 1957*. This is a matter discussed within chapter 17 of this text.

¹⁵² Clause 27 of the *Counter-Terrorism Bill 2003*.

¹⁵³ This was a matter included within the definition from 16 November 1977 through section 2(2)(b) of the *New Zealand Security Intelligence Service Amendment Act 1977*.

¹⁵⁴ Section 2 of the *New Zealand Security Intelligence Service Act 1969*.

- Finally, the Sentencing Act 2002 is amended so that offending that forms part of, or involves, a terrorist act is to be treated as an aggravating feature under section 9 of that Act.¹⁵⁶ Where murder is committed as part of a terrorist act, section 104 of the Sentencing Act has been amended to provide for a minimum period of 17 years imprisonment for such offending.¹⁵⁷

In terms of civil and political rights implications, three of the latter amendments clearly have the *potential* to have an impact: warrants to intercept private communications; and warrants to attach tracking devices to persons or property, each considered in chapter 17. Equally important is the new power of police to require assistance to access computer data, potentially impacting upon the privilege against self-incrimination (see chapter 18).

Other Legislation

As already indicated, there are numerous other pieces of legislation that add, to greater or lesser extents, to the body of what might be described as New Zealand's terrorism-related legislation. When referring to the Border Security Bill¹⁵⁸ and the Maritime Security Bill,¹⁵⁹ by way of example, Customs Minister Rick Barker said this:¹⁶⁰

[This] is part of a whole-of-government approach toward strengthening New Zealand's national security in the post-September 11 environment.

While such legislation does indeed act to strengthen national security and impacts upon counter-terrorism, this chapter has restricted itself to consideration of the seven items of legislation identified. Those enactments and regulations are specifically targeted to New Zealand's compliance with international anti-terrorism obligations and counter-terrorism within New Zealand.

¹⁵⁵ Section 4 of the *New Zealand Security Intelligence Service Act 1969*.

¹⁵⁶ Clause 30 of the *Counter-Terrorism Bill 2003*.

¹⁵⁷ Clause 31 of the *Counter-Terrorism Bill 2003*.

¹⁵⁸ Bill 53-2 introduced to Parliament on 18 June 2003. The Bill passed the second reading on 20 May 2004 but awaits the third reading (as at 1 December 2004).

¹⁵⁹ Now the *Maritime Security Act 2004*, assented to on 5 April 2004.

¹⁶⁰ New Zealand Government Press Release, 'Minister of Customs introduces Border Security Bill', 18 June 2003.

Conclusion

An examination of New Zealand's counter-terrorist legislation is not as simple as one might first imagine. This chapter is evidence of that. Although chapter 3 spent some time looking at the international anti-terrorism framework and the obligations that stem from that framework, chapter 4 then considered the nature of those obligations and the means by which the obligations apply in domestic law and/or require acts of transformation. Through that examination it is evident that the obligations upon New Zealand are effectively limited to ones that require transformation into municipal law through legislative action.

Six items of domestic legislation have been identified in this chapter as the vehicles through which transformation has been effected: the Aviation Crimes Act 1972; the Crimes (Internationally Protected Persons, United Nations and Associated Personnel, and Hostages) Act 1980; Maritime Crimes Act 1999; the United Nations Sanctions (Terrorism Suppression and Afghanistan Measures) Regulations 2001; the Terrorism Suppression Act 2002; and the Counter-Terrorism Act 2003. Although not enacted in response to international counter-terrorist obligations, the International Terrorism (Emergency Powers) Act 1987 has also been identified as documents requiring consideration, since it is an item of legislation addressing counter-terrorism and thereby complementing New Zealand's participation in the international agenda to suppress terrorism.

Examination of each item of legislation has revealed that New Zealand appears to have, other than in some very minor and usually technical ways, fully implemented its international anti-terrorism obligations. What the preceding analysis did not identify, however, was the failure of New Zealand's general criminal law to properly prohibit the incitement to terrorism, a matter to be addressed separately in chapter 13. By reviewing the structure and operation of each item of legislation, various provisions have been identified as having the potential to impact upon civil and political rights. Further contributing to this chapter of the book, chapter 11 will consider the extant position on civil and political rights in New Zealand. By establishing the international and domestic law on counter-terrorism and human rights under parts one and two of this book, part three of the text can then consider their interface, doing so within a comparative framework.

