

## Chapter 12

# Freedom of Expression and Media Control

The ‘War on Terror’, and the legislative and executive action that followed 11 September 2001, have been cited as the cause of a decline in the freedom of the press.<sup>1</sup> Interestingly, in the case of New Zealand, there have been no legislative changes since September 11 impacting upon media control. Rather, media control was something legislated for under the International Terrorism (Emergency Powers) Act 1987 (ITEPA) following the Rainbow Warrior bombing in 1985. This chapter considers the question of media control under the ITEPA and how this fits with the New Zealand Bill of Rights Act 1990 and its ‘parent’ the International Covenant on Civil and Political Rights.<sup>2</sup>

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

Under the ITEPA, the Prime Minister of New Zealand is able to prohibit the publication or broadcasting of certain matters relevant to an “international terrorist emergency” (as defined in the Act).<sup>3</sup> Although an international terrorist emergency has never been invoked, Assistant Commissioner of Police responsible for counter-terrorism, Jon White, has reported that this was contemplated in 2003 when cyanide was mailed in

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<sup>1</sup> See, for example, the accounts of the organisation Reporters Without Borders, pointing to the physical violence and enforced disappearance suffered by journalists, the arrest and detention of media workers, censorship, and the surveillance of the internet: ‘2003 Round-Up’, Reporters Without Borders, 6 January 2004, URL <<http://www.charter97.org/eng/news/2004/01/06/borders>> at 11 March 2005; and ‘United States’, Reporters Without Borders, 22 June 2004, URL <[http://www.rsf.org/article.php3?id\\_article=10612](http://www.rsf.org/article.php3?id_article=10612)> at 11 March 2005. See also United Nations Foundation, ‘Report Shows Decline of Press Freedom with War on Terror’, UN Wire, 8 January 2004, URL <<http://www.unwire.org/UNWire>> at 12 January 2004.

<sup>2</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>3</sup> See further, *infra*, chapter 5.

threatening letters to the embassies of the United States and United Kingdom.<sup>4</sup>

Section 14 of the ITEPA provides the Prime Minister with certain rights to control the media where an international terrorist emergency has been declared:<sup>5</sup>

**14. Prime Minister may prohibit publication or broadcasting of certain matters relating to international terrorist emergency-**

(1) Where, in respect of any emergency in respect of which authority to exercise emergency powers has been given under this Act, the Prime Minister believes, on reasonable grounds, that the publication or broadcasting of—

- (a) The identity of any person involved in dealing with that emergency; or
- (b) Any other information or material (including a photograph) which would be likely to identify any person as a person involved in dealing with that emergency—

would be likely to endanger the safety of any person involved in dealing with that emergency, or of any other person, the Prime Minister may, by notice in writing, prohibit or restrict—

- (c) The publication, in any newspaper or other document; and
- (d) The broadcasting, by radio or television or otherwise,—

of the identity of any person involved in dealing with that emergency, and any other information or material (including a photograph) which would be likely to identify any person as a person involved in dealing with that emergency.

(2) Where, in respect of any emergency in respect of which authority to exercise emergency powers has been given under this Act, the Prime Minister believes, on reasonable grounds, that the publication or broadcasting of any information or material (including a photograph) relating to any equipment or technique lawfully used to deal with that emergency would be likely to prejudice measures designed to deal with international terrorist emergencies, the Prime Minister may, by notice in writing, prohibit or restrict—

- (a) The publication, in any newspaper or other document; and
- (b) The broadcasting, by radio or television or otherwise,—

of any information or material (including a photograph) of any such equipment or technique.

(3) The Prime Minister may issue a notice under subsection (1) or subsection (2) of this section notwithstanding that the emergency in respect of which the notice is issued has ended.

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<sup>4</sup> John Smith, *New Zealand's Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, and International Responsibilities*, Ian Axford New Zealand Fellowship in Public Policy, December 2003, 11, note 57.

