

## Chapter 14

# Freedom of Association and Terrorist Designations

Sections 8 and 10 of the Terrorism Suppression Act 2002 (TSA) prohibit the provision of funds to, or collection of funds for, a designated entity, or the provision of property or financial services to such entities. Sections 12 and 13 make 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”, or to participate in such an organisation or group. Section 13A criminalises the harbouring or concealing of a person, where it is known (or ought to be known) that the person has carried out, or intends to commit, a terrorist act. Broadly speaking, then, these provisions prohibit various means of associating with terrorist entities. Central to these non-association provisions are two features. The first is concerns conduct related to a “terrorist act”, which is the subject of consideration in chapter 16. The second feature is conduct related to a designated entity. This chapter will consider the freedom of association and the permissible limitations upon that freedom. It will set out and explain the mechanisms under the Terrorism Suppression Act for the designation of terrorist entities. Chapter 15 will then undertake a detailed analysis of that regime focussing upon natural justice and the right to a fair hearing.

### Freedom of Association

The freedom of association is a right protected by both the International Covenant on Civil and Political Rights (ICCPR)<sup>1</sup> and the New Zealand Bill of Rights Act 1990 (NZBORA). Section 17 of the Bill of Rights expresses the freedom in very simple terms, describing it as “the right to freedom of association”. Article 22(1) of the ICCPR is not much more helpful:

Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

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<sup>1</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

Regrettably, the jurisprudence of the Human Rights Committee does not help define this right within the context of the current examination, since complaints before the Committee have concerned the membership of individuals in political parties or trade unions, and strike actions.<sup>2</sup> In the context of the Bill of Rights, there has likewise been little academic and judicial scrutiny of the freedom of association. The point made by Professor Paul Rishworth, however, is that freedom of association is often viewed as a right linked with others.<sup>3</sup> The freedom of association may permit, in turn, the exercise of the freedoms of expression (section 14) and peaceful assembly (section 16). Likewise, an interference with the freedom of association may involve discrimination against a person based upon that person's political opinion (section 19)<sup>4</sup>, or it may interfere with the manifestation of a person's religious beliefs (section 15).

#### *Association with Terrorist Entities and the ICCPR*

Freedom of association is not an absolute right, instead qualified by paragraph 2 of Article 22 of the ICCPR:

No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Considering Article 22(2) step by step, the first point is that the restrictions in question are provided for under the Terrorism Suppression Act and are therefore "prescribed by law".<sup>5</sup> The second requirement is that the restrictions must be necessary in a democratic society for the furtherance of certain interests. In the case at hand, it seems easily arguable that the identified provisions of the Terrorism Suppression Act are in pursuit of almost all of those interests identified in Article 22(2) of the Covenant by contributing to the international suppression of terrorism and by putting

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<sup>2</sup> See Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee* (London: Asghate Publishing Ltd, 2003) 61 and 65-67.

<sup>3</sup> Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (Oxford University Press, 2003) 354.

<sup>4</sup> See also section 21(1)(j) of the Human Rights Act 1993.

<sup>5</sup> For a discussion of the meaning of that term, see chapter 7.

into place means by which terrorist threats or acts within New Zealand can be suppressed and responded to: national security; public safety; the protection of public health; and the protection of rights and freedoms of others (including, for example, the right to life). It is therefore easy to conclude that the non-association provisions of the Terrorism Suppression Act are, in and of themselves, consistent with the ICCPR.

However, in saying that the provisions are “in and of themselves” consistent with the International Covenant on Civil and Political Rights, the author takes the view that this is dependent on the proper and just designation of terrorist entities. An abuse of that process might, for example, be used to prevent membership of all Islamic organisations rather than properly proscribing membership of organisations that fall within the proper terms of the designation process. The designation regime must therefore be considered closely, a matter undertaken by this and the following chapter.

It should be mentioned that membership of proscribed organisations is not something new. In considering regulations made by the relevant Minister in Ireland for the “preservation of the peace and the maintenance of public order”, the House of Lords had to determine in *McEldowney v Forde* whether it was proper for the Minister to have proscribed membership in a “republican club”.<sup>6</sup> By three judges to two, the House of Lords held that Forde’s conviction for being a member of such a club was proper. While the division in opinion might seem problematic, the dissenting judgments were on the question of whether there was sufficient evidence that “republican clubs” caused any prejudice to peace or good order.<sup>7</sup> There was no dispute as to whether membership *can* be proscribed for the purposes of preserving the peace and maintaining public order. Earlier still, the Nuremberg Tribunal held that proscribing membership of a criminal organisation was proper.<sup>8</sup>

#### *Association with Terrorist Entities and the NZBORA*

By reason of the plain expression of the freedom of association under the NZBORA, the provisions at hand do impact upon the freedom. The expression of the right does not qualify itself in any way that could render

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<sup>6</sup> *McEldowney v Forde* [1971] AC 632.

<sup>7</sup> *Ibid*, Lord Pearce (651-654) and Lord Diplock (658-665).

<sup>8</sup> International Military Tribunal, Nuremberg, judgment of 30 September 1946. For a discussion of this, see Kenneth Keith, ‘Terrorism, Civil Liberties and Human Rights’, a paper presented at the 13<sup>th</sup> Commonwealth Law Conference 2003, (CR4) Terrorism: Meeting the Challenges / Finding the Balances, 13-17 April 2003, 32-33.

those provisions consistent with its definition. The issue of consistency must therefore be determined by reference to the section 5 justified limitations provision.

