Counter-Terrorism Legislation Bill

25 June 2021

Submission of the Human Rights Commission

Submission of the Human Rights Commission on the Counter-Terrorism Legislation Bill

25 June 2021

The New Zealand Human Rights Commission (the Commission) is established and operates under the Crown Entities Act 2004 and the Human Rights Act 1993. The Commission is accredited as an 'A status' national human rights institution under the Paris Principles. Information about the Commission's activities can be found on our website: www.hrc.co.nz

NZ Human Rights.
Human Rights Commission
Te Kāhui Tika Tangata

Human Rights Commission Submission on the Counter-Terrorism Legislation Bill

Contents

Introduction

1. The Human Rights Commission appreciates the opportunity to make a submission to the Justice Committee on the Counter-Terrorism Legislation Bill (the Bill). The Bill is an Omnibus Bill[1] which was enacted in response to the March 2019 terror attacks on mosques in Christchurch[2] and the observations/recommendations of the Royal Commission of Inquiry

[1] The Bill amends several statutes at once, particularly the Terrorism Suppression Act 2002 (TSA), Terrorism Suppression Control Orders Act 2019 (COA) and the Search and Surveillance Act 2012 (SSA).

[2] Ministry of Justice "Regulatory Impact Assessment Coversheet: Options to strengthen counter terrorism legislation (terrorist financing and terrorist travel offences" Part 1 (hereafter, **RIA, Part 1**), at p 1 notes "The Government's overall goal is to prevent terrorism and protect the safety of New Zealanders. In March 2019, there were mass shootings at two mosques in Christchurch. The risk of successful terrorist attacks presents a threat to peoples' lives and wellbeing (public safety). Earlier intervention to prevent terrorism support and travel is expected to lessen the risk of harm from terrorism. Disrupting the precursors that facilitate terrorist activity is part of a package the government is planning to inhibit terrorist acts from being successfully planned and carried out."

into those attacks (RCOI Report).[3] In summary, by expanding the powers of the New Zealand Police as set out below, the Bill seeks to better prevent and respond to terrorism in accordance with United Nations Security Council Resolutions (UNSCR) 1373 (2001) and 2178 (2014).[4]

2. The key expanded powers under the proposed legislation are as follows:
    - Broadening the definition of "terrorist act" in s 5 of the TSA;
    - Introduction of a new offence travelling to, from, or via New Zealand with the intention to carry out a specified offence in the TSA;
    - Introduction of a new offence of planning or preparing to carry out a terrorist act;
    - Extension of the offence of financing terrorism to criminalise the provision of 'material support;
    - Extension of the Control Orders regime under the COA to "relevant offenders," being individuals who have committed and been convicted of a terrorist offence, completed their determinate sentence, and release conditions have expired;
    - Extension of warrantless powers under the SSA for capturing terrorist acts.

Summary and Recommendations

3. While the Commission considers that terrorist groups, organizations or entities that are involved in the planning or preparation of terrorist acts must be prevented from carrying them out and sanctioned appropriately, the proposed changes in the Bill must align with the principles of legality, necessity and proportionality required by domestic and international human rights law. There must also be adequate safeguards to prevent against abuse of these

[3] *Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019*. The departmental disclosure statement on the Bill (2021, No. 29), "Part Two: Background Material and Policy Information" notes that "The Royal Commission recommended a review of all legislation related to the counter-terrorism effort to ensure it is current and enables Public Sector agencies to operate effectively, prioritising, among other things, the creation of precursor terrorism offences in the Terrorism Suppression Act (see Recommendation 18). The Bill implements part of Recommendation 18 to create precursor terrorism offences as a matter of priority, while a wider review of counter-terrorism legislation to give effect to the remainder of Recommendation 18 is underway". The Commission notes that Recommendation 18 does not recommend the creation of precursor terrorism offence but rather recommends that the Government review all legislation related to the counter-terrorism effort (including the [TSA] and the Intelligence and Security Act 2017) to ensure it is current and enables Public sector agencies to operate effectively prioritising *consideration* (emphasis added) of the creation of precursor offences in the [TSA]…". It is notable that the Government is bringing forward an independent statutory review of the Intelligence and Security Act 2017 from September 2022 to July 1 2021, but is has not undertaken a review of legislation that is the subject of this Bill.

[4] UN Doc S/RES/1373 (2001) at 2(e) directs States to criminalise "any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts". The RIA Part 1, above n 2 p 2 also notes that "there may be a perceived gap in New Zealand's implementation of United Nations Security Council Resolution (UNSCR) 2178(6)(a) (2014) Among other things, this binding resolution requires all United Nation Member States to establish serious criminal offences for their nationals travelling or attempting to travel to perpetrate, plan, prepare or participate in terrorist acts or training".
Ministry of Justice "Regulatory Impact Assessment Coversheet: Strengthening New Zealand's counter-terrorism legislation" 13 April 2021 (**RIA Part 2**) notes further at p 2 and 12 that in *R v S* [2020] NZHC 1710, the High Court held that planning or preparing to carry out a terrorist act is not criminalised in the TSA. The judge noted at [52] that "the absence of an offence of planning or preparing a terrorist act (falling short of existing inchoate offences) could be an Achilles heel". By contrast, Australia and the United Kingdom have this offence.
Note also that Clause 35 proposes to insert Schedule 4D to the Bill, containing the full text of UNSCR 2178 (2014), which at [12] recalls the original obligations on Member States to criminalise "the financing, planning, preparation or perpetration of terrorist acts" in accordance with UNSCR 1373 (2001).

expanded powers, such as through regular reviews and remedial provisions as detailed in the final sections of this submission.

