

## Chapter 15

# Natural Justice and Domestically-Based Terrorist Designations

The preceding chapter was the first of two to consider the legal regime under the Terrorism Suppression Act 2002 (TSA) through which a person or group may be designated a terrorist entity. Its focus was upon the implications of such designation upon freedom of association, and two of the three principal amendments to be made to the designations regime under the recently introduced Terrorism Suppression Amendment Bill 2007. Namely: the removal of UN-listed entities from the process under the Act, replacing this with an automatic mechanism guaranteeing synergy between the list held by the United Nations 1267 Sanctions Committee and domestic designations; and, in the case of persons listed as terrorist entities by the Prime Minister outside the scope of the UN list, the replacement of extensions of final designations by the High Court to a system where such extensions can be made by the Prime Minister. This chapter considers the natural justice implications of what will remain as the domestically-initiated designation process under the TSA.

The legislative framework for the designation of terrorist entities under the Terrorism Suppression Act 2002 has been explained in chapter 14. Before turning to an examination of the natural justice issues arising from this process, one further feature of the TSA must be explained: that concerning classified security information.

### **Classified Security Information**

The information upon which a designation is based (or part of it) can be certified by the agency providing the information to the Prime Minister as “classified security information”. The ‘protection’ provided by, and to, these provisions is substantial.

*What is “Classified Security Information”?*

The definition of classified security information is set out, in reasonably lengthy terms, in section 32 of the TSA. Information will be certified as classified security information where the head of the agency providing the information certifies in writing that s/he is of the opinion that:<sup>1</sup>

- the information is of a kind specified in section 32(2), being information that:
  - (a) might lead to the identification of, or provide details of, the source of the information, the nature, content, or scope of the information, or the nature or type of the assistance or operational methods available to the specified agency; or
  - (b) is about particular operations that have been undertaken, or are being or are proposed to be undertaken, in pursuance of any of the functions of the specified agency; or
  - (c) has been provided to the specified agency by the government of another country or by an agency of a government of another country or by an international organisation, and is information that cannot be disclosed by the specified agency because the government or agency or organisation by which the information has been provided will not consent to the disclosure.

and
- that disclosure of the information would be likely to do any of the following things, as listed in section 32(3):
  - (a) to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand; or
  - (b) to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by the government of another country or any agency of such a government, or by any international organisation; or
  - (c) to prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial; or
  - (d) to endanger the safety of any person.

Information might satisfy this test (and therefore be capable of being certified as “classified security information”) where, for example, the information is provided to New Zealand by a security agency of another State on a confidential basis (section 32(2)(c)), the disclosure of which would thereby prejudice the confidential basis upon which the information was provided (section 32(3)(b)).

Although the provisions of section 32 will be considered by the head of an agency in determining whether or not to issue a classified security

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<sup>1</sup> *Terrorism Suppression Act 2002*, section 32(1)(c).

certificate, the impact of such a certificate is not felt at the level of the making of a designation.<sup>2</sup> Within the current framework of the Act, the significance of such certification lies in the treatment of classified security information in judicial proceedings.

*Treatment of Classified Security Information in Proceedings*

As the Terrorism Suppression Act stands, two sets of rules apply to the way in which classified information may be treated, depending upon the nature of the proceedings. This is to be replaced by one single procedure, if amendments proposed by the Terrorism Suppression Amendment Bill 2007 proceed. Set out below are the two existing procedures, followed by identification of the Amendment Bill procedure.

1. Crown proceedings

In the case of Crown applications for the extension of a designation under section 35 of the TSA (which will no longer be required if the Act is amended as proposed), the proceedings and treatment of classified information are prescribed by the Act. First of all, section 38 of the Act requires such proceedings to be heard by the Chief High Court Judge or nominee(s).<sup>3</sup> Secondly, section 38 allows classified security information to be withheld.

On application by the Attorney-General, and where the Crown satisfies the High Court that it is desirable for the protection of classified security information, the Court must receive or hear that information in the absence of the designated entity concerned, the entity's counsel, and members of the public.<sup>4</sup> The Court, in such circumstances, will be in a position to hear classified evidence in support of the Crown's application to extend the

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<sup>2</sup> Sections 20 to 23 (concerning the making of interim and final designations) do not require such notice to be given or responses to be provided by an entity before the making of a designation. Indeed, section 29(a) specifically states that a designation will not be invalid for failure to give prior notice or provide an opportunity to be heard. Likewise, any notice given to an entity of their designation status does not require information to be given about the factual basis upon which the designation is made: see section 26 of the Act.

<sup>3</sup> *Terrorism Suppression Act 2002*, section 38(3)(a). This provision had require that proceedings under sections 35 and 55 be heard by the Chief Justice or nominee(s). The *Terrorism Suppression Amendment Act (No 2) 2005* amended this so that proceedings are to be heard by the "Chief High Court Judge", reflecting the fact that – since the creation of the Supreme Court in New Zealand – the Chief Justice is now effectively two levels of appeal above the High Court.

<sup>4</sup> *Terrorism Suppression Act 2002*, section 38(3)(b).

designation, in a closed court situation, and without the presence of opposing counsel or the respondent. Two qualifications apply. Firstly, classified evidence can only be heard in this way where it is desirable to do so for the protection of either all or part of the information. Secondly, the Crown is required to provide a summary of the information concerned, except to the extent that this might prejudice the interests referred to in section 32(3). The summary must be approved by the Court, following which a copy of that summary will be given to the entity concerned.<sup>5</sup> This procedure applies to any appeal to the Court of Appeal under section 41 of the Act.<sup>6</sup>

Although not directly relevant to the designation process, it should be noted that the latter mechanisms under section 38 of the TSA also apply to applications brought by the Crown for the forfeiture of terrorist property.<sup>7</sup>

## 2. Judicial review and other proceedings

Section 39 of the Terrorism Suppression Act directs itself to the treatment of classified security information in the situation where the Crown is the respondent to proceedings, rather than the applicant. In such cases, the matter must again be heard by the Chief High Court Judge or nominee(s)<sup>8</sup> and the Court must also hear security information in the absence of the entity or counsel where the Court is satisfied that this is desirable for the protection of the information.<sup>9</sup> In this case, however, the Crown is not obliged to provide a summary of the classified security information.<sup>10</sup>

Again, it seems that this mechanism applies to any appeal against a decision on whether or not to extend a terrorist designation,<sup>11</sup> although there is no provision specifically stating that any appeal against a decision

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<sup>5</sup> *Terrorism Suppression Act 2002*, section 38(4)(b).

<sup>6</sup> *Terrorism Suppression Act 2002*, sections 38(5) and 41(2).

<sup>7</sup> *Terrorism Suppression Act 2002*, section 55. Such an application can only be brought by the Attorney-General once a designation has been extended beyond the normal three-year period (under section 35 of the Act) and if the Court is satisfied that forfeiture should be made, rather than simply continuing the prohibition against dealing with the property (under section 9). In other words, forfeiture cannot occur during the first three-year term of a designation.

<sup>8</sup> *Terrorism Suppression Act 2002*, sections 38(3)(a) and 39(3).

<sup>9</sup> *Terrorism Suppression Act 2002*, sections 38(3)(b), and 39(3) and (4).

<sup>10</sup> *Terrorism Suppression Act 2002*, section 39(3). Compare with the requirement to do so in the case of extensions of a designation: section 38(4) of the Act.

<sup>11</sup> That being a decision under section 35 of the *Terrorism Suppression Act 2002*. Section 41 of the Act does not specify the permissible grounds of appeal, simply stating that "a party to an application under section 35 may appeal to the Court of Appeal against the decision of the High Court".

on an application under section 33 (judicial review) must be subject to section 39.

### 3. Terrorism Suppression Amendment Bill 2007

Clause 22 of the 2007 Bill proposes to repeal sections 38 and 39, substituting them with a single provision concerning classified security information under a new section 38, with the 'protective' provisions reading as follows:

**38 Procedure in proceedings involving classified security information**

- (1) This section applies to any proceedings in a court arising out of, or relating to, the making of a designation under this Act.
- (2) The Court must determine the proceedings on the basis of information available to it (whether or not that information has been disclosed to or responded to by all parties to the proceedings).
- (3) If information presented, or proposed to be presented, by the Crown includes classified security information,—
  - (a) except where the proceedings are before the Court of Appeal, the proceedings must be heard and determined by the Chief High Court Judge, or by 1 or more Judges nominated by the Chief High Court Judge, or both; and
  - (b) the Court must, on a request for the purpose by the Attorney-General and if satisfied that it is desirable to do so for the protection of (either all or part of) the classified security information, receive or hear (the relevant part of) the classified security information in the absence of—
    - (i) the designated entity concerned; and
    - (ii) all barristers or solicitors (if any) representing that entity; and
    - (iii) members of the public.
- (4) Without limiting subsection (3), if the designated entity concerned participates in proceedings—
  - (a) the Court must approve a summary of the information of the kind referred to in section 32(2) that is presented by the Attorney-General except to the extent that a summary of any particular part of the information would itself involve disclosure that would be likely to prejudice the interests referred to in section 32(3); and
  - (b) on being approved by the Court, a copy of the statement must be given to the entity concerned.

Subsections (1) to (4) of new section 38 effectively mirror the current form of section 38, with some minor inconsequential amendments.