As before, the author takes the view that the provisions at hand present the most clear-cut case of justified limitations upon a right or freedom. The objectives of the various provisions are all directed, and rationally connected to, the suppression of the financing of terrorism, the participation in terrorist groups and the bringing to justice of the perpetrators of terrorist acts. Bearing in mind the consequences of terrorism,<sup>9</sup> these prohibitions are manifestly proportional to the limitations upon the freedom of association. It is therefore concluded that the provisions are ‘consistent’ with the Bill of Rights Act, within the meaning of Rishworth’s Step Two. No breach of the NZBORA occurs.

Again, however, the author qualifies this conclusion on the proviso that this is dependent on the proper and just administration of the process by which a person or group may be designated a “terrorist” or “associated” entity. To some extent, this concern is alleviated through the express qualifications within sections 8(2) and 10(2) of the Terrorism Suppression Act, which make it clear that these provisions do not make it an offence to provide or collect funds with the intention that they be used, or knowing that they are to be used, for the purposes of advocating democratic government or the protection of human rights, so long as such an organisation is not involved in carrying out terrorist acts. The Terrorism Suppression Amendment Bill 2007, however, seeks to remove these ‘avoidance of doubt’ provisions.

### **The Designation of Terrorists under New Zealand Law**

The Terrorism Suppression Act 2002 sets out a detailed process by which individuals or entities may be designated as terrorist or associated entities, either as a domestically initiated designation, or (as the Act stands at present) as a result of the listing of such entities by the UN Security Council resolution 1267 (1999) Sanctions Committee (the 1267 Sanctions Committee). This process poses certain difficulties with respect to UN-listed entities and, due to those problems, the Terrorism Suppression Amendment Bill 2007 proposes to remove reference to UN-listed entities leaving room for such entities to be automatically listed, rather than

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<sup>9</sup> See, *infra*, chapter 6.

requiring executive action.<sup>10</sup> This part of the chapter will set out the current regime for the designation of terrorist entities, identifying intended reform pursuant to the 2007 Amendment Bill.

### *The Making of Designations*

Designations under the Terrorism Suppression Act, whether interim or final, have the same consequences in terms of their linkage with offences and with reporting obligations (impacting upon third parties directly, and upon designated entities as a result of the fact that dealings with them are prohibited). The designations can also impact upon designated entities by virtue of the fact that property owned or controlled by a person or group that is the subject of a final designation can be forfeited to the Crown if that property is in New Zealand.<sup>11</sup> The primary differences between the two types of designation concerns the standard of belief required to be had by the Prime Minister before the making of a designation, and the life of each type of designation.

#### 1. Interim versus final designations

The primary difference between interim and final designations is the level of belief required of the Prime Minister regarding the status or conduct of the person or group being designated. An interim designation can be made where the Prime Minister has “good cause to suspect” that an entity has done certain things, while a final designation requires a belief “on reasonable grounds” to be held by the Prime Minister.<sup>12</sup>

There is no requirement that an entity be first designated on an interim basis before designation on a final basis. A final designation can be made in respect of a group or person that has never been the subject of an interim designation, or is at that time the subject of an interim designation, or was

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<sup>10</sup> New Zealand Parliamentary Library, *Bills Digest. Terrorism Suppression Amendment Bill 2007* (Bills Digest 1498, 21 March 2007), 5.

<sup>11</sup> *Terrorism Suppression Act 2002*, section 55. Forfeiture can only occur on application to the High Court by the Attorney-General and if the designation is one that has been extended beyond the normal three year period (under section 35 of the Act) and the Court is satisfied that it would be appropriate to forfeit the property rather than simply continue with the prohibition against dealing with it (section 9). The property of a designated entity is thus “frozen”, in that others are prohibited from dealing with it, but cannot be forfeited unless the designation is extended beyond three years and the prohibition against dealing with the property is not sufficient.

<sup>12</sup> Compare *Terrorism Suppression Act 2002*, section 22(1) and (3) (final designations) with section 20(1) and (3) (interim designations).

the subject of an interim designation that subsequently expired or was revoked.<sup>13</sup> If, however, a final designation is made in respect of an entity that is already the subject of an interim designation, the latter becomes revoked as a result of the making of the final designation.<sup>14</sup> In the case of an entity that has already been the subject of a final designation, and where that designation was revoked, a further final designation is permitted, but only if this is based on information that became available since the revocation of the earlier designation.<sup>15</sup>

## 2. Expiry of designations

A direct reflection of the differing standards required for interim versus final designations is found in the length of time that each type of designation can remain in force. In the case of interim designations, requiring the lower standard of proof of “good cause to suspect”, the designation can last only up to 30 days,<sup>16</sup> unless earlier revoked<sup>17</sup> or replaced by a final designation.<sup>18</sup> Importantly, a person or organisation cannot be made the subject of repeated interim designations in an attempt to extend a designation under this lower threshold.<sup>19</sup> The only exception to this rule is that an interim designation will continue if it becomes the subject of judicial review or other proceedings before a court (and is not otherwise revoked)<sup>20</sup> until those proceedings are withdrawn or finally determined.<sup>21</sup>

In contrast, final designations last for three years from the date they are made, unless earlier revoked.<sup>22</sup> As in the case of interim designations, if the

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<sup>13</sup> *Terrorism Suppression Act 2002*, section 23(a).