4. The Commission is concerned that the legislation is being passed quickly, without active engagement with tangata whenua as Te Tiriti partners[5]. The Crown must also ensure fulsome engagement with other affected communities, particularly members from Muslim communities.[6]

5. The Commission is concerned that without adequate human rights safeguards, these proposed changes not only threaten the human rights of vulnerable individuals but could also lead to greater national instability through undermining social cohesion.[7] Accordingly, the Commission urges the Committee to:

    - Ensure active engagement with tangata whenua in accordance with Te Tiriti o Waitangi;

    - Ensure that appropriate time and opportunity is provided for genuine public involvement and input on wider issues involving terrorism and extremism, especially from marginalised and affected communities such as those from Muslim communities; and

    - Ensure that the existing legislation and any legislative changes fully adhere to and integrate human rights norms.

[5] See paragraph 9 below.

[6] The former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UNSRCT), Martin Scheinin has highlighted that "Because of the potentially profound implications of counter-terrorism legislation, it is also important that Governments seek to ensure the broadest possible political and popular support for counter-terrorism laws through an open and transparent process". See: *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin: Ten areas of best practice in countering terrorism* UN Doc A/HRC/16/51, 22 December 2010 at [13].
The Commission also highlights the concerns of the Human Rights Committee in its *Concluding Observations on the sixth report to New Zealand* UN Doc CCPR/C/NZL/CO/6, 28 April 2016 at [13] – [14] which notes the speed at which the previous counter-terrorism amendments were made without adequate public consultation, and its recommendations to the Crown to fully integrate human rights into its legislative and policy actions to combat terrorism, while also ensuring wide public consideration and consultation of legislative amendments.

[7] In this respect, the Commission reiterates its concerns set out at paragraph 2 of our submission to the Foreign Affairs, Defence and Trade Committee on the Countering Terrorist Fighters Legislation Bill, dated 27 November 2014 (**2014 Submission**). The Commission reiterates the importance of the Crown engaging with tangata whenua and affected communities, through developing and strengthening relationships between the Crown and affected communities and thus fostering social and institutional solutions to the broader issues of terrorism and extremism. The issue of social cohesion is also discussed at length at Part 9 of the RCOI Report. Figure 48 at paragraph [1.21] of Part 9 reflects the differing levels of engagement required to empower communities: first informing them what is happening; seeking feedback, working together to identify issues and develop solutions, collaborating to design solutions, then allowing communities to make decisions which government implements. In this instance, it appears affected communities were not engaged even at the lowest levels through being directly informed about the legislation or asked to provide feedback for consultation.

Te Tiriti o Waitangi

6. Te Tiriti o Waitangi requires the State to act in partnership with tangata whenua (article 1), protect tino rangatiratanga (article 2), advance equity for Māori (article 3) and enable Māori customary practices and beliefs (oral article 4).

7. New Zealand is also party to the Convention on the Elimination of all forms of Racial Discrimination (CERD), which – together with the United Nations Declaration on the Rights of Indigenous People (UNDRIP) – reinforces the Crown's obligations under Te Tiriti o Waitangi.[8] Adopted in 2007, UNDRIP elaborates on the universal right to self-determination affirmed under Articles 1 of the ICCPR and ICESCR by affirming indigenous peoples' rights to "maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State".[9]

8. Given the overlapping nature of the respective authorities of the Crown and Māori, the relationship between the parties must be "conducted honestly, fairly, and in good faith in the spirit of cooperation and partnership".[10]

9. While the Regulatory Impact Assessment to the Bill (RIA) acknowledges the "constitutional significance" of the Bill and its potential to disproportionately impact Māori[11], it notes that it has not undertaken "targeted consultation with the public, including non-government organisations, interest groups and iwi/Māori given the time constraints and sensitive and restricted nature of the subject matter".[12] Nor does it appear there are any specific public consultations planned prior to the introduction of the Bill.

10. Despite not having consulted with tangata whenua, the RIA notes that the Crown does not consider the proposed offences pose any risk to the right of Māori to self-determination guaranteed by Te Tiriti and international law.[13] However, since the advent of colonisation, Māori have been othered, criminalised and subjected to persistent systemic discrimination

[8] Although not a treaty, the Waitangi Tribunal has confirmed that the Declaration has "significant normative weight" and can be taken into account in assessing the Crown's obligations under Te Tiriti o Waitangi. See Waitangi Tribunal *Whaia te Mana Motuhake - In Pursuit of Mana Motuhake*: *Report on the Maori Community Development Act Claim* (Wai 2417, 2015) at 34 and 39.

[9] UNDRIP, art 5.

[10] Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkinga Whāruarua Oranga Tamariki Urgent Inquiry, Pre-Publication Version* (Wai 2195, 2021) at 17.

[11] RIA Part 1, above n 2, at 14.

[12] RIA Part 1, above n 2, at 8.

[13] RIA Part 1, above n 2 notes at p 14 that the Ministry conducted its own assessment of the proposals against the Treaty principles and "on balance, consider[s] the proposed safeguards sufficiently mitigate risk. For example, we have considered whether support for self-determination or indigenous rights movements are likely to be captured by the proposed offences. We consider that protections built into the legislation help ensure peaceful advocacy is not criminalised. Section 5(5) of the TSA states that if a person engages in any protest, advocacy, dissent, strike, lockout, or other industrial action, it is not, by itself, a sufficient basis for inferring that the person is conducting terrorist activity".

through the criminal justice system[14]. Parihaka and Takaparawhā are two past examples of Māori peaceful protest being criminalised and the exercise of tino rangatiratanga impinged upon, in breach of Te Tiriti. Moreover, the last time counter-terrorism powers of the police were expanded under the TSA, Police conducted illegal surveillance[15] and unlawful and unreasonable raids against community members in Tūhoe under "Operation Eight", on grounds of investigating potential breaches of the TSA.[16]

11. The Commission is concerned that in the absence of partnership engagement with tangata whenua and strong human rights protections, the expansion of police powers proposed by the new legislation risks perpetuating systemic racism against tangata whenua in the criminal justice system. This could increase disproportionate surveillance and criminalisation of Māori communities.