<sup>5</sup> Subsections (4) and (5) of section 14 (concerning the publication of section 14 notices in the Gazette and proceedings of the House of Representatives) have not been reproduced.

Section 15 of the Act then deals with the expiry, revocation and renewal of section 14 notices. Subsection (3) provides that, unless earlier revoked or extended (or unless the notice specifies the life of the notice), a section 14 notice will expire 12 months after the date on which it was issued. This provision is unaffected by whether the terrorist emergency continues to exist. Section 15(4) allows further extensions for periods of five years at a time, if renewal of the notice is necessary either to protect the safety of any person, or to avoid prejudice to measures designed to deal with international terrorist emergencies.

#### *The Availability of Judicial Review*

A potential problem with the Prime Minister's powers under sections 14 and 15 of the ITEPA is that the establishment and continuance of media gags might not be capable of being challenged. If this is correct, there is no guarantee that notices under sections 14 and 15 are indeed connected with the stated objectives within those provisions. In the absence of a review mechanism, the effect of the provisions is to create the potential for an unfettered abuse of media control under the ITEPA.

The issue thus arising is whether notices under sections 14 and 15 are reviewable. The starting point is to recognise that the ITEPA does not prohibit judicial review and, as such, the media may be able to challenge the continuance of media gags through judicial review proceedings. This will depend on whether decisions of the Prime Minister under sections 14 or 15 of the ITEPA are justiciable. The most recent word on the justiciability of ministerial decisions in New Zealand is the case of *Curtis v Minister of Defence*.<sup>6</sup> Citing its earlier decision in *CREEDNZ v Governor General*,<sup>7</sup> and decisions of the Supreme Court of Canada and House of Lords, the New Zealand Court of Appeal concluded that:<sup>8</sup>

A non-justiciable issue is one in respect of which there is no satisfactory legal yardstick by which the issue can be resolved. That situation will often arise in cases into which it is also constitutionally inappropriate for the Courts to embark.

As to the making of decisions under sections 14 and 15, and applying the test identified by the Court of Appeal, such decisions do appear to be justiciable. Rephrasing the Court's test in the context of the ITEPA

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<sup>6</sup> *Curtis v Minister of Defence* [2002] 2 NZLR 744.

<sup>7</sup> *CREEDNZ v Governor General* [1981] 1 NZLR 359.

<sup>8</sup> *Curtis v Minister of Defence* (n 6) 752 (para 27).

provisions, there are two questions to ask. First, are decisions under sections 14 and 15 ones in respect of which it would be constitutionally acceptable for the courts to embark? Second, is there a satisfactory legal yardstick by which to determine whether the Prime Minister's decisions under sections 14 and 15 have been properly made? The answer to both questions is in the affirmative.

Considering the first question, the determinations at hand are not ones of a constitutionally sensitive nature calling for judicial deference. The decisions concern the safety of persons and the potential prejudice of information to future counter-terrorist operations. Unlike *Curtis*, they are not decisions concerning the disposition of armed forces or other policy-based matters. Such a conclusion is consistent with the Court of Appeal's approach in the *Zaoui* case, where the decision to issue a security certificate was held to be subject to judicial review in the absence of an express exclusion of judicial review.<sup>9</sup> This also goes to answer the second question. In exercising judicial review of decisions under sections 14 and 15, the courts would be considering the application of facts to the statutory tests under those provisions to determine whether the establishment or continuance of notices is proper. The question to be considered or, in the words of the Court of Appeal, the legal yardstick to be applied by the courts would be this: Would the publication or broadcasting of the identity of any person involved in the emergency (or of other information or material that would lead to the identity of such a person) be likely to either (1) endanger the safety of that or any other person (sections 14(1) and 15(4)(a)), or (2) prejudice measures designed to deal with international terrorist emergencies (section 14(2) and 15(4)(b))?

The question is a justiciable one, capable of determination upon the application of facts, and judicial review is thus available as a safeguard against the improper use of sections 14 and 15 of the ITEPA. The consequence of this is significant to the question of the provisions' compatibility with the New Zealand Bill of Rights Act, which is considered later in this chapter.