<sup>14</sup> *Terrorism Suppression Act 2002*, section 23(b).

<sup>15</sup> *Terrorism Suppression Act 2002*, section 23(c).

<sup>16</sup> *Terrorism Suppression Act 2002*, section 21(e).

<sup>17</sup> The Prime Minister has the authority, under section 34 of the *Terrorism Suppression Act 2002*, to revoke interim or final designations.

<sup>18</sup> *Terrorism Suppression Act 2002*, section 22.

<sup>19</sup> *Terrorism Suppression Act 2002*, section 21(a).

<sup>20</sup> The designation could be earlier revoked under section 23(b) of 34 of the *Terrorism Suppression Act 2002*.

<sup>21</sup> *Terrorism Suppression Act 2002*, section 21(f).

<sup>22</sup> *Terrorism Suppression Act 2002*, sections 23(g)(i) and 34. The *Terrorism (Bombings and Financing) Bill 2001* had provided that designations remain active for five years: see clause 17V of the Bill, as contained within the select committee’s interim report – Foreign Affairs, Defence and Trade Select Committee, *Interim Report on the Terrorism (Bombings and Financing) Bill*, 8 November 2001. In its final report on the Bill, the Committee recommended that this be reduced to three years, stating that “it is important that the designation of a person or group as a terrorist or associated entity expire, so designations do

final designation becomes the subject of judicial proceedings, that designation continues to operate, even beyond the three-year period.<sup>23</sup> Otherwise, for a final designation to continue beyond three years, it must be extended by an order of the High Court.<sup>24</sup> To do so, the Attorney-General must satisfy the Court, on the balance of probabilities, that the entity is the subject of criminal proceedings for terrorist acts,<sup>25</sup> or has been convicted of terrorist acts in an overseas tribunal (on a final basis),<sup>26</sup> or is a terrorist or associated entity.<sup>27</sup> This can be done on a repeated basis.<sup>28</sup> A decision of the High Court on an application for the extension of a designation can be appealed to the Court of Appeal by any party to that application.<sup>29</sup>

Whereas extensions to final designations must currently be made by the High Court, the Terrorism Suppression Amendment Bill 2007 proposes that extensions instead be made by the Prime Minister. This is considered further below.

### 3. Terrorist and associated entities

A further distinction to be made, applicable to both interim and final designations, concerns the ‘class’ of designations that can be made. A person or group can be designated as either a “terrorist entity” or an “associated entity”, the distinction essentially depending upon that person’s or group’s past conduct. Where the Prime Minister has good cause to suspect (interim designation) or believes on reasonable grounds (final designation) that an entity “has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts”, then that entity can be designated as a terrorist entity.<sup>30</sup> Associated entities can be designated where there is suspicion or belief that an entity is facilitating or participating in the execution of a terrorist act, or is acting on behalf of or at

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not continue after the reasons for making them cease to exist”: see Foreign Affairs, Defence and Trade Committee, *Final Report on the Terrorism <(Bombings and Financing)> Suppression Bill*, 22 March 2002.

<sup>23</sup> *Terrorism Suppression Act 2002*, section 23(h).

<sup>24</sup> *Terrorism Suppression Act 2002*, sections 23(g)(ii) and 35(2).

<sup>25</sup> Whether in New Zealand or overseas: see *Terrorism Suppression Act 2002*, section 37(a).

<sup>26</sup> That is, convicted in criminal proceedings that are not subject to any appeal and that are finally determined: see *Terrorism Suppression Act 2002*, section 23(b).

<sup>27</sup> *Terrorism Suppression Act 2002*, section 35(c) and (d). Compare these tests to their equivalents for interim and final designations under sections 20 and 22.

<sup>28</sup> *Terrorism Suppression Act 2002*, section 35(2) to (5).

<sup>29</sup> *Terrorism Suppression Act 2002*, section 41.

<sup>30</sup> *Terrorism Suppression Act 2002*, sections 20(1) (interim designation as a terrorist entity) and 22(1) (final designation as a terrorist entity). Note that the term “terrorist acts” is defined through sections 4 and 5 of the Act.

the direction of a terrorist entity, or is wholly owned or effectively controlled by a terrorist entity.<sup>31</sup> In the case of final designations, the Prime Minister can later change the description of the designation from “terrorist entity” to “associated entity” (or vice versa) by signing a written notice to that effect.<sup>32</sup>

#### 4. Political consultation

Before making *interim* designations of either terrorist or associated entities, the Prime Minister must consult with the Minister of Foreign Affairs and Trade.<sup>33</sup> The Prime Minister and Attorney-General must also advise the Leader of the Opposition of the making of an interim designation and, if requested, brief the Leader on the factual basis for the making of the designation.<sup>34</sup> If practicable, this must be done before the designation is publicly notified, or as soon as possible after the notification.

In the case of *final* designations, the Prime Minister must first consult with the Attorney-General about any proposed final designation, rather than the Minister of Foreign Affairs and Trade.<sup>35</sup> Advice to the Leader of the Opposition is not required.<sup>36</sup> Finally, the Prime Minister is bound to consult with the Attorney-General before deciding on whether to continue or revoke a designation (in a situation where the Prime Minister is requested under section 34(1) of the Act to reconsider the designation).