12. **The Commission urges the Crown to uphold its obligations under Te Tiriti through allowing ample time and opportunity to actively engage with tangata whenua on all aspects of the Bill.**

Counterterrorism and Human Rights

Overview

13. The former Special Rapporteur on Terrorism and Human Rights (UNSRCT) has emphasized that that effective counter-terrorism measures and the protection of human rights are not contradictory interests, but "complementary and mutually reinforcing goals".[17] Therefore, the protection and advancement of human rights is "an indispensable part of a successful medium- and long-term strategy to combat terrorism". This is reinforced in the four pillars of the United Nations Global Counter-Terrorism Strategy (UNGCTS)[18], which uphold the obligations of all member states to take "practical steps, individually and collectively, to prevent and combat terrorism", through respecting human rights and the rule of law.

---

[14] Criminal law professor Khylee Quince has detailed the long history of fraught relations between Māori and the Police characterised by "longstanding tensions" and "mutual distrust". See Khylee Quince "Chapter 12: Maori and the criminal justice system in New Zealand" in Julia Tolmie and Warren Brookbanks (eds) *Criminal Justice in New Zealand* (Lexisnexis, 2007) at 13-14. Professor Quince notes further at 2 that Māori are "3.3 times more likely to be apprehended for a criminal offence than non-Māori and seven times more likely to receive a custodial sentence upon conviction". Recent reporting revealed that Māori made up more than 70 per cent of those on the receiving end of police force in the Whanganui district in 2020. See Radio New Zealand "Police stats show 'systemic racism' – iwi leader", 27 May 2021: https://www.rnz.co.nz/news/ldr/443512/police-stats-show-systemic-racism-iwi-leader

[15] In *Hamed v R* [2011] NZSC 101; [2012] NZLR 305, the majority of the Supreme Court held that the police had improperly obtained covert surveillance footage of the alleged training camps, in breach of s 21 of the New Zealand Bill of Rights Act 1990.

[16] *Operation Eight: The Report of the Independent Police Conduct Authority* May 2013.

[17] See UNSRCT Report, above n 6 at [8].

[18] UN Doc A/RES/60/288, 20 September 2006. The United Nations Global Counter-Terrorism Strategy (UNCTS) – which Member States agreed to unanimously in 2006 illustrates a "common strategic and operational approach to fighting terrorism." The UNCTS is comprised of four pillars: 1. Addressing the conditions conducive to the spread of terrorism; 2. Measures to prevent and combat terrorism; 3. Measures to build states' capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard; and 4. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis for the fight against terrorism.

14. New Zealand is a party to many international human rights conventions, including the International Covenant on Civil and Political Rights (ICCPR) which is given effect to through the New Zealand Bill of Rights Act 1990 (NZBORA)[19]. Accordingly, while the Commission appreciates that the Bill seeks to increase New Zealand's compliance with UNSCR 1373 and 2174, in doing so, the New Zealand Government must also comply with human rights law[20]. That is, while some rights are absolute, such as the right to life and freedom of thought, other limitations on rights (such as freedom of movement and freedom of association engaged via the Bill's proposed legislative changes), may only be limited when they are prescribed by law and go no further than necessary in pursuing the legitimate objective of preventing, deterring and punishing terrorist activity.[21]

Concerns for Muslim communities and individuals

15. Section 5(1) of the Interpretation Act 1999 provides that "[t]he meaning of an enactment must be ascertained from its text and in light of its purpose". The Commission notes that the interpretation clauses in the Bill continue to focus the current legislation on Islamic-claimed terrorist groups, while for example, omitting to refer to the broader list used by the New Zealand Police in respect of UNSC resolution 1373 which include the terrorist responsible for the March 15 attacks.[22] This is worrisome given the fact that Muslims were specifically targeted in the March 15 attacks, against the backdrop of rising far-right extremism globally[23], and the fact that expansive counter-terrorism laws and policies in the Western world post

---

[19] See long title to NZBORA which describes it as:
"An Act—
(a)to affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and
(b)to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights".
The UNSRCT highlights in her latest report that "the target population of the prevention and countering of violent extremism is by nature much broader than that of counter-terrorism measures, which creates a compelling need for States and national and international policymakers to apply a fine-grained human rights and rule of law analysis to the domain". See *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc A/HRC/43/46, 21 February 2020 at [2].

[20] Human Rights Watch (HRW) has highlighted the issues with States implementing changes to legislation in accordance with UNSCR's, while failing to ensure adequate compliance with human rights norms at the same time, as required by those resolutions and international human rights norms. HRW highlighted that legislation relating to the definition of terrorism and precursor offences – such as those at issue in this Bill – are most at risk of breaching human rights. See: Human Rights Watch "In the Name of Security: Counterterrorism Laws Worldwide since September 11" June 29, 2012, www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11

[21] NZBORA, s 5. In *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64], [120]–[124], [203]–[205] and [272], the Supreme Court held that where a BORA right is limited by legislation, a proportionality analysis is required to determine whether the limitation is justified under s 5. Under that approach, the limitation must be rationally connected to its objective and impair the right or freedom in question as little as possible. See also Article 12(3). See also BORA Vet Advice: Counter-Terrorism Legislation Bill (PCO 22558/1.41) – Consistency with the New Zealand Bill of Rights Act 1990 Our Ref: ATT395/306, 6 April 2021 (hereafter **AG s 7 Report on CT Legislation**) at [9].