#### *The Unique Nature of the Prime Minister's Powers*

An observation to be made at this early stage is that the powers being considered under the ITEPA stand as a rare example of media control in counter-terrorism law and practice. Comparable powers are not known to exist in other Western democracies. Notwithstanding the uncommon nature

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<sup>9</sup> *Attorney-General v Zaoui (No 2)* [2005] 1 NZLR 690.

of these powers, however, the position of this author is that they are justifiable within their particular statutory framework and having regard to the availability of judicial review. If media control is indeed justifiable within those confines, one might therefore ask why New Zealand stands as an exception to general practice.

There is no clear answer to this question and one can only speculate. Two alternative and potentially overlapping considerations may have dissuaded other jurisdictions from taking similar steps. First, is the unpopularity of such legislative action being taken. Media control is something that is generally strongly opposed, although it may be that the pre-bill of rights mood in New Zealand existing at the time of the enactment of the ITEPA rendered such opposition ineffective. The other factor is that media control in this area may be perceived as unnecessary or, at least, that its absence does not pose a sufficiently high risk to warrant the potential political fall-out of taking legislative action. The type of information capable of protection under the ITEPA is, after all, unlikely to fall into the hands of the media, since such information will normally relate to covert operations, or operations that are conducted out of the sight or knowledge of the media.

### **Freedom of the Press**

Freedom of expression is a matter dealt with under Article 19(2) and (3) of the International Covenant on Civil and Political Rights. Paragraph (3) sets out the permissible limitations upon the freedom (to be discussed), while paragraph (2) expresses the substantive right:

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

In very similar terms, section 14 of the New Zealand Bill of Rights guarantees “the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form”.

### *Freedom of Expression and Freedom of the Press*

A question to briefly consider is whether Article 19 and section 14 afford protection to the media. In contrast to section 2(b) of the Canadian Charter

of Rights and Freedoms,<sup>10</sup> neither the ICCPR nor the NZBORA expresses a 'freedom of the press'. In the case of section 14 of the NZBORA, the approach of New Zealand courts has been to treat freedom of the press as an integral feature of the right of all members of the public to seek, receive and impart information and opinions. The High Court in *Solicitor-General v Radio New Zealand Ltd* stated that "the right of freedom of the press is no more and no less than the right of all and any member of the public to make comment".<sup>11</sup> Likewise, in *Television New Zealand Ltd v Attorney-General*, Cooke P stated for the Court of Appeal:<sup>12</sup>

The freedom of the press is not separately specified in the New Zealand Bill of Rights, our Bill differing in that respect from s 2 of the Canadian Charter of Rights and Freedoms and the First Amendment in the United States, but it is an important adjunct of the rights concerning freedom of expression affirmed in s 14 of the New Zealand Bill of Rights Act. They include 'the freedom to seek, receive, and impart information... Decisions of this Court have reflected the importance of media freedom, quite apart from the Bill of Rights'. *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 176 and *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 are two of the numerous examples which could be cited.

The situation under the International Covenant is slightly more complicated. The words of the Covenant do not expressly include the freedom of the press, although the argument adopted by New Zealand courts is again applicable. This must be correct, since Article 19(2) speaks of the right to *impart* information of any kind and in any way. The only difficulty lies in the fact that there is no jurisprudence in this area since complaints to the Human Rights Committee (HRC) under the First Optional Protocol to the ICCPR are limited to communications by individuals.<sup>13</sup> It was on that basis that communications 360/1989 and 361/1989 were dismissed by the Committee as being inadmissible under the Optional Protocol.<sup>14</sup> The communications involved claims by printing

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<sup>10</sup> Section 2(b) of the *Canadian Charter of Rights and Freedoms 1982* guarantees, as a fundamental freedom, the: "Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

<sup>11</sup> *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48, 61.

<sup>12</sup> *Television New Zealand Ltd v Attorney-General* [1995] 2 NZLR 641, 646.