#### 5. Material upon which designations may be based

In making either an interim or final designation, the Prime Minister can rely on “any relevant information”.<sup>37</sup> Two categories of information, however, are accorded special status. The first is information provided by the United Nations Security Council, which is deemed by section 31(1) of the Act to be sufficient evidence of the matters to which it relates, in the absence of

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<sup>31</sup> *Terrorism Suppression Act 2002*, sections 20(3) (interim designation as an association entity) and 22(3) (final designation as an association entity).

<sup>32</sup> *Terrorism Suppression Act 2002*, section 29A, as inserted through the *Counter-Terrorism Bill 2003*, clause 14.

<sup>33</sup> *Terrorism Suppression Act 2002*, section 20(4).

<sup>34</sup> *Terrorism Suppression Act 2002*, section 20(5).

<sup>35</sup> *Terrorism Suppression Act 2002*, section 22(4). Compare this with interim designations, which require the Prime Minister to consult with the Minister of Foreign Affairs and Trade: section 20(4) of the Act.

<sup>36</sup> Compare with the need to advise and brief in the case of interim designations: *Terrorism Suppression Act 2002*, section 20(5).

<sup>37</sup> *Terrorism Suppression Act 2002*, section 30.

any evidence to the contrary. Where such information indicates that the Security Council, or one of its Committees, considers that an entity is one that would otherwise satisfy the municipal tests for cause to designate,<sup>38</sup> then the Prime Minister may make a corresponding municipal designation.<sup>39</sup> This, as indicated, is the subject of proposed reform, so that UN-listed entities will become automatically listed under New Zealand law.

The second category of information dealt with under the Act is classified security information, being information held by the New Zealand police or an intelligence and security agency, where the head of the agency has certified that the information cannot be disclosed.<sup>40</sup> To be able to give such a certificate, the head of the agency must be of the opinion that the information is of a certain nature (as specified in section 32(2)), the disclosure of which would have certain prejudicial effects (as listed in section 32(3)).<sup>41</sup> The protection of classified information, and the natural justice implications of this, are considered in chapter 15.

## 6. Notice of designations

The designation itself must be made in writing and signed by the Prime Minister, then publicly notified in the Gazette as soon as practicable, and by any other means directed by the Prime Minister (by internet, for example).<sup>42</sup> Where a designated entity, or any representative of it, is in New Zealand, and if practicable, notice of the designation must also be given to the entity or representative with all reasonable speed.<sup>43</sup> The content of any notice of interim or final designation is prescribed by section 26:

- A notice under section 21(d)(i) or section 23(f)(i) (to notify the designated entity of the making of the designation under section 20 or section 22) –
- (a) must state the section under which the designation is made, and whether the entity concerned is designated as a terrorist entity or as an associated entity:

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<sup>38</sup> Cause to make an interim designation is, as discussed, governed by section 20(1) and (3) of the *Terrorism Suppression Act 2002*. Cause to make a final designation is governed by 22(1) and (3) of the Act.

<sup>39</sup> *Terrorism Suppression Act 2002*, section 31(2).

<sup>40</sup> *Terrorism Suppression Act 2002*, sections 4(1) and 32(1).

<sup>41</sup> *Terrorism Suppression Act 2002*, section 32.

<sup>42</sup> *Terrorism Suppression Act 2002*, sections 21(b) and (c), 22(d) and (e), and 28(1). The example of notification by internet was given by the Foreign Affairs, Defence and Trade Committee in its interim report on the Terrorism Suppression Bill, *Interim Report on the Terrorism (Bombings and Financing) Bill*, 8 November 2001, unnumbered page 9. The content of such notices is prescribed by section 27 of the Act.

- (b) may describe the entity concerned by reference to any name or names or associates or other details by which the entity may be identified;
- (c) must state the maximum period for which the designation may have effect or, if it is made under section 22, the maximum period for which it may have effect without being extended;
- (d) must include general information about how it may be reviewed and revoked;
- (e) must include any other information specified for the purposes of this paragraph by regulations made under this Act

A notable omission from this prescription of what must be included within a notice is the need to provide reasons for the designation. This is a point that is further reflected upon later in chapter 15.

The Prime Minister can also direct that notice be given to any person that may be in possession of property owned or controlled by the entity, or who may be in a position to provide property or services to the entity.<sup>44</sup> This will normally involve notice being given to registered banks or other financial institutions so that they are in a position to comply with their reporting obligations under the Act.<sup>45</sup> Just as designations must be notified under the Act, so must the revocation, expiry or invalidity of designations.<sup>46</sup>

An important feature of the notice provisions is that the Act specifically provides that a designation will not be invalid because the entity concerned was not given notice that a designation might be made, or given a chance to comment on whether it should be made.<sup>47</sup> The natural justice implications of these notice provisions will be considered in chapter 15.

#### *Review and Renewal of Designations*

Once a designation is made, there are three means by which the designation will be reviewed or renewed. The first involves an extension of a final designation beyond the standard three-year period.<sup>48</sup> It is this first review mechanism that is to be changed under the Terrorism Suppression Bill 2007, and comments on the nature of the proposed amendment will follow. The other two means of reviewing the status of designations involve

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<sup>43</sup> *Terrorism Suppression Act 2002*, sections 21(d)(i) (notice of interim designation) and 23(1)(f) (notice of final designation).