[22] New Zealand Police "Lists associated with Resolution 1373" https://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities/lists-associated-with-resolution-1373

[23] See Foreign Policy, Heath Ashby "Far-Right Extremism is a Global Problem: And it is time to treat it like one", January 15, 2021: https://foreignpolicy.com/2021/01/15/far-right-extremism-global-problem-worldwide-solutions/.

9/11 have led to increasingly discriminatory targeting and scapegoating of Muslim individuals[24]. Our key concerns in this respect are set out below:

- First, the purpose of the Bill is set out at s 3. The amendments to s 3(c) reinforce New Zealand's commitments to fighting Islamic-claimed terrorism by reference to UNSCR's relating to Al-Qaida, the Taliban and now also ISIL (Da'esh). The Bill also seeks to updates the definition of "United Nations listed terrorist entity" under the s 4 Interpretation section, to remove Usama Bin Laden and include ISIL (Da'esh) or an ISIL (Da'esh) entity.[25] Meanwhile, the Bill does not explicitly highlight its commitment to fighting other forms of terrorism, such as far-right terrorism. Moreover, the New Zealand Government has been criticised for not updating its list of designated terrorist entities to include any far-right extremist groups.[26] It has not done so, despite the broad discretion given to the Prime Minister to make such designations under the TSA[27], and the inclusion of such groups by countries such as Australia[28], Canada[29], and the United Kingdom.[30]

- Second, the Bill lacks any mention of New Zealand's human rights obligations under domestic law (such as NZBORA) or international law such as under the UNGCTS[31], which highlights the need for counter-terrorism laws to promote a culture of peace and justice. The Commission notes the contrast between this Bill and s 3(c)(i) and (ii) of the Intelligence and Security Act 2017, (ISA) which sets out that the purpose of that Act "is to protect New Zealand as a free, open and democratic society by ensuring that the functions of the intelligence and security agencies are performed in accordance with New Zealand law and all human rights obligations recognised by New Zealand law; and… in a manner that facilitates effective democratic oversight".

[24] Amnesty International, "Europe: How to combat counter-terrorr discrimination" February 3, 2021, www.amnesty.org/en/latest/news/2021/02/europe-how-to-combat-counter-terror-discrimination/

[25] See the definition "United Nations listed terrorist entity" under s 4 of the TSA compared with the proposed new s 4(9)(e) and (f) of the Bill.

[26] Newsroom, Marc Daalder "NZ left behind as Australia designates far-right terror group" 8 April 2021, https://www.newsroom.co.nz/nz-left-behind-as-australia-designates-far-right-terror-group. See also New Zealand Police "Designated terrorist entities" at https://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities. The only far right-wing entity designated as a terrorist by the New Zealand government is the March 15th terrorist.

[27] Sections 20 – 23 of the TSA gives the Prime Minister discretion to designate entities as terrorist entities on an interim or final basis. The definition requires that "the Prime Minister believes on reasonable grounds that the entity has knowingly carried out, or has knowingly participated in the carrying out of, one or more terrorist acts" and specifically notes that the "entity ... need not be in New Zealand".

[28] Reuters "Australia designates far-right group as terrorist organization", 22 March 2021: https://www.reuters.com/article/us-australia-security-idUSKBN2BE0KD

[29] NPR "Proud Boys Named 'Terrorist Entity' in Canada, 2 May 2021: https://www.npr.org/2021/05/02/992846086/proud-boys-named-terrorist-entity-in-canada

[30] See designation of neo Nazi / white supremacist groups, Feuerkrieg Division (FKD); "National Action" Sonnenkrieg Division (SKD) and Atomwaffen Division (AWD) also known as National Socialist Order (NSO) in United Kingdom Home Office Policy Paper "Proscribed terrorist groups or organisations" Updated 23 April 2021: https://www.gov.uk/government/publications/proscribed-terror-groups-or-organisations--2

[31] UN Doc A/RES/60/288, 20 September 2006. See above n 18

16. The Commission is concerned that the legislation maintains a focus on Islamic-claimed terrorism extremism while omitting to acknowledge the rise of far-right extremism or provide sufficient human rights safeguards in the proposed legislation.[32] The Government must therefore ensure that it allows sufficient time and opportunity to fully engage with Muslim communities and individuals on the proposed changes to the legislation.

17. **The Commission recommends that the Crown:**

    (a) Amend the purpose section of the Bill to align with New Zealand's human rights obligations;

    (b) Rebalance the Bill's current focus on Islamic-claimed terrorism so that it ensures a sufficient and proportionate focus on far-right extremism and other terrorist threats; and

    (c) Ensure that appropriate time and opportunity is provided for genuine public involvement from marginalised and affected communities, especially those from Muslim communities.