### *The Trump Card*

A final and important point to note about the current form of sections 38 and 39 (and their proposed replacement) is that the protective provisions under section 38, subsections (2) to (4), are themselves subject to protection. Section 38(7) of the current Act (mirrored by proposed section 38(6)) provides that these protective clauses are to “apply despite any enactment or rule of law to the contrary”. The implications of this statutory exclusion of invalidity are significant (relevant to the operative provisions of the Bill of Rights Act) and are considered further below.

### **The Designation Process and Natural Justice**

The designation process and matters pertaining to it involves a reasonably complex interaction of mechanisms, together with review and appeal procedures.<sup>12</sup> Summarising the important features of the process, there are two *types* of designation (terrorist entity or associated entity), distinguished by the level of current and prior involvement in terrorist conduct. Applicable to both types of designation, there are two *levels* of designation that can be made by the Prime Minister (interim and final). Interim designations can be made where there is good cause to suspect that an entity satisfies the Act’s test for what is a terrorist or associated entity, whereas final designations require a belief on reasonable grounds that the test has been satisfied.<sup>13</sup> The different thresholds applicable have correspondingly different time limitations. Interim designations can only exist for a maximum of 30 days, and can only be made once in respect of any one entity. A final designation can currently continue for a period of three years,<sup>14</sup> with the Attorney-General having the ability to extend the designation if s/he satisfies the High Court (on the balance of probabilities) that the test for designation continues to be met.

The consequences of both interim and final designations mainly affect third parties, who are prohibited from dealing with property owned or

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<sup>12</sup> The designation process and related matters comprise 22 sections of the *Terrorism Suppression Act 2002*, most of which are reasonably lengthy in themselves.

<sup>13</sup> The “test” under the Act is set out in the above discussion concerning terrorist and associated entities.

<sup>14</sup> Assuming that there are no judicial proceedings that might prolong that period: see section 23(h) of the *Terrorism Suppression Act*, as discussed above at 7.1.1(b) *Expiry of designations*. Note that this three year period does not take into account the temporary extension of final designations proposed under the *Terrorism Suppression Amendment Bill (No 2) 2004*.

controlled by terrorist or associated entities or from providing financial services to them. Naturally, this prohibition indirectly affects the entities themselves, since they will be unable to use their money or property in relations with other. Likewise, reporting obligations apply to property owned or controlled by terrorist or associated entities. In the case of final designations that are extended by the High Court beyond the normal three year period, the Attorney-General can apply to have the property forfeited.

There are no particular difficulties with the latter aspects of the terrorist designation process and its consequences. Of more concern, however, are those aspects of the process relating to the giving of notice, the rights of review and appeal, and the manner in which classified security information is dealt with under such review or appeal. In that regard, a number of features of the TSA are relevant. Firstly, the making of a designation does not contain any procedure by which the alleged terrorist or associated entity can make its case prior to being designated under section 20 or 22.<sup>15</sup> Secondly, once a designation is made, any notice given to a designated entity in New Zealand (or its representative in New Zealand) does not need to give reasons for the designation, whether made on an interim or final basis. Next, where a designated entity requests the Prime Minister to revoke a designation, there is no corresponding right to be heard or right to receive information about the basis upon which the designation was made.

Fourthly, where the Attorney-General applies to extend a final designation, the High Court is required to receive any classified security information relating to the application without the presence of the designated entity (or its counsel) if that is desirable for the protection of the information. Having said that, the Attorney-General is obliged to provide a summary of the information to the designated entity, except to the extent that this would involve disclosure of information that would prejudice those interests listed in section 32(3) of the Act. Next, any appeal against a decision of the High Court to extend a designation restricts (in the way just mentioned) the appeal court's dealings with classified security information.<sup>16</sup> Finally, although the Act does not prevent a person from bringing judicial review proceedings arising out of the making of a designation, the High Court is again required to receive any classified security information relating to the application without the presence of the designated entity (or its counsel) if that is desirable for the protection of the

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<sup>15</sup> See section 29(a) of the *Terrorism Suppression Act 2002*, which prevents invalidation of a designation "just because... the entity concerned was not... given notice... or a chance to comment...".

<sup>16</sup> *Terrorism Suppression Act 2002*, section 41.

information - this time without the requirement for the Attorney-General to produce a summary of the information.<sup>17</sup>

### *The Issue of Natural Justice*

The issue that arises from these features of the statutory designation framework is whether it is consistent with the principles of natural justice, in particular the right of a respondent to be informed of the case against it and the corresponding right to answer the case against it. In particular, are the five situations identified in the preceding paragraph consistent with natural justice? Namely, concerning: (1) the making of a designation without hearing from the alleged terrorist or associated entity; (2) the content of a notice of designation; (3) the manner in which requests to the Prime Minister to reconsider a designation are dealt with; (4) the status of classified security information in proceedings to extend a designation (or any appeal against such proceedings); and (5) the status of classified security information in judicial review proceedings (or any appeal against such proceedings).

A sixth situation is indirectly, but very significantly, affected by the treatment of classified security information in the designation process. As discussed, one of the consequences of designations under the act is to prohibit certain dealings with terrorist or associated entities. The Terrorism Suppression Act includes four such offences: dealing with property, knowing that the property is owned or controlled by a designated entity (or derived from such property); making property, or financial or related services, to an entity, knowing that the entity is designated under the Act; recruiting a person as a member of a group, knowing that the group is a designated entity; and participating in a group, knowing that the group is a designated entity, with the aim of enhancing its ability to carry out, or participate in, a terrorist act.<sup>18</sup> In the context of the last-mentioned offence, the writer can see no problem, since the offence is not only linked with designation but also with an intention to facilitate terrorist acts. With the other three offences, however, the key to the offending is that the conduct is otherwise lawful (dealing with property, providing financial services, and recruiting group members) except that it is in respect of an entity that is

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<sup>17</sup> The rationale behind this difference is unclear, but may be borne out of the fact that section 33 proceedings are not at the instigation of the Crown, whereas section 35 proceedings are initiated by the Attorney-General (and therefore warrant further burdens upon the Crown). Either way, the author does not see that this should make any material difference to the enjoyment of the right to natural justice.

<sup>18</sup> *Terrorism Suppression Act 2002*, sections 9(1), 10(1), 12(1) and 13.

known by the actor to be designated under the Act. What significance does this hold? The problem that arises is where a defendant might seek to challenge the validity of the designation. To give an example:

A (a New Zealand citizen) makes a donation to B (a Muslim organisation in Auckland). B has been made the subject of a final designation as an associated terrorist entity (the Prime Minister concluding under section 22(3)(b)(i) of the TSA, on receiving classified security information, that B [the associated entity] is acting on behalf of C to denounce the action of the United States military in Afghanistan). C is an organisation in Afghanistan, designated under Security Council Resolution 1267 and the Terrorism Suppression Act as a terrorist entity. A [the donor] knows that B [the associated entity] has been designated as an associated terrorist entity, but claims that he and B had no knowledge that C [the terrorist entity] had carried out, or was participating in, any terrorist act. A [the donor] is charged, under section 10(1) of the Terrorism Suppression Act, with making money available to B [the associated entity], knowing that B was designated under the Act.

In that situation, A [the donor] would no doubt want to complain that B [the associated entity] had been improperly designated under the Act - i.e. that the Prime Minister was wrong in concluding that B was an associated entity, since B knew nothing of C's involvement in any terrorist conduct, and since peaceful protest about the military conduct of the United States in Afghanistan is not unlawful. It is not difficult to imagine such a situation arising. Indeed, fear of such an outcome was the basis of a number of submissions made by the public to the select committee's hearings on the Terrorism (Bombings and Financing) Bill.<sup>19</sup> What, then, might A seek to do?

The first point to make is that A would be unable to make direct use of such an argument as a defence to criminal proceedings. A prosecutor is only required to satisfy a criminal court of the elements of an offence and would, as such, argue that the only relevant issue before the court is whether A [the donor] knew that B [the associated entity] was designated under the Act. A prosecutor would furthermore properly argue that any challenge to the validity of the designation was not an issue for the court

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<sup>19</sup> See, for example, submissions by the New Zealand Council for Civil Liberties (submission number 22), the Democratic Peoples Republic of Korea Society (submission number 28), the Indonesia Human Rights Committee (submission number 36), the Canterbury Council for Civil Liberties (submission number 45), the Latina America Committee of New Zealand (submission number 88), and the Auckland Council for Civil Liberties (submission number 95). See also 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, 61.

exercising its criminal jurisdiction in that matter, but was instead a civil matter. And, indeed, the designation process is a civil one, although the status of the designation would, at the very least, be a relevant factor in sentencing.

However, notwithstanding the fact that a challenge to the validity of a designation could not act as a defence to a criminal charge, such a challenge could act to suspend the criminal proceedings. Taking the same example: A [the donor], as a person with an interest in ascertaining the validity of the designation of B [the associated entity], could initiate proceedings under section 33 of the Terrorism Suppression Act:

### **33 Judicial review of designations**

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

In doing so, A [the donor] would seek to have the Prime Minister's decision concerning B [the associated entity] reviewed. Specifically, section 22(3)(b)(i) (which is the basis of B's designation in this scenario) provides that the Prime Minister can designate as an associated entity a group that s/he believes on reasonable grounds:

- (b) is acting on behalf of, or at the direction of, -
  - (i) the terrorist entity, knowing that the terrorist entity has done what is referred to in sub-section (1) [emphasis added]

In that regard, sub-section (1) of section 23 refers to the designation of an entity as a terrorist one if it has knowingly carried out or participated in a terrorist act. In the example given, A [the donor] would seek to argue (on judicial review of the Prime Minister's decision) that although B [the associated entity] was denouncing the US military role in Afghanistan at the direction of C [the terrorist entity], B did not know that C had carried out or participated in a terrorist act, and that the test under section 22(3)(b)(i) was therefore not satisfied. In more simple words, A would argue that the Prime Minister had improperly concluded that B was an entity within the definition of section 22.