<sup>13</sup> See Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee* (London: Ashgate Publishing Ltd, 2004), 18-21.

<sup>14</sup> *A Newspaper Publishing Company v Trinidad and Tobago*, Human Rights Committee Communication 360/1989, UN Doc CCPR/C/36/D/360/1989 (1989); and *A Publication and*

companies, whose main purpose was to purchase and supply material to a publication company for the production, printing and publishing of weekly newspapers. Both communications were submitted on behalf of companies incorporated under the laws of Trinidad and Tobago. Under Article 1 of the Optional Protocol, only individuals are able to submit a communication to the Human Rights Committee. As such, the particular communications were found to be inadmissible.

Importantly, however, this does not invalidate the application of Article 19 to the freedom of the press. The effect of what has just been discussed simply means that only individuals, as opposed to media groups or corporations, may complain to the Human Rights Committee about interference with their freedom of expression. The freedom is still a right guaranteed under the Covenant and an obligation in respect of which New Zealand must, as a State party, comply. The non-justiciability of group rights under the optional complaints procedure established by the First Protocol must not be taken to exclude the application of rights to groups or other entities.

#### *Limiting the Freedom of the Press when Responding to Terrorism*

It can thus be concluded that control upon the media and its ability to publish or broadcast any matter is something that impacts upon the freedom of expression. In the language of the steps advocated by Paul Rishworth for application of sections 4, 5 and 6 of the NZBORA, the right being invoked (the freedom of expression) applies to the circumstances being complained of (the Prime Minister's authority under sections 14 and 15 of the ITEPA).<sup>15</sup> Because these provisions effect limitations upon the freedom of expression, the issue to then consider is whether the limitations are consistent with section 5 of the New Zealand Bill of Rights Act and the rights-specific limitations expressed within Article 19(3) of the ICCPR.

In its 1991 report on emergencies, the New Zealand Law Commission spoke of the generally accepted notion that only in the most exceptional circumstances is it desirable or necessary to control the media in its coverage of events.<sup>16</sup> The report pointed to the siege of the Iranian Embassy in London in 1980 as a situation in which this almost arose. The police and

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*a Printing Company v Trinidad and Tobago*, Human Rights Committee Communication 361/1989, UN Doc CCPR/C/36/D/361/1989 (1989), para 12.2.

<sup>15</sup> Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (Auckland: Oxford University Press, 2003), 135-157.

<sup>16</sup> Kenneth Keith, *Final Report on Emergencies* (Wellington: New Zealand Law Commission Report 22, 1991), para 7.140.

SAS assault on the Embassy was filmed, although this was not broadcast live. In noting such occurrences, the report identified various factors that might call for media control, from the perspective of both dealing with an instant terrorist emergency and the longer-term implications of broadcasting and publication. On the subject of dealing with an actual terrorist incident, the report noted:<sup>17</sup>

Media coverage of terrorist events can compromise the efforts of the authorities to resolve those events and may also prejudice further responses to terrorist action. The primary concern is that the terrorist, by following the coverage of the incident, may be alerted to counteractive measures taken by the police and by the armed forces where they are involved. This forewarning may result in the failure of the operation and could place lives, of both anti-terrorist personnel and hostages (if any) at risk.

Other factors were also identified as having a potential impact upon the ability of authorities to deal with particular instances of terrorist activity.<sup>18</sup> First was the obstruction of authorities by the physical presence of the media, although this is a matter that could apply to the physical presence of any person and is, in any event, dealt with under section 10 of the ITEPA.<sup>19</sup> The Commissioner also identified that media representatives may become participants in an international terrorist event by communicating directly with the terrorists and thereby potentially undermining the conduct of authorities. Again, however, this is a matter that appears capable of being dealt with under the police powers to restrict entry and require evacuation of emergency areas under section 10 of the Act.