Human rights analysis of legislative changes

Broadened definition of "terrorist act"

18. Section 5 of the TSA criminalises three categories of conduct: acts carried out against a specified terrorism convention,[33] terrorist acts committed in an armed conflict as defined in s 4(1),[34] or acts satisfying the requirements of s 5(2) and (3) of the TSA.[35]

19. The international model definition of terrorism is set out as follows (**emphasis** added):[36]

---

[32] Amnesty International Europe: A Human Rights Guide for Researching Racial and Religious Discrimination in Counter-Terrorism, 3 February 2021: See https://www.amnesty.org/en/latest/news/2021/02/europe-how-to-combat-counter-terror-discrimination/. See also Part 3, chapter 4 of the RCOI Report which details what communities told the Royal Commission about the broader context in which the terror attack occurred, noting the need to increase trust between authorities and the Muslim community instead of "being engaged with like [they] are a threat" [4.49]. Because of the persistent focus of the counter-terrorism effort on Islamic-claimed extremism, coupled with a lack of understanding of Muslim culture, one Muslim individual describes how the authorities failed to catch the March 15 terrorist because "[The authorities] were watching us, not watching our backs" [4.42]. The report notes at [4.48] "some members of the Muslim Community Reference Group who had reported concerns about racism, discrimination and hate crimes to Public sector agencies including New Zealand Police, but they felt that their concerns were often not taken seriously or followed up. They told [the Royal Commission] that 'we actually need to see evidence of [Public sector] agencies acting on our concerns in order for us to trust them'. In their view, counter-terrorism agencies are not identifying extremists (particularly right-wing extremists or white supremacists) due to preconceptions and bias about who poses a threat to New Zealand. In particular, we were told about the vulnerability of young men to sophisticated recruitment strategies from extreme right-wing groups and a belief that New Zealand's counter-terrorism agencies are not picking up harmful extremists".

[33] TSA, s 5(1)(b).

[34] TSA, s 5(1)(c).

[35] TSA, s 5(1)(a).

[36] See UNSRCT Report, above n 6 at [28].

1. The action:

(a) Constituted the intentional taking of hostages; or

(b) Is intended to cause **death or serious bodily injury** to one or more members of the general population or segments of it; or

(c) Involved lethal or serious physical violence against one or more members of the general population or segments of it;

And

2. The action is done or attempted with the intention of:

(a) Provoking a **state of terror** in the general public or a segment of it; or

(b) **Compelling a Government** or international organization to do or abstain from doing something; and

3. The action corresponds to:

(a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or

(b) All elements of a serious crime defined by national law.

20. Section 5 currently provides that (**emphasis** added):

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

(a) to **induce terror** in a civilian population; or

(b) to **unduly compel** or to force a government or an international organisation to do or abstain from doing any act.

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

(a) the **death of, or other serious bodily injury** to, 1 or more persons (other than a person carrying out the act):

(b) a serious risk to the health or safety of a population:

(c) **destruction of, or serious damage to, property** of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):

(d) serious interference with, or serious disruption to, an **infrastructure facility**, if likely to endanger human life:

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

21. As set out above, the international model definition requires an intention to commit an act of violence against a person or persons, while the current definition extends to an intention to

cause destruction of, or serious damage to property.[37] The new proposed definition strays even further from the international model definition through:[38]

- Lowering the mens rea requirement from requiring an intention to induce "terror in a civilian population" to inducing "fear in a population", and from "unduly compel" to "coerce" a government or international organisation to act (or not act) in s 5(2)(a)-(b).

- Expanding the types of property that may be affected and lowering the level of damage that may result from the terrorist action, by replacing "infrastructure facility" with "critical infrastructure" and "devastate" with "cause major damage to" in s 5(3)(d) – (e).

22. The Bill also expands s 5(2) above by replacing "for the purpose of" with "one or more of the purposes which are or include". The reason for committing the terrorist act is not a concern for the international model definition. However, by sanctioning acts that are committed in the name of a particular ideological, political, or religious cause, the provision engages the right to freedom of expression (s 14), the right to manifest religion and belief (s 15) freedom of peaceful assembly (s 16) and freedom of association (s 17)[39].

23. The rationale for expanding the definition of "terrorist act" is to "improve the clarify of the law and ensure it is fit for purpose" in order to give agencies such as the New Zealand Police "the confidence to use the definition appropriately".[40] However, the Commission considers that by expanding the definition of terrorism beyond what is stipulated under the international model definition, the new provision is at risk of being used inappropriately, beyond what is a necessary and proportionate limitation on the rights affirmed by NZBORA.[41]

24. **The Commission recommends that the Bill adopt a definition of terrorism that aligns with the international model definition.**

[37] It also goes beyond the requirements of UNSCR 1566 UN Doc S/RES/1566, 8 October 2004 which calls upon States to cooperate fully to prevent and punish acts that have the following 3 cumulative characteristics at [3]: a) Acts, including against civilians, committed with the intention of causing death or serious bodily injury, or the taking of hostages; and b) Irrespective of whether motivated by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature, also committed for the purpose of provoking a state of terror in the general public or in a group of persons or particular persons, intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; and c) such acts constituting offences within the scope of and as defined in the international conventions and protocols relating to terrorism.

[38] See s 6 of the Bill.

[39] See also Articles 19, 18, 21 and 22 of the ICCPR, respectively.

[40] RIA Part 2, above n 4 at 3.

[41] The Commission refers to [9] of the AG s 7 Report on CT Legislation and highlights that criminal actions which fall short of the international definition of terrorism can be effectively and proportionately regulated by the criminal law in relation to criminal damage, public order or assault.

New offences: travelling to carry out terrorist act

25. Clause 16 proposes to insert s 13F, which introduces a new offence of travelling "to, from, or via New Zealand" with the intention of committing a "specified offence". Subsection (3) lists 14 specified offences under the Act, including the new s 6B (planning or preparations to carry out a terrorist act).

26. This new travelling offence engages the right to freedom of movement under s 18(2) and (3) of the NZBORA[42] which may only be subject to reasonable limits as prescribed by law and as can be demonstrably justified in a free and democratic society.[43]

27. However, because the travelling offence must be committed with the intention of committing a "specified offence" the legitimacy of the travelling offence from a human rights perspective depends on the extent to which these new "specified offences" conform with the principles of legality, necessity, and proportionality as required under ICCPR. This submission addresses two new specified offences of planning/preparing a terrorist act and financing/providing material support for terrorism in the sections below.