<sup>44</sup> *Terrorism Suppression Act 2002*, sections 9(1), 10(1), 21(d)(ii), 23(f)(ii) and 28(2). The content of such notices is prescribed by section 27 of the Act.

<sup>45</sup> See sections 43 to 47 of the *Terrorism Suppression Act 2002*.

<sup>46</sup> *Terrorism Suppression Act 2002*, section 42.

<sup>47</sup> *Terrorism Suppression Act 2002*, section 29(a).

<sup>48</sup> *Terrorism Suppression Act 2002*, section 35.

reviews initiated either by the designated entity or reconsideration of the designation at the Prime Minister's own volition.

### 1. Judicial review initiated by a designated entity or interested party

The first available option under the Terrorism Suppression Act open to a designated entity is that of judicial review. Section 33 of the Act is unrestricted in its terms, allowing "a person" (presumably *any* person) to bring any judicial review or other proceedings before a court arising out of, or related to, the making of a designation under the Act.

A designated person, or a third party with "an interest in the designation",<sup>49</sup> may also apply in writing to the Prime Minister to revoke a designation.<sup>50</sup> In doing so, the application must be based on one of two grounds: either (1) that the designation should be revoked because the entity concerned does not satisfy the prescribed requirements for designation; or (2) that the entity is no longer involved in any conduct that would otherwise legitimate a designation under the Act.<sup>51</sup> In determining such an application, the Prime Minister is required to consult with the Attorney-General.<sup>52</sup>

### 2. Internal, government-initiated reviews

Where the Attorney-General seeks to extend a final designation beyond its statutory expiry date, the Attorney-General must satisfy the Court, on the balance of probabilities, that the entity is the subject of criminal proceedings for terrorist acts,<sup>53</sup> or has been convicted of terrorist acts in an overseas tribunal (on a final basis),<sup>54</sup> or is a terrorist or associated entity.<sup>55</sup>

The ability to revoke a designation under section 34 of the Act can also be initiated at the Prime Minister's own initiative.<sup>56</sup> This is the only mechanism by which an 'internal' review of designations can be initiated. In the form presented within the select committee's interim report on the

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<sup>49</sup> As defined by section 34(2) of the *Terrorism Suppression Act 2002*.

<sup>50</sup> *Terrorism Suppression Act 2002*, section 34(1).

<sup>51</sup> *Terrorism Suppression Act 2002*, section 34(3).

<sup>52</sup> *Terrorism Suppression Act 2002*, section 34(5).

<sup>53</sup> Whether in New Zealand or overseas: see *Terrorism Suppression Act 2002*, section 37(a).

<sup>54</sup> That is, convicted in criminal proceedings that are not subject to any appeal and that are finally determined: see *Terrorism Suppression Act 2002*, section 23(b).

<sup>55</sup> *Terrorism Suppression Act 2002*, section 35(c) and (d). Compare these tests to their equivalents for interim and final designations under sections 20 and 22.

<sup>56</sup> *Terrorism Suppression Act 2002*, section 34(1).

Bill, the Terrorism Suppression Act was also to include a mandatory review of designations by the Inspector-General of Intelligence and Security.

### 3. Renewal of a final designation beyond three years

All final designations currently expire after three years, unless renewed by the High Court on the application of the Attorney-General under section 35 of the Terrorism Suppression Act. The Attorney-General must thus currently satisfy the High Court, on the balance of probabilities, that the entity is the subject of criminal proceedings for terrorist acts,<sup>57</sup> or has been convicted of terrorist acts in an overseas tribunal (on a final basis),<sup>58</sup> or is a terrorist or associated entity.<sup>59</sup>

In the context of UN-listed entities, which number in the hundreds, this presents a significant administrative and judicial burden, as well as placing New Zealand in the potential position of having its Courts require a person or entity to be removed from listing under New Zealand law, in conflict with obligations under the UN Charter and relevant Security Council resolutions. These problems initially prompted the passing of the Terrorism Suppression Amendment Act (No 2) 2005, stretching extant final designations to five years instead of three.<sup>60</sup> The Terrorism Suppression Amendment Bill 2007 will achieve remove the problem, as it applies to UN-listed entities, by making all such entities automatically designated under New Zealand law. This change is considered further below.

The 2007 Amendment Bill seeks to go further than this, however, by placing the renewal of domestically-designated entities (as well as UN-listed entities) in the hands of the Prime Minister, instead of the High Court. Clause 21 of the Bill will replace current sections 35 to 37 of the Act. The existing provisions, in brief, provide that: final designations (those made under section 22 of the Act) expire after three years, unless extended by order of the High Court upon application of the Attorney-General (section 35); preservation of any final designation pending judicial review proceedings initiated by the designated entity, and associated matters (section 36); and a detailed list of grounds upon which the High Court is

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<sup>57</sup> Whether in New Zealand or overseas: see *Terrorism Suppression Act 2002*, section 37(a).

<sup>58</sup> That is, convicted in criminal proceedings that are not subject to any appeal and that are finally determined: see *Terrorism Suppression Act 2002*, section 23(b).

<sup>59</sup> *Terrorism Suppression Act 2002*, section 35(c) and (d). Compare these tests to their equivalents for interim and final designations under sections 20 and 22.