A point made earlier was that A would be unable to make direct use of such an argument as a defence to criminal proceedings. By challenging the validity of the designation under section 33, however, A would no doubt be able to obtain an adjournment of the criminal proceedings to await the

outcome of the civil (judicial review) proceedings.<sup>20</sup> The issue of natural justice comes into play with regard to those civil proceedings, since section 39 of the Terrorism Suppression Act could require the High Court to hear the classified security information in the absence of A [the donor] or B [the associated entity]. If the classified security information was the only basis on which the designation of B was made, how is A or B to respond to the Crown's argument before the High Court that the Prime Minister's decision was proper? Thus, the issue of natural justice can also arise for a person accused of offences under sections 9, 10 or 12 of the Terrorism Suppression Act 2002.

### *Sources and Content of the Right to Natural Justice*

If natural justice is an issue in the situations identified, then a number of enquiries must be made. The first, to be dealt with under this part of the chapter, is to determine what the various sources of the right to natural justice are. In doing so, it will be necessary to consider and examine the content of the right. Those two enquiries will be shown to lead to a preliminary conclusion that the situations identified conflict with the right to natural justice. Having arrived at that position, this chapter will then consider whether the Act's designation process can be a valid limitation upon the right to natural justice.

Addressing the first enquiry, there are three relevant "sources" of the right to natural justice (or its equivalent) for the purpose of this chapter: (1) the International Covenant on Civil and Political Rights (ICCPR); (2) the New Zealand Bill of Rights Act 1990 (NZBORA); and (3) the Terrorism Suppression Act itself.<sup>21</sup> Each is considered in further detail.

#### 1. The International Covenant on Civil and Political Rights

Using the language of the ICCPR, the International Covenant guarantees to all persons the right to a fair hearing:<sup>22</sup>

##### Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and

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<sup>20</sup> Where a defendant is proceeded against summarily, for example, the Court has an unfettered power to adjourn the hearing of any charge: *Summary Proceedings Act 1957*, section 45(1).

<sup>21</sup> The right, it should be acknowledged, is also a common law one (see *Drew v Attorney-General* [2002] 1 NZLR 58).

<sup>22</sup> Note that the balance of Article 14 is limited in its application to criminal proceedings.

obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

As can be seen, the provision contains exceptions to the right, which will be considered later in this chapter. At this stage, this examination is concerned with determining the broad content of the right to a fair hearing, which has been recognised by the Human Rights Committee as including the various rules of natural justice. The jurisprudence of the Committee has accepted that Article 14(1) encompasses the principles of equality before courts and tribunals, the need for tribunals to be competent, independent and impartial and to promptly dispose of proceedings.<sup>23</sup> Specifically pertaining to the right to a fair and public hearing, the Committee has considered this to include the notion of equality of arms, the right to attend a hearing, the right to respond to a case, and the idea of open justice.<sup>24</sup> The Committee has also taken the view that the right to natural justice is not dependent on the status of one of the parties (whether governmental, parastatal or an autonomous statutory entity).<sup>25</sup> Presumably, then, this includes decisions of a Prime Minister.

To the extent possible, an 'equality of arms'<sup>26</sup> will be an important factor in the guarantee of a fair hearing. Having said this, the Committee has been reluctant to find breach of this aspect of a fair hearing, so long as the person has been afforded an opportunity to be present, examine witnesses and be represented if that is the person's wish. In *Agudo v Spain*,

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<sup>23</sup> For a more detailed discussion of the jurisprudence of the Human Rights Committee on these points, 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) 117-125.

<sup>24</sup> *Ibid*, 122-124.

<sup>25</sup> *YL v Canada*, Human Rights Committee Communication 547/1993, para 9.11. See also Conte, Davidson and Burchill (*ibid*) 118-119.

<sup>26</sup> This is a term used by both the United Nations Human Rights Committee and the European Court of Human Rights to represent the idea of the procedural equality of parties. See, for example, Wasek-Wiaderek M, *Principle of "Equality of Arms" in Criminal Procedure Under Article 6 of the European Convention on Human Rights & its Function in Criminal Justice of Selected European Countries* (Leuven University Press, 2000).

for example, the author claimed that there was no verbatim record of the statements of witnesses, experts, parties and counsel but only a summary drawn up by the clerk of the court, so that the proceedings lacked essential guarantees. The Committee failed to see how those facts alone constituted a breach of Article 14(1).<sup>27</sup> In *Jansen-Gielen v The Netherlands*, however, the Committee found that there had been an inequality of arms. The Netherlands Central Appeals Tribunal had failed to append a psychological report (submitted by the author's counsel) to the case file two days before the hearing, in violation of her right to a fair hearing. The Netherlands argued that the Court had considered that the admission of the report two days before the hearing would have unreasonably obstructed the other party in the conduct of the case. The applicable procedural law did not, however, provide for a time limit for the submission of documents. The Committee found that it was the duty of the Court of Appeal, which was not constrained by any prescribed time limit, to ensure that each party could challenge the documentary evidence which the other filed or wished to file and, if need be, to adjourn proceedings.<sup>28</sup>

The right to a fair trial in a suit at law, by being present at the hearing, is less clear than in the conduct of criminal proceedings.<sup>29</sup> The Committee has commented that Article 14(1) 'may' require that an individual be able to participate in person in civil proceedings. In such circumstances the State party is under an obligation to allow that individual to be present at the hearing, even if the person is a non-resident alien. In assessing whether the requirements of Article 14(1) were met in *Said v Norway*, the Committee noted that the author's lawyer did not request a postponement of the hearing for the purpose of enabling the author to participate in person; nor did instructions to that effect appear in the signed authorisation given to the lawyer by the author and subsequently presented by the lawyer to the judge at the hearing of a child custody case. In those circumstances, the Committee adopted the view that there was no violation by the state through any failure by the Oslo City Court to postpone the hearing, on its own initiative, until the author could be present in person.<sup>30</sup> The Committee went no further to clarify *when* civil proceedings 'may' require that an individual be able to participate in person in civil proceedings. Interesting,

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<sup>27</sup> *Agudo v Spain* Human Rights Committee Communication 864/1999, para 9.4.

<sup>28</sup> *Jansen-Gielen v The Netherlands* Human Rights Committee Communication 846/1999, para 8.2.

<sup>29</sup> In the case of criminal proceedings, the Committee has been clear about the need to ensure that an accused is tried in person and the limited restrictions to this rights that are permissible: see Conte, Davidson and Burchill (n 23) 122-123.

<sup>30</sup> *Said v Norway* Human Rights Committee Communication 767/1997, para 11.3.

also, is the fact that the party in *Said v Norway* was at least represented by counsel and, thereby, allowed to respond in some form to the case against him.

The case of *Hermoza v Peru* is also highly relevant to the question of the content of the right to a fair hearing.<sup>31</sup> Hermoza was an ex-sergeant of the Peruvian police, Guardia Civil, and claimed to have been temporarily suspended from the force on false accusations of insulting a superior officer. When brought before a judge on the charge, he was released for lack of evidence. Notwithstanding that fact, Hermoza was discharged from service by an administrative decision in respect of which he was not permitted to make representations. The Human Rights Committee concluded that those circumstances entailed a breach of Article 14(1) of the Covenant.<sup>32</sup> In the individual opinion of Committee members Cooray, Dimitrijevic and Lallah, the Committee members specifically expressed that the principle of *audi alteram partem* (literally meaning “hear the other side”)<sup>33</sup> was part of the right to a fair hearing under the Covenant.<sup>34</sup>

In summary, Article 14(1) guarantees the right to a fair hearing in civil proceedings, which has been equated with various principles of the right to natural justice. Relevant to the enquiry in this chapter, it has been expressed to include the principle of equality of arms, the right to be present, or at least represented, at a hearing, and the ability to state one’s case in response to the case of an opposing party.

## 2. The NZBORA and the Terrorism Suppression Act 2002

Section 27 of the New Zealand Bill of Rights Act protects three rights: the right to natural justice, the right to seek judicial review, and the right to bring and defend civil proceedings against the Crown on an equal basis.<sup>35</sup> As already seen through the expository review of the designation process under the Terrorism Suppression Act, the right to judicial review is specifically guaranteed.<sup>36</sup> Thus there are only two provisions of the Bill of Rights to be considered:

### **27. Right to Justice-**

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to

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<sup>31</sup> *Hermoza v Peru*, Human Rights Committee Communication 203/1986.

<sup>32</sup> *Ibid*, para 12.

<sup>33</sup> Philip Joseph, *Constitutional and Administrative Law in New Zealand*, (2nd ed, Brookers, 2001) 860.

<sup>34</sup> *Hermoza v Peru* (n 31) para 4.

make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

- (3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

Before considering the content of these provisions, it is important to note that, in the Solicitor-General's review of the first draft of the Terrorism (Bombings and Financing) Bill, he advised the Attorney-General that:<sup>37</sup>

In my view, the process of designation is consistent with BORA and, in particular, s 27(1) thereof.