New offence: planning or preparing to carry out a terrorist act

28. Clause 9 of the Bill inserts s 6B into the TSA which expands the definition of "terrorist act" to include "planning or other preparations to carry out the act, whether it is actually carried out or not".[44] The prosecution must prove that a person planned or prepared to commit an act with the intention of carrying out a terrorist act as defined in s 5.[45]

29. But for the issues identified by the RCOI Report[46] and those highlighted in our recommendations above, the Commission considers that the requirement that the

---

[42] See also Article 12, ICCPR.

[43] NZBORA, s 5. In *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64], [120]–[124], [203]–[205] and [272], the Supreme Court held that where a BORA right is limited by legislation, a proportionality analysis is required to determine whether the limitation is justified under s 5. Under that approach, the limitation must be rationally connected to its objective and impair the right or freedom in question as little as possible. See also Article 12(3) ICCPR and Human Rights Committee *General Comment No.27: Article 12 (Freedom of Movement)* UN Doc CCPR/C/21/Rev.1/Add.9, 1 November 1999.

[44] Section 6B(1). At Part 8, [30] of the RCOI Report, the Royal Commission notes that UNSC Resolution 2178 of 2014 also requires states to criminalise those who travel for the purpose of preparing or participating in terrorist acts.

[45] This new offence purports to respond to the High Court's criticism of the gap in the New Zealand law with respect to planning and preparation of terrorist acts in of *R v S* [2020] NZHC 1710 (see above n 4) as well as Recommendation 18 of the RCOI Report which highlights New Zealand's obligation to criminalise acts of planning and preparation for terrorism under Security Council Resolution 1373. At paragraph 13.4, the RCOI report notes that UNSC Resolution 2178 of 2014 also requires states to criminalise those who travel for the purpose of preparing or participating in terrorist acts.

[46] In the context of the March 15 terror attacks, Part 8 of the RCOI Report at [26] – [28] notes that this planning offence would have made it easier for the police "to cancel [the terrorist's] firearms license and seize his firearms" and/or "require him to return to Australia…" However, "[t]o be reasonably confident of conviction, New Zealand Police would [still] probably have had to wait until the morning of 15 March 2019 when the individual departed Dunedin for Christchurch". Accordingly, even if this new planning provision were in place at the time, the chance of authorities using it to prevent the terrorist attack still appears slim. Note also the issues

prosecution must prove that a person planned or prepared to commit an act with the intention of carrying out a terrorist act constitutes a justified limitation in pursuit of the legitimate aim of preventing, deterring and punishing criminal activity.

Extension of offence of financing terrorism to provision of 'material support' for terrorist acts or entities

30. The Bill amends ss 8 and 10 to criminalise the financing and provision of material support for terrorism (s 8) and making property and material support available to designated terrorist entities (s 10).[47] Through the insertion of a new definition of "material support" in s 4 as proposed under Clause 5(8) of the Bill, the breadth of potentially criminal activities covers "the full range of material support that people are providing for terrorist acts/to entities that carry out terrorist acts"[48] including but not limited to, giving advice, services, skills, accommodation, equipment, or knowledge.[49] Under the proposed legislation, the support must be provided wilfully or recklessly and without lawful justification or reasonable excuse. Humanitarian-based support provided in good faith for "essential human needs" is excluded from this provision.[50]

31. The Commission notes that this new provision may be subject to a challenge under NZBORA on the basis that it constitutes an unjustified restriction on the rights to freedom of expression (s 14), the right to manifest religion and belief (s 15) freedom of peaceful assembly (s 16) and/or freedom of association (s 17) under NZBORA[51] for the reasons set out below:

    - First, the non-exhaustive list of potential activities deemed "material support" could lead to uncertainty about the type of actions that are covered, leading to unnecessary and disproportionate targeting of innocent individuals[52], while also increasing the risk of dissuading individuals and aid organisations from providing legitimate donations or other assistance to overseas organisations.

---

of systemic unconscious bias felt by Muslim individuals and communities highlighted in Part 4 of the RCOI Report, detailed at n 32 above.

[47] Clauses 10 and 13 of the Bill.

[48] RIA Part 1, p 24.

[49] Clause 5(8)(b) of the Bill.

[50] See clause 5(8) of the Bill (inserting definition of 'material support'). Clause 5(a)(ii) excludes from the definition of "material support" humanitarian-based support that "does or may do more than only satisfy essential human needs of those to whom, or for whose benefit it is provided, (A) in good faith for genuine humanitarian reasons; and (B) impartially or neutrally as between people who have those needs".

[51] See also Articles 19, 18, 21 and 22 of the ICCPR, respectively.

[52] At Part 3 chapter 4 [54] of the Royal Commission report, Muslim community members told the Commission that they "believe the national security system is prejudiced against them, and they feel targeted. [The Commission was] told 'it is no secret that prior to these attacks, the Muslim community was under the microscope for being a potential threat to national security'". The Commission "also heard from non-Muslim communities who reported feeling targeted by the intelligence and security agencies".

- Second, requiring a mens rea standard of recklessness, as opposed to intent only, is contrary to international standards,[53] which could unnecessarily increase the size of the target population and pose an excessive restriction on rights[54].

32. Moreover, aside from the exclusions proposed under Clause 5(8)(a)(ii) that focus squarely on humanitarian needs, it is not clear what would constitute a "lawful justification" or "reasonable excuse" for someone to escape liability under this section[55].