<sup>60</sup> 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. See also Press Release, 'Amendments to Tighten Terrorism Suppression Act', URL <<http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=21825>> at 8 January 2005.

authorised to extend a final designation for a further period (section 37). Clause 21 of the Bill will see these three provisions replaced by a new section 35 which, in the form presented to Parliament on 21 March 2007, reads as follows:

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

- (1) A designation made under section 22 expires 3 years after the date on which it takes effect, unless it is earlier—
  - (a) revoked under section 34; or
  - (b) renewed by an order under subsection (2) or (3).
- (2) The Prime Minister may order that a designation made under section 22 remain in force for a further 3 years after the making of the order if the Prime Minister is satisfied that there are still reasonable grounds as set out in section 22 for an entity to be designated under that section.
- (3) Before expiry of an order under subsection (2), the Prime Minister may make another order renewing the designation concerned for a further 3 years.
- (4) The Prime Minister may make any number of orders under subsection (3) in respect of the same designation.

The first rather obvious observation to make is that these proposed amendments are significantly more simple than the extant sections 35 to 37. Furthermore, the grounds upon which an extension may be made are less than under the current regime, restricting the Prime Minister to the test under section 22 for determining whether the person or group is a terrorist or associated entity. The only matters of potential concern are the removal of judicial scrutiny each three years, and the fact that while the High Court can extend a designation if satisfied of matters “on the balance of probabilities” (extant section 37), the Prime Minister need only have a belief “reasonable grounds” of the matters in section 22 (sections 22 and proposed 35(2)). These matters are not, however, of substantial concern, since any extension under proposed section 35 remains subject to judicial review under section 33 of the Act.

**United Nations-Listed Terrorist Entities**

Other than granting a special status to information provided by the UN Security Council, under section 31 of the Terrorism Suppression Act 2002, the TSA does not currently distinguish between “domestic designations” (designations that can be initiated by the New Zealand Government under the Act) and “UN designations” (the designation of individuals and entities

that have been listed by the UN Security Council 1267 Sanctions Committee). This, as indicated, is to change of the Terrorism Suppression Amendment Bill 2007 is enacted in its current form. This part of the chapter considers the current treatment of UN-listed entities, the problems associated with this, and the desirability or otherwise of the proposed reforms.

*UN Designations and Associated Obligations upon New Zealand*

It is useful at this stage to provide an overview of the 1267 Sanctions Committee role and functioning, the associated obligations upon New Zealand as a UN member State, and the means by which those obligations are currently put into effect.

The Taliban/Al-Qaida Sanctions Committee, established under Security Council Resolution 1267,<sup>61</sup> has described itself as “a key instrument in the fight against terrorism”.<sup>62</sup> The Sanctions Committee maintains a list of individuals and entities that are part of, or associated with, the Taliban, Al-Qaida and Usama bin Laden. The Sanctions Committee operates under the mandate of several Security Council resolutions.<sup>63</sup> There are general guidelines on the mandate and operation of the Committee.<sup>64</sup> There are few guidelines on the procedure by which the Committee is to designate individuals or entities, particularly not regarding the rights of those designated or proposed for designation.<sup>65</sup>

<sup>61</sup> SC Res 1267, UN SCOR, 4051<sup>st</sup> Mtg, UN Doc S/Res/1267 (1999), para 6. The Committee is formally known as the “Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities”.

<sup>62</sup> Security Council Committee Established Pursuant to Resolution 1267 (1999), *Guidance for Reports Required of all States pursuant to paragraphs 6 and 12 of Resolution 1455 (2003)*, online: <[http://www.un.org/Docs/sc/committees/1267/guidanc\\_en.pdf](http://www.un.org/Docs/sc/committees/1267/guidanc_en.pdf)> (last accessed 15 August 2005).

<sup>63</sup> See: SC Res 1267 (n 61); SC Res 1333, UN SCOR, 4251<sup>st</sup> Mtg, UN Doc S/Res/1333 (2000); SC Res 1363, UN SCOR, 4352<sup>nd</sup> Mtg, UN Doc S/Res/1363 (2001); SC Res 1388, UN SCOR, 4449<sup>th</sup> Mtg, UN Doc S/Res/1388 (2002); SC Res 1390, UN SCOR, 4452<sup>nd</sup> Mtg, UN Doc S/Res/1390 (2002); SC Res 1452, UN SCOR, 4678<sup>th</sup> Mtg, UN Doc S/Res/1452 (2002); SC Res 1455, UN SCOR, 4686<sup>th</sup> Mtg, UN Doc S/Res/1455 (2003); SC Res 1456, UN SCOR, 4688<sup>th</sup> Mtg, UN Doc S/Res/1456 (2003); SC Res 1526, UN SCOR, 4908<sup>th</sup> Mtg, UN Doc S/Res/1526 (2004); and SC Res 1617, UN SCOR, 5244<sup>th</sup> Mtg, UN Doc S/Res/1617 (2005).

<sup>64</sup> See Security Council Committee Established Pursuant to Resolution 1267 (1999), *Guidelines of the Committee for the Conduct of its Work*, adopted on 7 November 2002 and amended on 10 April 2003, online: <<http://www.un.org/Docs/sc/committees/1267Template.htm>> (last accessed 9 August 2005).