Regrettably, the Solicitor-General gave no reasons for arriving at that conclusion within his letter of advice. While that advice seems out of step with the discussion that follows, it should be noted that the Solicitor-General was advising on the first redraft of the Bill, which included the Inspector-General of Security and Intelligence being involved in the designation and review process.<sup>38</sup>

The right to natural justice (subsection (1)) contains two main components: *audi alteram partem*, the duty to hear both sides of a matter before making a decision; and *nemo iudex in sua causa*, the notion that no one should be a judge in his or her own cause.<sup>39</sup> It is the first component that is of relevance to this chapter. Of particular relevance, the duty to hear both sides *can* include the giving of prior notice, the disclosure of relevant material, the receipt of (written or oral) submissions, representation by counsel, and the giving of reasons for the decision-maker's finding.<sup>40</sup>

The first point to note is that the right to natural justice differs in its content as between administrative versus judicial decision-makers. Professor Joseph summarises the point that natural justice does not include a right to a hearing before an administrative decision-maker, but merely a

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<sup>35</sup> As summarised in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney, *The New Zealand Bill of Rights* (Oxford University Press, 2003) 753.

<sup>36</sup> *Terrorism Suppression Act 2002*, section 33.

<sup>37</sup> 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, para 20.

<sup>38</sup> As will be discussed later, that role is seen by the author as central to achieving a justifiable balance between the needs of the designation process and the right to natural justice.

<sup>39</sup> Rishworth, Huscroft, Optican and Mahoney (n 35) 754.

<sup>40</sup> Joseph (n 33) 860-874.

right to tender written submissions, whereas parties have an unqualified right to be heard orally before the courts.<sup>41</sup> Where a hearing is granted, prior notice of the hearing is seen as inherent to the right to be heard.<sup>42</sup> In being heard, however, natural justice does not recognise any general right to be represented by legal counsel.<sup>43</sup> What it does recognise, however, is that an administrative tribunal has the discretion to permit representation, which must be exercised fairly, and be based on a number of factors identified in *R v Secretary of State for the Home Department; ex parte Tarrant*: the seriousness of the allegation and of any potential penalty, whether points of law are to arise, the ability of the person to present the case, the potential for procedural difficulties, the desirability for the prompt disposal of proceedings and the need for an equality of arms.<sup>44</sup>

Two features of the right to natural justice are particularly important to this chapter: the disclosure of relevant material; and the giving of reasons for a decision-maker's finding. Central to the *audi alteram partem* rule is the right to hear the nature and basis of the case, thereby allowing interested parties to respond to the case and, if appropriate, contest or seek to correct the information in issue. In *Daganayasi v Minister of Immigration*, the New Zealand Court of Appeal quashed the Minister's refusal to revoke a deportation order, since the Minister's decision had been based upon a medical report that had not been disclosed to the applicant.<sup>45</sup> Where disclosure is made, it must be in a way that affords a person a proper opportunity to consider the material and be thus put in a position to respond. The production of a detailed report at the time of hearing has been held, for example, to be a breach of natural justice by failing to give a person an opportunity to assess the report and make submissions on it.<sup>46</sup> Where disclosure is made by way of a summary of information, the summary must disclose what Professor Joseph refers to as a "sufficient account" of the information to make the right to respond a meaningful one.<sup>47</sup>

The second important aspect of the right to natural justice is the desirability that a decision-maker will give reasons for its decision. Ultimately, however, there is no obligation at law to give reasons, which "places the law out of step with public expectations of transparency and

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<sup>41</sup> Ibid, 864.

<sup>42</sup> Ibid, 860-861.

<sup>43</sup> Ibid, 864-866.

<sup>44</sup> *R v Secretary of State for the Home Department; ex parte Tarrant* [1985] 1 QB 251.

<sup>45</sup> *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130.

<sup>46</sup> *Mockford v New Zealand Milk Board* unreported, 14/10/81, Roper J, HC Dunedin.

<sup>47</sup> Joseph (n 33) 862.

accountability in decision-making".<sup>48</sup> Notwithstanding this, Chief Justice Davison, in *Potter v New Zealand Milk Board*, described it as a public responsibility of both courts and administrative authorities to provide reasons:<sup>49</sup>

The giving of reasons helps to concentrate the mind of the tribunal upon the issues for determination: it enables litigants to see that their cases have been carefully considered and the arguments understood and appreciated; it enables a litigant dissatisfied with a decision to more readily consider whether there are grounds of appeal; and it enables an appellate Court or tribunal to ascertain the determinations of the tribunal on questions of fact, to which the appellate Courts pay deference on the hearing of an appeal and [it] also enables the appellate Court... to know what principles of law have been applied and to consider whether such were correct.

The right to bring and defend proceedings against the Crown (section 27(3) of the NZBORA) is described as being grounded in Dicey's idea of equality and as comprising two components: the right to bring and defend proceedings; and the right that those proceedings be dealt with on the same basis as if the Crown was not a party.<sup>50</sup> In principle, the first component is not affected by the designation process since the Terrorism Suppression Act envisages in its terms that proceedings concerning designations can be both defended and brought against the Crown.<sup>51</sup> The latter component is of particular relevance, and mirrors the concept of equality of arms discussed above. As noted in the White Paper on the New Zealand Bill of Rights:<sup>52</sup>

The individual should be able to bring legal proceedings against the Government, and more generally to engage in civil litigation with it, without the Government enjoying any procedural or jurisdictional privileges.

### *Preliminary Conclusion*

The above analysis can easily lead to the preliminary conclusion that there is an apparent, or *prima facie*, conflict between the various components of the right to natural justice and the Terrorism Suppression Act, sections 20 and 22 (the making of designations), 26 (notice), 34 (reconsideration by the Prime Minister on application of the entity), 38 and 41 (treatment of

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<sup>48</sup> *Ibid*, 871.

<sup>49</sup> *Potter v New Zealand Milk Board* [1983] NZLR 620, 624.

<sup>50</sup> Rishworth, Huscroft, Optican and Mahoney (n 35) 767.

<sup>51</sup> *Terrorism Suppression Act 2002*, section 33, 35, 39 and 41.

<sup>52</sup> New Zealand Department of Justice, *A Bill of Rights for New Zealand* (1985) AJHR A6, para 10.177.

classified information in proceedings concerning designation extensions), and 39 (treatment of classified information in proceedings arising out of the making of a designation). In each of the five situations identified above, these provisions have the potential effect of excluding all or most of the reasons for the making of a designation. This will be the case where the Prime Minister's decision to designate is based entirely, or largely, upon classified security information, or where the notice of designation fails to give reasons for the designation.

In such circumstances (which clearly impact upon the rights, obligations or interests of a designated or accused person), a person is being denied access to the reasons for the designation and is thereby denied the opportunity to "answer the case". In the situation of reconsiderations by the Prime Minister under section 34, the person has no right to be heard at all.

The question now becomes whether there is an actual conflict or inconsistency. To determine this, one needs to give careful consideration to a number of further issues. Are the rights concerned able to be limited within the framework of the ICCPR, and do the limitations imposed by the Terrorism Suppression Act fit within any such permissible limitations? Similarly, are the limitations justifiable within the framework of section 5 of the Bill of Rights, and how do sections 4 and 6 affect the relationship between the limitations and the expression of the right to natural justice within the NZBORA? Next, what implications are there if the limitations are justifiable under one instrument (e.g. the Bill of Rights) but not under the other (e.g. the International Covenant)?

### **The Designation Process as a Limitation upon Natural Justice**

#### *Limiting Natural Justice under the ICCPR*

The first of the questions just posed was this: are the rights concerned able to be limited within the framework of the ICCPR, and do the limitations imposed by the Terrorism Suppression Act fit within any such permissible limitations? As seen in the discussion above, Article 14 of the ICCPR only permits a limitation upon the right to a fair and open trial by permitting the press and public to be excluded "from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made

public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children". The jurisprudence of the Human Rights Committee has not extended this exception to the right. Neither the words of Article 14, nor the jurisprudence of the Committee, suggest that the right to a fair hearing can be limited in the way it is under the designation process within the Terrorism Suppression Act.

As such, the earlier preliminary conclusion that the designation process is in breach of the principle of natural justice, enshrined in the ICCPR through the right to a fair hearing in Article 14, must stand as a final conclusion. Although Article 14(1) is not listed within Article 4(2) of the Covenant – setting out rights that may not be derogated from in times of emergency – the position remains that New Zealand has not lodged a declaration of emergency under Article 4. As such, it cannot claim to be derogating from the right to a fair hearing as a result of any state of terrorist emergency.

#### *Limiting Natural Justice under the NZBORA*

In considering the question of whether natural justice can be properly limited under the Terrorism Suppression Act within the framework of the New Zealand Bill of Rights Act, the answer does not lie in simply applying the section 5 justified limitation provision of the latter Act. Application of the Bill of Rights brings into play what has been described as the “unholy trinity” of sections 4, 5 and 6.<sup>53</sup> Much of that is an exercise in statutory interpretation and, as such, it is important to identify the precise language of each provision that is to be examined.<sup>54</sup>

#### 1. The making of designations

The making of designations is done by the Prime Minister under section 20 (interim designations) or 22 (final designations). The authority of the Prime Minister is contained within subsections (1) to (3) of those sections (what has earlier in this chapter been described as the “tests” for designation):

- (1) The Prime Minister may designate an entity as a terrorist entity under this section if the Prime Minister [has good cause to

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<sup>53</sup> That phrase having been coined by Dr James Allen in his article “The Operative Provisions - An Unholy Trinity” [1995] *Bill of Rights Bulletin* 79.