33. **The Commission recommends that the Bill is amended to:**

- **Restrict the types of activities defined as "material support" to an exhaustive list of activities that directly contribute to a terrorist act;[56]**

- **Require that the support is provided intentionally; and**

- **Clarify the types of activities that would constitute a "lawful justification" or "reasonable excuse" for someone to escape liability under this section, by providing a non-exhaustive list of examples that would qualify.**

Extension of control orders

34. The COA allows the High Court on application by the Commissioner of Police to impose significant restrictions on liberty, freedom of movement, expression and association (akin to parole or extended supervision order conditions), as set out under s 17 of the Act[57], if the court is satisfied that the person is a "relevant person"[58], and that such orders are necessary

---

[53] See UNSCR 1373 (2001) at 2 UNSCR 2178 (2014) at 5 which direct States to criminalise "the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts".

[54] This concern is aggravated by the overbroad definition of "terrorist act" referred to above, contrary to international standards.

[55] The RIA Part 1 at 5 notes that "a reasonable excuse could include, for example, the provision of food that does no more than satisfy essential human needs" which would come under the exclusions provided under s 4(1).

[56] A "terrorist act" being one that is properly defined in accordance with international standards.

[57] Examples include (a) restrictions/prohibitions on being in certain places without a Police escort,(c) communicating with certain individuals, (e) accessing or using specific forms of technology, including the internet, (h) holding accounts or using certain financial services, (j) remaining at a specified address between specified times or on specified days, (n) requirement to submit to electronic monitoring and (o) requirement to undertake alcohol and drug assessments (o).

[58] As defined in s 6(1) as a person who is 18 years old or older, who is or may be coming to New Zealand or has arrived in New Zealand, and who before their arrival in New Zealand—

(a) engaged in terrorism-related activities (see section 8(1)) in a foreign country; or

(b) travelled, or attempted to travel, to a foreign country to engage in terrorism-related activities in a foreign country; or

(c) was convicted in a foreign country of an offence because of conduct that is or includes engaging in terrorism-related activities in a foreign country; or

(d) was deported from, had a visa cancelled by, or had any passport, citizenship, or nationality revoked by, a foreign country for reasons that are or include a security risk related to conduct that is or includes engaging in terrorism-related activities in a foreign country; or

(e) is or was the subject of any control order regime, or other analogous supervisory regime, in a foreign country, because of conduct that is or includes engaging in terrorism-related activities in a foreign country. as a person who is 18 years or older.

and appropriate to protect the public from terrorism, and prevent engagement in terrorism-related activities, and support the person's reintegration or rehabilitation.[59]

35. Before imposing any requirements, the court must consider how such requirements would impact the person's financial, health, or other personal circumstances as well as any other matter the court thinks fit, including whether the requirements are justified limits on rights and freedoms under NZBORA.[60]

36. When control orders were introduced under the United Kingdom's Anti-Terrorism Crime and Security Act 2001, they were viewed as "an unwelcome but appropriate means of addressing a small number of cases" when there was no scope for prosecuting precursor offences such as the ones set out above.[61]

37. In this case, however, the proposed legislation not only introduces precursor offences but also extends the control orders regime under s 6 to include not only those suspected of terrorism overseas returning to New Zealand, but also those who have already served their sentence of imprisonment for a terrorism offence. It does this by extending the definition of "relevant person" to include both "relevant returner" and "relevant offender". The current provisions ss 15 and 16 now apply to "relevant returners" as defined under s 6(1)[62] while the proposed new provisions ss 16A and 16B apply to "relevant offenders" or persons who have already served their sentence of imprisonment for a terrorism offence as defined under s 6(5).[63]

38. By extending the control orders to persons who have already served their sentence of imprisonment, these proposed changes engage the rights secured by s 22[64], s 25(g)[65] and s

---

[59] Section 12(2).

[60] Section 12(3)(a) – (b).

[61] Lord Carlile of Berriew, Independent Reviewer of Terrorism Legislation, *Report on the operation in 2005 of the Terrorism Act 2000*, May 2006, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243589/9780108509278.pdf, accessed June 2021. In *Secretary of State for the Home Department Respondent v. E and another (Appellant)* [2007] UKHL 47, the Court holds at [14] that" the control order regime is not intended to be an alternative to the ordinary processes of criminal justice, with all the safeguards they provide for those accused, in cases where it is feasible to prosecute with a reasonable prospect of success".

[62] See above n 58.

[63] Being a person who is 18 years or older who is:

(a) convicted under the new Counter-Terrorism Legislation Act 2021; and
(b) sentenced to a determinate sentence of imprisonment; and
(c) whose statutory release date, or whose last day as an offender who is subject to release conditions, for 1 or more sentences of imprisonment that are or include that determinate sentence of imprisonment, is after that commencement date.

[64] Section 22: Liberty of the person – Everyone has the right not to be arbitrarily detained or arrested. This issue of the right to freedom from arbitrary detention is discussed in detail in the Attorney-General's Section 7 report on the Terrorism Suppression (Control Orders) Bill (version 22), Ref ATT395/302, 7 October 2019 at paragraphs 6 – 14. The Commission agrees with the Attorney-General's assessment that by limiting the restriction on liberty to 12 hours per day, this does not amount to a "detention" for the purposes of s 22. The report did note however that "[t]he imposition of significant residential conditions, particularly where accompanied by intensive personal supervision or electronic monitoring, could constitute a detention rather than simply a restriction on the offender's freedom of movement".

[65] Section 25(g): Minimum standards of criminal procedure - Everyone who is charged with an offence has, in relation to the determination of the charge…the right, if convicted of an offence in respect of which the penalty has been varied between the commission and the offence and sentencing, to the benefit of the lesser penalty.