<sup>65</sup> Some broad roles of the Committee are expressed within para 5 of SC Res 1390 (n 63); and, more generally, SC Res 1455 (n 63) and SC Res 1526 (n 63).

UN member States have an obligation to designate as terrorist entities those that are listed by the UN Sanctions Committee, that obligation arising from a combination of the following documents:

- Article 25 of the Charter of the United Nations, which requires UN members “to accept and carry out the decisions of the Security Council in accordance with the present Charter”.
- Paragraph 4(b) of Security Council resolution 1267 (1999), requiring States to freeze assets of Taliban entities designated by the Sanctions Committee.<sup>66</sup> Paragraph 4(b) provides that States shall:

Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any other persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need.
- Paragraph 8(c) of Security Council resolution 1333 (2000), which then requests the Sanctions Committee to maintain a list of individuals and entities associated with Usama bin Laden and Al-Qaida (not just the Taliban) and requires UN member States to similarly freeze the assets of those individuals and entities.<sup>67</sup>
- Security Council resolution 1390 (2001), which modifies the sanctions initially imposed under resolution 1267 (1999).<sup>68</sup> As far as it affects the operation of the Terrorism Suppression Act and its designation process, the resolution does nothing more than reiterate the role of the Sanctions Committee and the obligations mentioned.
- Paragraph 1 of Security Council resolution 1617 (2005), which again reiterates the resolution obligations mentioned.<sup>69</sup> Paragraphs 2 and 3 go on to direct how it is to be determined that an individual or entity is “associated with” Usama bin Laden, Al-Qaida and the Taliban.

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<sup>66</sup> SC Res 1267 (n 61).

<sup>67</sup> SC Res 1333 (n 63).

<sup>68</sup> SC Res 1390 (n 63).

<sup>69</sup> SC Res 1617 (n 63).

These obligations are complementary to and consistent with those under Security Council resolution 1373 (2001), and the International Convention for the Suppression of the Financing of Terrorism.<sup>70</sup> With regard to the Financing Convention, Article 8(2) is notable on the subject of the forfeiture of funds, as it obliges States parties to “take appropriate measures... for the forfeiture of funds used or allocated for the purpose of committing [terrorist offences] and the proceeds derived from such offences”.

#### *Compliance with Obligations to Designate UN-Listed Entities*

The practical means by which States have sought to comply with the obligations just mentioned is through the establishment of offences prohibiting the provision of financial or related assistance to designated entities, offences prohibiting the dealing with financial resources of designated entities (thus freezing these resources), and mechanisms allowing for the forfeiture of such resources. In New Zealand’s case, this is through sections 8, 9, 10 and 55 of the Terrorism Suppression Act.<sup>71</sup>

Other than the section 8 prohibition against the financing of terrorism (linked to the commission or facilitation of “terrorist acts”), these provisions are currently linked to domestically promulgated designations. Thus, generally speaking, New Zealand must have designated those entities listed by the Sanctions Committee in order to comply with the obligations mentioned. Thus, if an entity is listed by the Sanctions Committee but not designated under New Zealand law, then the prohibitions under sections 9 and 10 of the TSA will not apply, meaning that New Zealand nationals would be lawfully able to fund the entity, provide financial services to it, and deal with its assets and property. This goes against the obligations of New Zealand to: freeze the assets of entities listed by the Sanctions

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<sup>70</sup> *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2179 UNTS 232 (entered into force 10 April 1992).

<sup>71</sup> Section 8 of the *Terrorism Suppression Act 2002* prohibits the financing of terrorism (linked to “terrorist acts”, as defined within sections 4 and 5 of the TSA); section 9 prohibits the dealing with property of, or derived or generated from property of, terrorist or associated entities (as designated under the Act); section 10 prohibits the making of property, or financial or related services, available to terrorist or associated entities (as designated under the Act); and section 55 authorises the Attorney-General, when seeking a renewal of a designation under the act, to apply for forfeiture of property owned or controlled, directly or indirectly, by a designated entity (or derived or generated from such property) upon satisfying the Court that forfeiture to the Crown is appropriate, rather than it remaining subject to the prohibition in section 9.

Committee; and prohibit nationals from financing or providing financial or associated services to entities listed by the Sanctions Committee.<sup>72</sup>

*A Distinct Process for UN-Listed Entities*

On the basis of the obligations mentioned to designate UN-listed entities, the means of achieving compliance with those obligations and the consequences of not designating UN-listed entities, there is a strong case for establishing mechanisms by which UN-listed entities become automatically designated by New Zealand following notification from the Sanctions Committee of a new designation. This is the approach advocated by the 2007 Amendment Bill and is met with qualified support by the author of this text.

1. A qualified support

A qualification to this support concerns a matter raised in chapter 11 of this text, concerning the making of regulations under the United Nations Act 1946 which, the author presumes, will be the vehicle through which UN-listed entities will become designated under New Zealand law. It was discussed there that there is tension between the need for New Zealand to comply with binding decisions of the Security Council, and the need to ensure that regulations under the Act do not encroach upon the rights and freedoms set out under the New Zealand Bill of Rights Act 1990. To meet the challenges of this tension, chapter 11 set out recommendations for changes to the regulation-making power under the United Nations Act.