The report also makes the point that media coverage may have an impact outside the operation of a particular terrorist emergency.<sup>20</sup> This might occur through terrorist organisations gaining tactical information and technical knowledge from the media coverage of counter-terrorist operations. Such coverage might also expose the identity of members of counter-terrorist forces and thereby expose them to the risk of attack by terrorists. These are clearly undesirable consequences and, as discussed next, go to the heart of the justifiability of sections 14 and 15 of the ITEPA.

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<sup>17</sup> Ibid, para 7.142-7.143.

<sup>18</sup> Ibid, para 7.144.

<sup>19</sup> See, *infra*, chapter 5.

<sup>20</sup> Law Commission Report 22 (n 16), para 7.144.

### Media Control as a Justifiable Limit to the Freedom of the Press

Having established the scope of the powers under sections 14 and 15 of the International Terrorism (Emergency Powers) Act 1987, their susceptibility to judicial review, and that they impact upon the freedom of expression, this part of the chapter examines whether the ITEPA provisions are consistent with section 5 of the New Zealand Bill of Rights Act and the rights-specific limitations expressed within Article 19(3) of the ICCPR.

#### *Media Control and the ICCPR*

Article 19(3) of the International Covenant on Civil and Political Rights sets out a number of rights-specific limitations as follows:

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

A number of preliminary observations can be made. First, as recognised within the first sentence of paragraph (3), the exercise of freedom of expression carries with it special duties and responsibilities. This permits the imposition of restrictions upon the freedom, which may relate either to the interests of other persons (paragraph (3)(a)) or to those of the community as a whole (paragraph (3)(b)). Any restriction must be provided for by law, it must address one of the aims enumerated in paragraph (3)(a) and (b), and it must be *necessary* to achieve those legitimate purposes (as explained in the second sentence of Article 19(3)). The cumulative nature of these requirements was emphasised by the Human Rights Committee in *Mukong v Cameroon*.<sup>21</sup> Any limitation must also be proportional and not implemented in a manner that nullifies the substance of the right to expression, as explained by the Committee in its General Comment on Article 19.<sup>22</sup> Where a State seeks to justify a limitation as falling within the ambit of paragraph (3), the Human Rights Committee will require the State party to specify the precise nature of the threat allegedly posed by a

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<sup>21</sup> *Mukong v Cameroon*, Human Rights Committee Communication 458/1991, UN Doc CCPR/C/51/D/458/1991 (1994), para 9.7.

<sup>22</sup> *General Comment 10. Article 19*, CCPR General Comment 10 of 1983, reprinted UN Doc HRI/GEN/1/Rev.1 at 11 (1994), para 4.

person's exercise of freedom of expression and how the limitation achieves dissipation of that threat.<sup>23</sup>

The question of limiting the freedom of expression on the basis of national security was considered in *Park v Republic of Korea*. Korea stated, in that communication, that the restrictions in question (prohibiting the "praising, encouraging, or siding with or through other means the activities of an anti-State organization") were justified in order to protect national security, and that they were provided for by law under Article 7 of the *National Security Law 1980* (Korea).<sup>24</sup> Despite the potentially sensitive nature of security issues, the Committee took the view that it was nevertheless required to determine whether any measures taken were in fact necessary for the purpose stated. On the facts of the communication, the State party invoked national security by reference to the general situation in the country and the threat posed by "North Korean communists". The Committee considered that the State had failed to specify the precise nature of the threat posed by the author's exercise of freedom of expression and therefore found that there was no basis upon which the restriction could be considered compatible with Article 19(3).<sup>25</sup>

In contrast to the adverse aspects of this communication, the ITEPA deals with specific emergencies (declared by no fewer than three Ministers upon advice from the Commissioner of Police, on the particular facts, to constitute an "international terrorist emergency").<sup>26</sup> Applying the various requirements of paragraph (3) identified above, the first requirement is clearly met, since sections 14 and 15 set out restrictions imposed by law. Next, to satisfy paragraph (3), the provisions must be in pursuit of the aims expressed in subparagraphs (3)(a) and (b). Sections 14 and 15 appear to fit well within the aim of protecting national security and, equally, protecting public order or public health. The Prime Minister's authority to restrict the media only arises where the information in question:

- "would be likely to endanger the safety of any person involved in dealing with that emergency, or of any other person" (section 14(1)); or

<sup>23</sup> See, for example, *Kim v Republic of Korea*, Human Rights Committee Communication 574/1994, UN Doc CCPR/C/64/D/574/1994 (1999), para 12.5; *Laptsevic v Belarus*, Human Rights Committee Communication 780/1997, UN Doc CCPR/C/68/D/780/1997 (2000), para 8.5; and *Pietrataroia v Uruguay*, Human Rights Committee Communication r10.44/1979, para 17.

<sup>24</sup> *National Security Law 1980* (Korea), Art 7(1).

<sup>25</sup> *Park v Republic of Korea*, Human Rights Committee Communication 628/1995, UN Doc CCPR/C/64/D/628/1995 (1998). See also *Kim v Republic of Korea*, Human Rights Committee Communication 574/1994, UN Doc CCPR/C/64/D/574/1994 (1999), para 10.3.

<sup>26</sup> See further, *infra*, chapter 5.

- “would be likely to prejudice measures designed to deal with international terrorist emergencies” (section 14(2)).

Likewise, extension of such notices can only occur where:

- “renewal of the notice is necessary... to protect the safety of any person” (section 15(4)(a)); or
- “renewal of the notice is necessary... to avoid prejudice to measures designed to deal with international terrorist emergencies” (section 15(4)(b)).

The final requirement of paragraph (3) is that any limitation upon the freedom of expression be proportional and in response to specific identifiable threats caused by a continuance of the freedom. In the main, the author considers that proportionality is met, and it is clear that these measures can only apply to identified, and expressly declared, states of international terrorist emergencies. The only matter of concern relates to section 14(3) of the ITEPA, which permits the continuance of restrictions or prohibitions notwithstanding that the emergency has ended. A notice under section 14 automatically lasts for one year, unless earlier revoked by the Prime Minister.<sup>27</sup> The restrictions can then be extended for five year periods under section 15(4) if renewal of the notice is necessary for the protection of any person or to avoid prejudice to measures designed to deal with terrorism. As identified earlier, the continued suppression of information may be necessary for the purpose of preventing the identification of counter-terrorist agents or to prevent terrorist organisations from gaining tactical or technical information on counter-terrorist operations and, to that extent, the ability for restrictions to apply after a state of emergency seems reasonable. At face value, then, this seems appropriate.

The only question that remains is whether the Prime Minister’s authority is subject to sufficient checks and balances. As concluded earlier, sections 14 and 15 are subject to judicial review. This might not give the media much comfort in the short-term, given the immediate effect of section 14 notices and the reality that judicial review will take time. One might observe, however, that the powers of the Prime Minister will only be activated during an “international terrorist emergency”, declared on the basis of consensus on the part of at least three Ministers of the Crown based upon advice from the Commissioner of Police). The New Zealand Law

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<sup>27</sup> Section 15(2) and (3) of the Act.

Commission identified that the gravity of the circumstances giving rise to such an emergency will vary, as will the threat posed by the publication or broadcasting of information.<sup>28</sup>

As noted by the Law Commission, the Human Rights Committee has levelled criticism at the media provisions of the ITEPA in its consideration of New Zealand's reports under the ICCPR.<sup>29</sup> In its observations on New Zealand's second periodic report, the Committee noted that concerns raised by it during the examination of New Zealand's report concerning the scope of the ITEPA had not been alleviated.<sup>30</sup> The Committee expressed particular concern about the 'closure provisions' of the ITEPA media gags referring, it seems, to the means by which media gags may be discontinued. The ability to judicially review the continuance of notices and thereby allow such notices to be tested against the Article 19(3) grounds for limiting freedom of expression should, however, satisfy the Committee.