<sup>54</sup> These have been earlier identified as raising six situations that are inconsistent with the principles of natural justice.

suspect - *section 20(1)*] [believes on reasonable grounds - *section 22(1)*] that the entity has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts.

- (2) On or after designating an entity as a terrorist entity under this Act, the Prime Minister may designate 1 or more other entities as an associated entity under this section.
- (3) The Prime Minister may exercise the power given by subsection (2) only if the Prime Minister [has good cause to suspect - *section 20(3)*] [believes on reasonable grounds - *section 22(3)*] that the other entity-
  - (a) is knowingly facilitating the carrying out of 1 or more terrorist acts by, or with the participation of, the terrorist entity (for example, by financing those acts, in full or in part); or
  - (b) is acting on behalf of, or at the direction of,-
    - (i) the terrorist entity, knowing that the terrorist entity has done what is referred to in subsection (1); or
    - (ii) an entity designated as an associated entity under subsection (2) and paragraph (a), knowing that the associated entity is doing what is referred to in paragraph (a); or
  - (c) is an entity (other than an individual) that is wholly owned or effectively controlled, directly or indirectly, by the terrorist entity, or by an entity designated under subsection (2) and paragraph (a) or paragraph (b).

The provision does not exclude the ability to hear from an alleged terrorist or associated entity, although the drafters of the Act clearly anticipated that there would be no such hearing, section 29 providing that:

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

- (a) the entity concerned was not, before the designation was made, given notice that it may be made, or a chance to comment on whether it should be made, or both:

Adopting the approach advocated by the New Zealand Court of Appeal in *Moonen*, and explained in Chapter 8, the first step to be taken is to identify the different interpretations of the words contained in the provision being examined, with a view to determining the application of section 4 and 6 of

the NZBORA.<sup>55</sup> One might thereby argue that, since sections 20 and 22 do not exclude the right to be heard by the Prime Minister or the right to be informed of the basis upon which the designation is being considered, then one interpretation that is open (and one most consistent with the NZBORA right to natural justice) is that the Prime Minister is obliged to hear the alleged entity and provide it with a copy of the information being considered.

However, such an interpretation would produce an absurd result. Firstly, not all entities being designated will necessarily be resident in New Zealand, or even have representatives in New Zealand. Secondly, such an interpretation would not cater for the special status of classified security information, which must surely be protected (and is able to be protected, by proportionate means, in the view of the author). The additional problem concerns the role of the Prime Minister and is one of common sense and reality. As head of State, and ultimately the effective head of security intelligence services and of the military, it is suggested that the Prime Minister cannot be expected to him/herself hear alleged terrorist or associated entities. In any event, that would not establish an independent and impartial process. In saying this, it is not suggested that the Prime Minister would fail to act in an impartial manner, but the reality is that the office of the Prime Minister is an executive rather than a judicial one. In contrast, the office of the Inspector-General of Security and Intelligence is one (in the view of the author) that does guarantee impartiality and independence.<sup>56</sup> It is suggested that, in order to achieve a proper balance between the exercise of the right to be heard and the protection of the integrity of the designation review process, reform is again necessary. The reforms advocated below seek to introduce a process by which designations are automatically reviewed by the Inspector-General of Security and Intelligence, with certain rights to be heard and be advised of the reasons for the designation. In effect, the proposal is to re-establish the Inspector-General's review as had been proposed within the first redraft of the Terrorism (Bombings and Financing) Bill. In the discussion of those reforms, it will be shown that such a process, while still limiting the right to natural justice, would nevertheless be proportionate and thereby justifiable in a free and democratic society.

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<sup>55</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 17.

<sup>56</sup> While it has to be acknowledged that there have been criticisms of the Inspector-General in this regard (see David Small, "A Critique of the Terrorism Suppression Bill", available online at the ARENA website, online: <<http://www.arena.org.nz>> (last accessed on 2 November 2002), the author posits that the structure of the *Inspector-General of Intelligence*

## 2. Notice of designations

As to notice, section 26 of the Terrorism Suppression Act provides:

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

- (a) must state the section under which the designation is made, and whether the entity concerned is designated as a terrorist entity or as an associated entity;
- (b) may describe the entity concerned by reference to any name or names or associates or other details by which the entity may be identified;
- (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

The provision does not exclude the ability to inform the entity of the information upon which a designation was based, nor does it require it. In attempting to identify the different interpretations of the words contained in the provision, one might argue that, since section 26 does not exclude the provision in such a notice of information upon which a designation is based, then an open interpretation of section 26 (and one most consistent with the NZBORA right to natural justice) is that notice under section must inform the entity of the information upon which the designation was based.

That is certainly an attractive argument and one that, in the author's view, is correct. There are, however, two practical problems that remain. The first is the simple fact that section 26 does not state that such information is required and that, as such, an innocent application of the section could cause notice to be given without the provision of such information. The more important problem is that, although section 26 should be interpreted as requiring information to be given, such an interpretation provides no guidance on how classified security information should be dealt with. As will be seen in the discussion that follows, the protection of classified security information is seen by the author as an important objective and an interpretation of section 26 should not, it is proposed, be such that it would require disclosure of all classified information. The protection of classified information in the provision of

information could, as argued later, be justifiable in a free and democratic society (section 5). As such, this is something that calls for reform.<sup>57</sup>

### 3. Review of designations by the Prime Minister

Requests by an entity to have a designation reconsidered by the Prime Minister are provided for under section 34(1) of the Terrorism Suppression Act:

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

- (a) by the entity who is the subject of the designation; or
- (b) by a third party with an interest in the designation that, in the Prime Minister's opinion, is an interest apart from any interest in common with the public.

Again, the provision does not exclude rights (in this case, any accompanying right to be heard by the Prime Minister or to receive information about the basis upon which the designation was made), nor does it require or allow it. Again, one might therefore conclude that application of section 6 of the New Zealand Bill of Rights Act requires this provision to be interpreted in a manner that is most consistent with the right to natural justice, thereby requiring the Prime Minister to hear an applicant and first provide the applicant with information about the basis upon which the designation was made.

Here, there are three perceived problems with this position. As before, the first practical problem is that any right to be heard or provided with information is not expressed and might therefore lead to an inconsistent application. The second again relates to the problem of protecting classified security information, as earlier discussed.

The additional problem in the context of reviews by the Prime Minister is one of common sense and reality. As head of State, and ultimately the effective head of security intelligence services and of the military, it is suggested that the Prime Minister cannot be expected to him/herself hear a designated entity. A practical answer may lie in the delegation of this authority by the Prime Minister. In any event, and under either option, this would not establish an independent and impartial process. In saying this, it is not suggested that the Prime Minister would fail to act in an impartial

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*and Security Act 1996* does guarantee (to the extent possible) the impartiality and independence of the office.

<sup>57</sup> Proposals for reform of the designation process are set out later within this chapter.

manner, but the reality is that the office of the Prime Minister is an executive rather than a judicial one. In contrast, the office of the Inspector-General of Security and Intelligence is one (in the view of the author) that does guarantee impartiality and independence.<sup>58</sup> It is suggested that, in order to achieve a proper balance between the exercise of the right to be heard and the protection of the integrity of the designation review process, reform is again necessary. The reforms advocated below seek to introduce a process by which entities can be heard when requesting a review by the Prime Minister, but that such hearing be conducted by the Inspector-General for Security and Intelligence.

#### 4. Status of classified security information

As explained in the beginning of this chapter, the protection of classified security information is something that is addressed several times within the Terrorism Suppression Act 2002, under sections 38 and 39. The Terrorism Suppression Amendment Bill 2007 is to replace these provisions with a single mechanism under new section 38. As also identified earlier, the protected status accorded to classified security information is itself protected by what has been described as a 'trump card' (current section 38(7); new section 38(6)). The effect of this trump card is that, notwithstanding any finding that section 38 is inconsistent with the right to natural justice, section 38 is nevertheless to be applied.<sup>59</sup> Section 4 of the NZBORA provides the trump card with that effect.

Two issues remain. The first is whether section 38 can be provided with more than one meaning, since section 6 will require the meaning most consistent with the NZBORA to be adopted. Next, although section 4 requires the trump card to prevail, the question *in principle* is whether the limitations upon natural justice imposed by these provisions are justifiable in a free and democratic society.

On the question of potential interpretations of the provisions, the author takes the view that the provisions have been drafted with sufficient precision that only one meaning is open in each case. If the Attorney-

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<sup>58</sup> While it has to be acknowledged that there have been criticisms of the Inspector-General in this regard (see Small n 56), the author take the view that the structure of the *Inspector-General of Intelligence and Security Act 1996* does guarantee (to the extent possible) the impartiality and independence of the office.

<sup>59</sup> The use and effect of classified security information in the designation process has been expressed by the responsible select committee chair, Graham Kelly MP, as "a necessary evil": see John E 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, 62.

General requests, and the Court is satisfied that “it is desirable to do so for the protection of (either all of part of) the classified security information”, then the Court must hear that information in the absence of the designated entity, its counsel and the public (section 38(3)(b)). The question of “desirability” is linked only to the protection of classified information. Having said this, the question of the ‘desirability’ of excluding information from one party to proceedings for the purpose of protecting classified security information *may* (depending on the approach taken by the Chief High Court Judge or his or her delegates) be applied in a robust manner to give effect to natural justice. At least in theory, the Judge could determine that is it *never* desirable to exclude the enjoyment of the right to natural justice for the protection of classified security information. It has to be acknowledged, however, that this is an assessment of what the Court *might* do and cannot therefore be relied upon with any certainty. Secondly, where the Attorney-General is required to provide a summary of information “except to the extent that a summary of any particular part of the information would itself involve disclosure that would likely prejudice the interests referred to in section 32(3)”, this is again a proviso precise in its language.