Given the international concerns with the apparent lack of due process in the listing of entities by the 1267 Sanctions Committee, the subject at hand reinforces the need for such safeguards in executive law-making. As indicated earlier, other than the expression of some very broad roles of the Sanctions Committee, the procedure by which the Committee designates individuals and entities leave those that have been designated, or are subject to a proposed designation, with no enforceable rights to be heard, or to seek an appeal or review of the listing. UN member States can themselves request that the Committee “de-list” an individual or entity where they have received information (by petition from the listed person, for example) pointing to the conclusion that the entity should not be

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<sup>72</sup> See: SC Res 1267 (n 61) para 4(b); SC Res 1333 (n 63) para 8(c); SC Res 1390 (n 63) para 2(a); and SC Res 1617 (n 63) para 1.

designated.<sup>73</sup> This procedure is, however, the only express mechanism safeguarding the right of wrongfully designated entities or individuals, should there be any, to challenge their designation by the Committee (i.e. by petitioning a UN member State to do so on their behalf).

Several States have expressed concern that the listing and de-listing procedures of the Sanctions Committee do not live up to the principles of due process.<sup>74</sup> Some States have even taken the position that they will not actively assist the Committee by providing it with names of persons or entities that might become listed until these concerns have been addressed.<sup>75</sup> Evidenced within statements of the current Chair of the Security Council Counter-Terrorism Committee, there appears to be general acceptance that the Sanctions Committee guidelines need improvement.<sup>76</sup> New Zealand's Permanent Representative has herself expressed New Zealand's view that basic standards of due process must be met within the Committee's listing process and, in doing so, urged the Security Council to consider amendments to the Committee's regime to meet these concerns.<sup>77</sup>

## 2. An alternative approach

The due process concerns with the United Nations-listing mechanisms might, alternatively, be capable of redress by implementing domestic

<sup>73</sup> See the Sanctions Committee guidelines (n 64).

<sup>74</sup> See, for example, the statement of Ellen Margrethe Løj (Danish Ambassador to the United Nations, and current Chair of the Security Council Counter-Terrorism Committee), UN Press Release, 'Security Council Reaffirms Terrorism One of Most Serious Threats to Peace', UN SCOR, 59<sup>th</sup> Sess, 5229<sup>th</sup> Mtg, UN Doc SC/8454 (2005).

<sup>75</sup> Ibid.

<sup>76</sup> Ibid, operative para 18 of SC Res 1617 (n 63) is said to further reflect a desire on the part of a number of Security Council member States to secure improvements in the Sanctions Committee's process. See also: EU Network of Independent Experts in Fundamental Rights, *The Balance Between Freedom and Security in the Response by the European Union and its Member States to the Threat of Terrorism* (EU Network of Independent Experts in Fundamental Rights, 2003); Ben Hayes, *Terrorising the Rule of Law: The Policy and Practice of Proscription* (Statewatch, 2005); and Yusuf and Al Barakaat International Foundation v Council and Commission (unreported judgment of the European Court of Justice of first instance, 21 September 2005), online: <<http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docj=docj&numaff=&datefs=&datefe=&nomusuel=&domaine=&mots=terror&resmax=100>> (last accessed 3 November 2005).

<sup>77</sup> Rosemary Banks (New Zealand Permanent Representative to the United Nations), Statement on Counter-Terrorism to the President of the United Nations Security Council, 20 July 2005, online: <<http://nzmissionny.org/securitycouncil.htm>> (last accessed 17 August 2005).

safeguards. As the matter stands now, and would continue to do so following successful amendment, if New Zealand nationals were ever to find themselves the subject of a UN-listing, the only recourse would be an informal one. That is, where the individual is able to persuade the New Zealand Government to petition the Sanctions Committee. Assuming that such a plea to the Government was successful, there is no guarantee of success, no matter how compelling the evidence might be. The de-listing process has only been initiated once by Sweden in such circumstances and, although ultimately successful, was initially met with considerable resistance from the sponsor of the initial listing, the United States.

The only other alternative is to permit such a person to bring an application for judicial review before the New Zealand courts. This does, however, raise more questions than answers. What legal yardstick would a court consider in any such application? If a court was to agree that there were no reasonable grounds for the identification of the applicant as a terrorist or associated entity, what remedy could be awarded? Should the court be capable of obligating the New Zealand Government to make a petition for de-listing? Such an approach would be complex and troublesome, and it is therefore no wonder that the 2007 Amendment Bill avoids such an option altogether.

## **Conclusion**

Restrictions upon freedom of association with persons or entities which commit terrorist acts, or are listed as terrorist or associated entities, is in principle a permissible form of restriction. The justifiability of such restrictions ultimately depend upon the proper definition of terrorist acts (to be considered in chapter 16) and/or an appropriate process by which persons or groups are listed as terrorist or associated entities. The latter feature is provided for in New Zealand law under the Terrorism Suppression Act 2002. This chapter has outlined that process and considered two issues of reform being contemplated under the Terrorism Suppression Amendment Bill 2007. The first is a change in the manner by which New Zealand designates UN-listed entities, making such designation automatic. Having regard to New Zealand's obligations under the United Nations Charter, and relevant Security Council resolutions, this is an appropriate response. The second change to be made under the 2007 Amendment Bill concerns the extension of final designations beyond three years, where such renewal will be undertaken by the Prime Minister instead of by application of the Attorney-General to the High Court. In light of the

basis upon which such renewals can be made, and the susceptibility of such renewals to judicial review, this reform is also seen as unproblematic.