#### *Media Control and Section 5 of the NZBORA*

Turning now to the question of whether sections 14 and 15 of the ITEPA impose justifiable limits in accordance with section 5 of the NZBORA, the first consideration (the existence of an important objective) seems easy to answer. To the extent that media gags are issued for the purposes identified under sections 14(1) and (2) and 15(4) of the ITEPA, those objectives are clearly pressing and substantial. They not only deal with instant emergencies, but are also aimed at preserving the integrity of counter-terrorist operations, and the safety of persons. Such objectives clearly satisfy the first limb of the *Oakes* and *Radio New Zealand* limitations test.<sup>31</sup>

In applying the second, proportionality, limb of the section 5 test one must first be satisfied that the legislative provision is rationally connected to the achievement of the objective. Again, this seems easy to answer in the affirmative. The structure of sections 14 and 15 is such as to restrict or prohibit the publication or broadcasting of information likely to prejudice the safety of a person or the integrity of future counter-terrorist operations. The second proportionality factor requires the legislative provision to impair the right as little as reasonably possible. This goes to the question of whether sections 14 and 15 are the least intrusive means by which their

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<sup>28</sup> New Zealand Law Commission Report 22 (n 16), para 7.151.

<sup>29</sup> *Ibid*, para 7.152.

<sup>30</sup> *Concluding observations of the Human Rights Committee: New Zealand*, UN Doc CCPR/A/44/40 (1989), paras 393 and 402.

<sup>31</sup> *R v Oakes* (1986) 26 DLR (4th) 200 (SCC); and *Solicitor-General v Radio New Zealand Ltd* (n 11).

objectives might be achieved. So long as safeguards exist against the improper use of these provisions, this paper takes the view the minimal impairment test is satisfied. The current statutory framework does not exclude judicial review of section 14 and 15 decisions and, as concluded above, these decisions are justiciable so that adequate safeguards against abuse are present. This conclusion goes to the final factor of the proportionality test also, rendering the effect of the provisions upon the freedom of the press proportional to the objectives of protecting the safety of persons and the ability to deal with future counter-terrorist operations. As such, sections 14 and 15 are 'consistent' with the New Zealand Bill of Rights Act 1990 and no further enquiry under Rishworth's steps is required.

### Conclusion

Sections 14 and 15 of the International Terrorism (Emergency Powers) Act 1987 stand as a rare example of media control by the State in counter-terrorism law and practice. Notwithstanding this, having regard to the susceptibility of ITEPA notices to judicial review and the purposes in respect of which notices may be made and extended, it has been concluded that these provisions are compliant with both the ICCPR and NZBORA. In a disappointingly brief and cursory examination of the ICCPR and NZBORA, the Law Commission's 1991 report on emergencies concluded that media control under the ITEPA was ineffective. The Commission gave no reasons for this conclusion, other than that the Act was 'cumbersome' in determining whether a terrorist emergency exists.<sup>32</sup> This does not, however, go to the question of whether the media control provisions are themselves effective.

The Commission also concluded that the encroachment of sections 14 and 15 upon the ICCPR and NZBORA was not justified, again without analysis as to how that conclusion was reached.<sup>33</sup> The *Final Report on Emergencies* therefore recommended the repeal of sections 14 and 15, preferring a model by which voluntary guidelines be adopted by the media.<sup>34</sup> With due respect to the then Commissioner, this author disagrees. Certainly, the provisions do limit freedom of the press, a freedom guaranteed by Article 19 of the ICCPR and section 14 of the NZBORA.

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<sup>32</sup> New Zealand Law Commission Report 22 (n 16), paras 7.160 and 7.161.

<sup>33</sup> *Ibid.*, 7.162.

<sup>34</sup> *Ibid.*

However, the restricted purposes in respect of which media gags may be issued, combined with the availability of judicial review as a safeguard against abuse of the powers under the provisions, mean that the ITEPA provisions comply with the limitations provisions of Article 19(3) of the ICCPR and section 5 of the NZBORA.