In the application of section 5 of the Bill of Rights Act, it is firstly notable that the provisions at hand do not exclude the rights to be informed of the case and to present the other side, but they limit the rights. This, as discussed in chapter 9, is something that the Supreme Court of Canada has seen as important to determining whether provisions of an enactment are capable of justification. This feature is preserved by virtue of the fact that the provisions call for their application on the particular facts of each case. The hearing of evidence in the absence of the entity or counsel will only occur “if it is desirable to do so” for the protection of classified security information. Likewise, the exclusion of classified security information from a summary will only occur “to the extent that a summary of any particular part of the information would itself involve disclosure that would be likely to prejudice the interests referred to in section 32(3)”.

Those factors would also go towards an argument that the limitations at hand are reasonable and proportionate. In some cases, that may be true. However, it is suspected that domestic designations are likely to be based upon high-level classified information, and *solely* upon such information. In those circumstances (even if they are rare), a designated entity (and its counsel) will be excluded from hearing information presented to the court and may thereby learn nothing of the reasons for the designation and be in a position where it cannot answer the case against it. Such situations would entirely oust the observance of natural justice, as enshrined in the *audi*

*alteram partem* principle. Such situations would not, it is concluded by the author, be proportionate and justified in a free and democratic society.

Before closing on this discussion, there are two matters to be addressed. The first is that there are some parallels in New Zealand legislation to the TSA's treatment of classified security information. The Crown Proceedings Act 1950 provides the Crown with exemption from disclosing in civil proceedings documentation that would be likely to prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand.<sup>60</sup> This exemption, however, pertains only to such prejudicial documentation and relates to 'normal' civil proceedings in which the Crown is involved and in respect of which classified information is unlikely to form the substance of the case. The Immigration Act 1987 also provides for the special treatment of classified security information (which is given an identical definition to that under the TSA).<sup>61</sup> As a safeguard, the process is combined with rights of review and the inclusion in the process of legal counsel and the Inspector-General of Security and Intelligence.<sup>62</sup> The provision of full disclosure is also a matter restricted in the case of information relating to the application for and making of warrants to intercept communications under the Misuse of Drugs Act 1976 and the Crimes Act 1961.<sup>63</sup> That process, however, does not deny an accused access to evidence that will be tendered against him or her and therefore does not impact upon the ability for an accused to answer the prosecution case.<sup>64</sup> Finally, a process very similar to that under the Terrorism Suppression Act is being proposed under the Identity (Citizenship and Travel Documents) Bill 2004.<sup>65</sup>

The second matter to be addressed is that the Solicitor-General's office has, in advice to the Attorney-General in 2001 and 2006, given some attention to the treatment of classified security information.<sup>66</sup> In his advice

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<sup>60</sup> *Crown Proceedings Act 1950*, section 27

<sup>61</sup> *Immigration Act 1987*, section 114B

<sup>62</sup> *Immigration Act 1987*, sections 114A – 114R.

<sup>63</sup> *Misuse of Drugs Act 1976*, sections 14-29, and *Crimes Act 1961*, sections 312A-312Q.

<sup>64</sup> This was held to be the case by the Court of Appeal in *R v Saifiti* [1994] 2 NZLR 403, 408.

<sup>65</sup> For a brief overview of the Bill, see New Zealand Law Society, 'Delay changes to citizenship criteria, NZLS says', LawTalk, 14 February 2005, 5.

<sup>66</sup> In the context of advice on the **Terrorism (Bombings and Financing) Bill**, see the letter from the Solicitor-General to the Attorney-General of 9 November 2001 (n 37) paras 21-22. For advice on the **Terrorism Suppression Amendment Bill 2007**, see the letter from Crown Counsel Val Sim and Allison Bennett 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, paras 6 and 7.

of 2001, the only point made by the Solicitor-General concerning the justifiability of the consequent limitations upon natural justice was contained in a footnote, in which he said:<sup>67</sup>

In addition, I draw comfort from the decision of the Canadian Supreme Court in *Chiarelli v Canada (Minister of Employment and Immigration)* (1992) 90 DLR (4<sup>th</sup>) 289 in which that Court upheld against Charter attack a scheme under which, where security and intelligence issues were at stake classified security information need not be revealed to a deportee at a hearing before the Security Intelligence Review Committee.

Reference to this, and similar decisions, was made in the 2006 advice of the Crown Law Office to the Attorney-General.<sup>68</sup> The summary of the Supreme Court of Canada's decision is, however, misleading. The Supreme Court concluded, on the particular facts, that fundamental justice had been observed by the Security Intelligence Review Committee through the provision by the Committee to the respondent of documents summarising information and giving (in the view of the Court) sufficient information to know the substance of the allegations against him and to be able to respond.<sup>69</sup> The provisions of the Terrorism Suppression Act, in contrast, has the potential to result in no substantive information being provided to an interested party. This key aspect of the decisions referred to has not been highlighted in either letter of advice to the Attorney-General.

##### 5. The Ahmed Zaoui case

A matter of clarification needs to be addressed before proceeding any further. Many have wrongly assumed that the case involving Mr Ahmed Zaoui, an Algerian national who entered New Zealand in December 2002 and was detained by authorities until December 2004, was a matter involving his designation and/or detention under the Terrorism Suppression Act.<sup>70</sup> Mr Zaoui's matter in fact involved his claim for refugee status, the application of the Immigration Act 1987 and processes outside the Terrorism Suppression Act instigated by the Director of Security. Mr Zaoui had been granted refugee status by the Refugee Status Appeals Authority, but the New Zealand Government sought his removal based upon section

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<sup>67</sup> Ibid, footnote 2.

<sup>68</sup> Ibid, para 6.

<sup>69</sup> *Chiarelli v Canada (Minister of Employment and Immigration)* (1992) 90 DLR (4<sup>th</sup>) 289, 291.

<sup>70</sup> This is a question that has commonly been presented to the author during the conduct of various seminars and discussions on the subject of the *Terrorism Suppression Act 2002*.

129X of the Immigration Act 1987 and Article 33(2) of the Refugee Convention, the latter providing that the principle of nonrefoulement (literally non-return) does not apply to a person in respect of whom there are reasonable grounds for regarding as a danger to the security of the country.

Having said this, there are some useful statements made by the New Zealand Court of Appeal and High Court concerning the use of classified security information in the issuing by the Director of Intelligence of a security risk certificate against Mr Zaoui. In an appeal against judicial review proceeding in the High Court, President Anderson of the Court of Appeal identified the relevant issue as follows:<sup>71</sup>

As a general proposition, for a system to be fair, it would have to recognise and apply the ordinary principles of natural justice which in New Zealand are affirmed by s 27 of the New Zealand Bill of Rights Act 1990 ('BORA'). A fundamental aspect of natural justice is the right to know, and to be accorded the opportunity of being heard in respect of matters which might be considered in the course of a decision affecting a person's rights or interests. But it may sometimes be the case that the Contracting State's grounds for regarding a refugee as a danger to the security of that country are based on classified information, the disclosure of which, to others including the refugee facing refoulement, may compromise the source of the information or State security operations. This can produce a conflict between the refugee's rights to natural justice and the State's interest in its own security.

Notwithstanding that conflict, the High Court had held that the Director of Intelligence was required to provide Mr Zaoui with a summary of the allegations against him, provided that the information did not disclose classified security information which could not be divulged under the relevant provisions of the Immigrations Act.<sup>72</sup> The High Court's finding on that account was not the subject of appeal. Useful reference to Justice Williams' judgment in the High Court can therefore be made:<sup>73</sup>

[I]n struggling to reconcile their obligations under the international human rights covenants with national security concerns in a world plagued by more prevalent terrorism, other countries - including countries which have actually been subjected to terrorist attacks - have nonetheless found ways and adopted procedures which do not exclude those thought to be threats to security from procedural safeguards designed to ensure that, in a limited way, they can meet and challenge what is alleged against them through procedures which comply

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<sup>71</sup> *Attorney-General v Zaoui (No 2)* [2005] 1 NZLR 690, para 4.

<sup>72</sup> *Zaoui v Attorney-General* [2004] 2 NZLR 339, 383.

<sup>73</sup> *Ibid*, paras 162-163.

in as full a measure as possible with natural justice. For the most part, overseas experience such as that reviewed in the authorities and the affidavits filed on Mr Zaoui's behalf provides for:

- (a) Review by an independent functionary of unquestioned integrity;
- (b) The provision of summaries of classified information to the person concerned shorn of matter likely to identify source or proscribed from disclosure; and
- (c) Procedural fairness in the sense of the right to call evidence and present a case in opposition.

These seem consistent themes in countries comparable with New Zealand. Two of the three already apply in this country. There seems no reason why the third should not apply. Certainly, Part IVA and s 114I [of the Immigration Act] do not forbid it.

That position, it is posited by the author, is entirely consistent with the conclusion made earlier that the mechanisms under the Terrorism Suppression Act are currently inconsistent, in principle, with the requirements of natural justice.

#### 6. The Clash between the ICCPR and the NZBORA

Against the background of this analysis, a mixed and somewhat peculiar situation is exposed. Firstly, it appears that sections 20, 22, 26 and 34(1) - relating to the making of a designation, the provision of notice of a designation and the review of designations by the Prime Minister - can be given interpretations that are consistent with the right to natural justice. The outcome of doing so, however, is problematic for a number of reasons, most importantly that a "NZBORA-consistent" interpretation neither caters for the special requirements of classified security information, nor the special nature of the Prime Minister's office. The conclusion drawn has been that reform is necessary.

More significantly, it has been concluded that although the provisions of the Terrorism Suppression Act concerning classified security information cannot be invalidated or held to be ineffective through application of the Bill of Rights, these provisions are nevertheless in breach of Article 14(1) of the ICCPR. New Zealand is thus in a position where the application and effect of its domestic law (the Terrorism Suppression Act and the Bill of Rights Act) renders it in breach of its international obligations (under the International Covenant on Civil and Political Rights). What are, or might be, the consequences of this?

As already established earlier in this thesis, the internal law of a nation cannot be relied upon as a justifiable reason for breach of that nation's

international obligations. As also seen, the Human Rights Committee has expressly directed that New Zealand must, when implementing its counter-terrorist obligations under Security Council resolution 1373 (2001), ensure that this is done in full conformity with the ICCPR.<sup>74</sup> The failure of New Zealand to do so will likely result in adverse comments being made by the Human Rights Committee in the next periodic report under Article 40 of the Covenant. If the matter is made the subject of a communication under the ICCPR Optional Protocol, it could again see the Committee render adverse comments and direct New Zealand to amend its laws.<sup>75</sup> Thus, this chapter comes to the final issue to be considered: that of reform.

## **Reform**

Given the different outcomes in the application of New Zealand's domestic versus international human rights instruments, and the resulting tension between the two, it now falls to be considered whether the relevant restrictions under the Terrorism Suppression Act should be abandoned or modified. They should not, it is posited, be abandoned. The protection of classified security information, and the terrorist designation process, are clearly both important matters. Abandoning the mechanisms by which classified security information can be protected would not only prejudice New Zealand's ability to use, gain and exchange such information, but it would also prejudice its work in countering terrorism.

However, if New Zealand wants to comply with its international obligations, reform is clearly necessary. To that end, three levels of reform are advocated. All three reforms are suggested to be necessary for New Zealand to implement its counter-terrorist designation process in a manner that is at least proportionate with the objectives sought to be achieved. It should be noted that, strictly, speaking, the reforms would still not fall within any expressed permissible limitation upon the right to a fair hearing under the ICCPR. As discussed, Article 14(1) only permits restriction upon the "open justice" nature of the right. Notwithstanding that fact, it is suggested that the following reforms would balance the restriction upon rights so in a manner that is proportionate (and, as such, compliant with

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<sup>74</sup> Human Rights Committee, *Concluding observations of the Human Rights Committee: New Zealand*, 17 July 2002, CCPR/CO/75/NZL, para 11.

<sup>75</sup> A communication can only be lodged by a person that is a *victim* of a breach of a right under the ICCPR: see Article 5 of the First Optional Protocol to the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

section 5 of the New Zealand Bill of Rights Act). As a consequence, it is proposed that the Human Rights Committee would be loathe to make overly adverse comments or directions against New Zealand in situations where it could be shown that New Zealand had taken all reasonable steps to ensure that the right has only been limited to the extent strictly necessary and in a manner that seeks to limit the right to the least possible extent and with safeguards preventing an abuse of the process.

*Notice of Designations*

As already seen, section 26 of the Terrorism Suppression Act requires notice of a designation to be made to an entity within New Zealand (or its representative in New Zealand) that has been designated as a terrorist or associated entity, on either an interim or final basis. Despite the various requirements for a notice, nothing requires such notice to include information about the information upon which the designation has been made. The first recommendation for reform is to amend section 26 of the Act, requiring information to be given of the reason(s) for the designation, subject to the need to protect classified security information. The following amendment to section 26 is recommended (new subsection (e)):

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

- (a) must state the section under which the designation is made, and whether the entity concerned is designated as a terrorist entity or as an associated entity;
- (b) may describe the entity concerned by reference to any name or names or associates or other details by which the entity may be identified;
- (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 a summary of the information upon which the designation was based, to the extent that this does not prejudice the interests referred to in section 32(3);]
- [(f)] must include any other information specified for the purposes of this paragraph by regulations made under this Act.

The aim of the new subsection (e) is to guarantee the right to be informed of the basis upon which a designated entity's interests have been affected, while at the same time protecting (to the extent necessary) the special status

of classified security information. The limitation, in that regard, has been drawn from the wording of section 38(3)(b) of the Act.

### *Reinstatement of the Inspector-General's Review*

The second reform recommended is the reinstatement of a modified form of the review of designations by the Inspector-General of Security and Intelligence.<sup>76</sup> There are a number of anticipated objectives and benefits in such a review process.

#### 1. Review of designations

The first proposed role of the Inspector-General would be to exercise the function envisaged within the first redraft of the Terrorism Suppression Bill: to undertake a mandatory review of all designations and consider, in that review, whether the tests for designation were properly applied and satisfied, when weighed against the information received by the Prime Minister. In doing so, the Inspector-General would act as an internal check upon the exercise of the significant decision-making power of designation. Not only is this important to the integrity of the designation process itself, but also to the criminal responsibility implications of such designations.<sup>77</sup> By introducing an immediate and mandatory checking mechanism, this also addresses the lack of notice and hearing prior to the making of a designation. It is posited that the addition of this checking mechanism transforms the latter limitation upon natural justice into a proportionate and justifiable one.

Naturally, the power of review should come with the ability on the part of the Inspector-General to act upon his or her findings. Under the proposed regime in the Terrorism (Bombings and Financing) Bill, the Inspector-General was to have the power to revoke designations upon review<sup>78</sup> and it is proposed that any reinstatement of the Inspector-General's role under the TSA include the same authority to revoke. In essence, as summarised by the Solicitor-General in his review of the Bill when giving advice to the

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<sup>76</sup> As had been contained within the *Terrorism (Bombings and Financing) Bill* (see the select committee's interim report, Foreign Affairs, Defence and Trade report, *Interim Report on the Terrorism (Bombings and Financing) Bill*, 8 November 2001), but then removed in the later *Terrorism Suppression <Bombings and Financing> Bill* (see the committee's final report, Foreign Affairs, Defence and Trade Committee, *Final Report on the Terrorism <(Bombings and Financing)> Suppression Bill*, 22 March 2002, 11).

<sup>77</sup> Since the *Terrorism Suppression Act 2002* prohibits certain dealings with designated entities.

<sup>78</sup> *Terrorism (Bombings and Financing) Bill* [first redraft], clause 17T(1).

Attorney-General, the Inspector-General's review would amount to a *de novo* determination.<sup>79</sup> The decision of the Inspector-General should, it is proposed, be accompanied with notice of the decision being given to the designated entity. By doing so, the entity will be in a better position to assess whether to seek judicial review of the decision.

As was provided for in the Bill, it is proposed that the Inspector-General's review function be able to be triggered by the designated entity. The Bill had provided, in that regard, that if a designated entity had unsuccessfully applied to the Prime Minister to have a designation revoked (current section 34(1) of the TSA), then it could apply for review by the Inspector-General.<sup>80</sup>

## 2. Review of notifications

The second role for the Inspector-General would be additional to that originally proposed by the Foreign Affairs, Defence and Trade Committee in its interim report on the Bill. It is again proposed that this be mandatory and undertaken at the same time as the latter review of any designation. The question for the Inspector-General to consider here, though, would be whether the notice under section 26 has been properly made, having specific regard to the proposed new subsection (e):

- (e) [must include a summary of the information upon which the designation was based, except in the case of classified security information to the extent that this might prejudice the interests referred to in section 32(3):]

This second role would require the Inspector-General to determine two things. First, whether the summary of information provided under the notice was a proper and fair reflection of the information upon which the designation was based. Next, it would require him or her to determine whether any exclusion of classified security information was necessary to the extent required to protect the interests referred to in section 32(3).

This power of review should again be accompanied with the ability on the part of the Inspector-General to take any necessary action. In this case, s/he should be able to direct that the notice be amended to include any additional information s/he deems necessary – that is, information upon which the designation was based, except classified security information (to the extent that this might prejudice the interests referred to in section 32(3)).

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<sup>79</sup> *Terrorism (Bombings and Financing) Bill* [first redraft], clause 17P(1): see letter from the Solicitor-General to the Attorney-General 9 November 2001 (n 37) para 16.

### 3. Hearing of entities seeking reconsideration of designations

The next proposed role for the Inspector-General addresses the specific concern of the manner in which requests to the Prime Minister to reconsider a designation are dealt with under section 34. The point has been made that there is currently no right, in such circumstances, to be heard or to receive information about the basis upon which the designation was made. The latter aspect has been addressed, it is suggested, by recommending the new section 26(e) concerning the provision of information in the notice of designation and the associated power of review of the notice by the Inspector-General.

What is recommended here is that the Inspector-General be empowered to receive submissions from an entity that requests review of their designation by the Prime Minister. However, it is posited that a careful balancing act must be achieved. The author has earlier criticised the fact that any reconsideration by the Prime Minister of a designation does not provide for the designated person to be heard. As already indicated, that is not to suggest that the Prime Minister should him/herself be required to hear a designated entity. Likewise, the Inspector-General should also not be expected to hear any frivolous evidence or submissions. It is posited that in seeking to maintain the integrity of any process, the checks upon that process should themselves be reasonable and prudent. Thus the following process is recommended:

- Where an entity, or a third party with “an interest in the designation”,<sup>81</sup> requests reconsideration of a designation by the Prime Minister under section 34(1) of the Act, the written notice requesting reconsideration should first be referred to the Inspector-General of Security and Intelligence.
- If the written notice does not disclose any information which, in the view of the Inspector-General, challenges the basis upon which the designation was made, then the Inspector-General should: (1) consider whether the information upon which the designation was based satisfies the tests for designation under the Act;<sup>82</sup> and (2) advise the Prime Minister accordingly. He or she should not, however, be required to hear from the applicant if the application does nothing to challenge the basis of the designation. To do so, it is suggested, would be pointless. Notwithstanding this, the Inspector-General should inform the

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<sup>80</sup> *Terrorism (Bombings and Financing) Bill* [first redraft], clause 17N(2).

<sup>81</sup> As currently permitted under section 34(1) of the *Terrorism Suppression Act 2002*.

<sup>82</sup> In other words, s/he should confirm that the designation is valid.

applicant that the applicant's written notice does not disclose any information which challenges the basis upon which the designation was made and that, in the absence of such further information, s/he has reached the conclusion that the designation should stand (or be revoked) and has made a recommendation to the Prime Minister accordingly. By doing so, the applicant is thereby advised of the Inspector-General's recommendation and the reasons for it.

- If, in contrast, the written notice does disclose information which challenges the basis upon which the designation was made, then the Inspector-General should be required to advise the applicant that they can (a) file with the Inspector-General written submissions; and/or (b) attend at a specified time and place to be heard in person. After hearing from the applicant in this way, the Inspector-General should: (1) consider whether the information upon which the designation was based, together with any further information received, satisfies the tests for designation under the Act; and (2) advise the Prime Minister accordingly. Again, it is recommended that the Inspector-General should advise the applicant that s/he has reached the conclusion that the designation should stand (or be revoked) and has made a recommendation to the Prime Minister accordingly.
- The latter process should, to ensure both fairness and efficiency, include appropriate time limits.

Such a process, in the view of the author, would both guarantee the right to be heard (where there is something to be heard about) and at the same time limit the Prime Minister's involvement in that process and restrict frivolous applications from taking the time of both the Prime Minister and Inspector-General. What must be remembered, as discussed earlier, is that there is no right to be heard in person by an administrative tribunal. There is only a right to make representations. By instituting a system where representations can be made to the Inspector-General (with the ability for him or her to hear submissions in person), that right is preserved. Furthermore, by notifying an applicant of the Inspector-General's recommendations, the applicant is in a better position (it is suggested) to assess whether to seek judicial review of the recommendation, or of the Prime Minister's later decision to designate or refuse to revoke a designation.

#### 4. Panel of Security-Cleared Counsel

The recommendations thus far have addressed the early stages of the designation process, not all dependent on action by a designated entity or interested third party. The final recommendation considered now concerns the representation of an entity or interested third party in judicial proceedings under the Terrorism Suppression Act. Specifically, those proceedings relating to the extension of a designation (sections 35 and 41), or arising out of the making of a designation (section 33). In the case of such proceedings, the current position is as follows:

- Where the Attorney-General applies to extend a final designation (section 35), the High Court is required to receive any classified security information relating to the application without the presence of the designated entity (or its counsel) if that is desirable for the protection of the information (section 38(3)(b)). The Attorney-General is however obliged to provide a summary of the information to the designated entity, except to the extent that this would involve disclosure of information that would prejudice those interests listed in section 32(3) of the Act. Any appeal against a decision of the High Court to extend a designation restricts (in the way just mentioned) the appeal court's dealings with classified security information.<sup>83</sup>
- Next, although the Act does not prevent a person from bringing judicial review proceedings arising out of the making of a designation (section 33), the High Court is again required to receive any classified security information relating to the application without the presence of the designated entity (or its counsel) if that is desirable for the protection of the information. This time the Attorney-General is not required to produce a summary of the information.

These restrictions are clearly imposed for the purpose of protecting classified security information and are, to that extent, important ones. It has been concluded, however, that they are not proportional. The recommendation made here is to address these restrictions by permitting an entity (that is the subject of extension proceedings) and/or interested person (the subject of review proceedings) to be represented by counsel and thereby ensure that those persons' interests are represented and put forward to the Court.

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<sup>83</sup> *Terrorism Suppression Act 2002*, section 41.

The principal objection to representation by counsel is likely to be that representation by counsel does not avoid the need to protect certain classified security information. What is proposed here, though, is the establishment of a special panel of legal counsel that have an appropriate level of security clearance so that they may be present during the otherwise “closed hearing” of classified information when section 38(3)(b) of the TSA is applicable. Such counsel, it is proposed, should also be entitled to make submissions to the Court on the content of any summary of information to be presented by the Attorney-General under section 38(4) of the Act. Doing so, it is posited, transforms what can otherwise be a blanket exclusion of disclosure into a justifiable and proportionate limitation upon the duty of disclosure. At least by having counsel present during the hearing and consideration of all information before the Court, respondents or applicants in proceedings under sections 33, 35, 39, and 55 of the Terrorism Suppression Act can be sure that they have a level of capacity to respond to the case against them. The proposed reform would at the same time preserve the important need to protect classified security information.

For the sake of completeness, two further matters should be addressed. Firstly, it must be recognised that there is no direct equivalent to this proposal in any established procedures in New Zealand law. There are, however, some analogies. Panels of specialised counsel are not a new phenomenon. New Zealand retains panels of military counsel for the purpose of proceedings under the Armed Forces Discipline Act 1971; panels and categories of criminal legal aid counsel for ordinary criminal proceedings in New Zealand courts (administered under the Legal Services Act 2000); and specialised counsel for the child under the Care of Children Act 2004. Although these panels do not have (as the central requirement for being on the panels) the need for special security clearance,<sup>84</sup> they do have their own special requirements for relevant expertise.

The use of security-cleared counsel is, however, something that exists in other jurisdictions. Such panels exist in the United Kingdom, for example, under a Special Commissions system initially introduced for the purpose of dealing with classified information pertaining to immigrations appeals.<sup>85</sup> The role of Special Commission, with its panel of cleared counsel, has been gradually extended to include the hearing of other types of appeals where confidential information is important, including matters pertaining to terrorist designations.

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<sup>84</sup> Members of military defence panel must have a certain level of security clearance, but by virtue of the fact that they are members of the armed forces rather than as a specialised feature of their status as counsel.

<sup>85</sup> See the Special Immigration Appeals Commission Act 1997 (UK).

The further issue that should be touched upon is that of choice. Given that any panel of security-cleared counsel is likely to be limited, could a non-Crown party to proceedings under the Terrorism Suppression Act complain that they have little or no choice in who is to represent them? This, however, is not seen as problematic and there are, again, analogies to be seen. Those charged within criminal offences who are granted legal aid have for a significant time had no choice at all in what counsel is to be assigned to represent them. It has been only a recent initiative of the Legal Services Agency to introduce a system of “preferred counsel”, whereby an applicant for criminal legal aid can nominate counsel to be represented. Although, in practise, preferred counsel is usually appointed, there is no obligation upon the Legal Services Agency to do so. Likewise, in family proceedings, it is the Family Court that appoints counsel for the child under section 7 of the Care of Children Act 2004, or section 30 of the Guardianship Act 1968. Appointment of counsel is at the sole discretion of the Family Court and the New Zealand High Court has recently pronounced that the child to be represented has no right to determine what counsel is to act.<sup>86</sup>

## **Conclusion**

The process by which designations are made, reviewed, extended, and capable of being challenged is a complex one. It is central to the operation of the Terrorism Suppression Act anti-financing regime, and to New Zealand’s compliance with the Security Council’s identification of terrorist organisations. The process is important to New Zealand’s contribution to the international regime towards the suppression of the financing of terrorism. Designations are also important to the way in which others are able to deal with designated entities, and to the interests of the entity concerned. Entities are, by reason of their designation, restricted in their property and financial dealings and may be subject (upon extension of a final designation) to forfeiture of their property to the Crown. Third parties are prohibited from financing, supporting, recruiting into, or providing financial or other property-related services to terrorist or associate entities. Financial institutions are bound to report financial transactions. In short, terrorist designations impact, in significant terms, upon both designated entities and those that might interact with them.

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<sup>86</sup> *In the matter of R*, unreported, 30/07/04, Kean J (HC), Auckland, para 61.

Identified within this chapter are a number of features of the designation process that give rise to serious concerns about the compliance of the process with various aspects of the right to natural justice, under both the current regime and the proposed amended regime under the Terrorism Suppression Amendment Bill 2007. Most significant is the principle of hearing the other side, *audi alteram partem*, featuring within that the notions of equality of arms, the disclosure of information, the ability to make submissions and the receipt of reasons for the making of decisions. It has been concluded that the current regime under the Terrorism Suppression Act does not comply with New Zealand's obligations under the International Covenant on Civil and Political Rights (Article 14(1)). Likewise, it has been concluded that although aspects of the regime cannot be invalidated by domestic courts in the application of the New Zealand Bill of Rights Act, features of the regime are otherwise incompatible with the normal standards of justifiable limitations upon rights in a free and democratic society.

A number of reforms have therefore been recommended within this chapter. Their aim is to produce a designation process that is workable, achieves compliance with New Zealand's international counter-terrorist obligations, and protects the special status of classified security information. At the same time, the reforms aim to achieve a proportional balance between those objectives and the enjoyment of rights to justice.