26(2) of the NZBORA[66]. The section below addresses the key right not to be punished twice for the same offence, as affirmed in s 26(2) of NZBORA.

Right to not be punished twice for the same offence

39. Section s 26(2) of NZBORA affirms that "No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again". Similarly, Article 14 of the ICCPR protects against double jeopardy by ensuring that no one is liable to be tried or punished again for an offence for which they had already been finally convicted or acquitted in accordance with the law. Article 15 also protects against retroactivity, providing that no one shall be held guilty of a criminal offence for an action that did not constitute a criminal offence at the time it was committed, nor be subject to a heavier penalty than the one that was applicable at the time when the offence was committed.

40. In *R v Poumako*[67], the Court of Appeal elaborated on the significance of this right under s 26(2) (at [73]):

> *"It is a fundamental right that no one should be held criminally liable for an act or omission which did not constitute an offence at the time it was committed,* ***or be subjected to a sentence which was not in force at that time*** *(emphasis added). A defendant's conduct is to be judged by the law at the time of the conduct; not in retrospect. If Parliament chooses to depart from this principle it must surely take care to ensure that it does so with due deliberation and with firm adherence to proper form."*

41. In determining whether s 26(2) is triggered under this proposed provision, the question is whether the control orders enable the Court to impose a retrospective criminal penalty, after the person has served their sentence.

42. The United Nations Human Rights Committee notes that the determination of a criminal sanction will depend on its "purpose, character or severity".[68] In *Belcher v Chief Executive*[69], the Court of Appeal dealt with a similar issue in respect of extended supervision orders (ESO's) imposed on persons convicted of a specified sexual offence involving a child victim, who receive finite terms of imprisonment.[70] The Court found that imposing onerous restrictions connected to a previous conviction such as significant restrictions on movement and association constituted a retrospective criminal penalty in breach of s 26(2), which was not capable of justification under s 5.

43. In the former Attorney-General's section 7 report on the original Control Orders Bill, he notes the similarities between the ESO scheme and the Control Orders one but ultimately finds that

---

[66] "No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again".

[67] [2000] NZCA 69; [2000] 2 NZLR 695(CA).

[68] Human Rights Committee, *General Comment No. 32 (2007) on article 14: the right to equality before courts and tribunals and to a fair trial*, UN Doc CCPR/C/GC/32 at [15].

[69] *Belcher v Chief Executive of the Department of Corrections* (2006) NZCA 262 [2007] 1 NZLR 507 (CA).

[70] Under the ESO scheme, after completing an assessment of the offender's risk of re-offending, the Department of Corrections could apply to the sentencing court for an ESO, on grounds of there being a substantial risk of re-offending beyond the period of parole or release conditions.

"on balance, control orders are primarily civil in nature due to the fact that the entry point into the scheme is not necessarily a prior conviction, sentence, or even proof to the criminal standard that conduct occurred; and their preventative purpose.[71] By contrast, the former Attorney-General – like the Court of Appeal – found the ESO scheme inconsistent with the NZBORA, as "[t]he state should not detain citizens solely in the basis of preventing future offending, nor should it punish offenders twice for the same offence".[72]

44. In this instance, the proposed provisions are directly linked to the prior conviction as under the ESO scheme, which could constitute an unjustified breach of s 26(2) of the NZBORA. The Commission agrees with the Attorney-General's assessment that a determination of whether a control order amounts to a penalty will depend on the severity of its terms.

45. **The Commission recommends that the Committee closely review the proposed extension of the control orders scheme to those who have already served their sentence of imprisonment for terrorism-related offences, to ensure that the proposed restrictions do not enable the Crown to breach its obligations under s 26(2) of the NZBORA.**

Extension of warrantless powers for capturing terrorist acts

Right to protection against unreasonable search and seizure

46. Clauses 38 – 41 of the Bill also amend the SSA to allow for warrantless searches of places, vehicles and devices (the latter being limited to 48 hours), if an enforcement officer has reasonable grounds to believe that a terrorist act – including planning and/or preparation – has been or is about to be carried out (ss 15-17 and 48). The extension of powers thus engages Article 17 of the ICCPR, as reflected in s 21 of NZBORA.

47. Article 17 of the ICCPR provides that "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy ... or correspondence … (2) Everyone has the right to the protection of the law against such interference or attacks." Similarly, s 21 of the NZBORA provides that "Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise".

48. The UNSRCT has highlighted that the protection of the right to privacy forms the basis of any democratic society as it is paramount to ensuring the protection of all other rights, including freedom of expression and due process[73]. The New Zealand Law Commission has also confirmed the need for search and surveillance powers to adequately protect human rights, noting "[t]here is little to be gained by empowering agencies of the State to investigate crime if, in doing so, we erode the basic rights we value as a society and create fear or suspicion of

[71] See above n 64 at [26]. The ESO scheme is similar to the Control Orders one, as they can both impose significant restrictions on movement, electronic monitoring and residential restrictions. However, the ESO scheme could impose residential restrictions of longer than 12 hours akin to home detention. A person who breaches the terms of an ESO is liable to up to two years' imprisonment while a person who breaches a control order is liable to up to one year's imprisonment.

[72] *Report of the Attorney-General under the NZBORA on the Parole (Extended Supervision Orders) Amendment Bill*, 2 April 2009 at [23].

[73] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 28 December 2009, UN Doc A/HRC/13/37 at [11].

the government among the very people it exists to protect".[74] Accordingly, the State must ensure that any interference complies with the principles of legality, proportionality and necessity.

49. The Commission recognises that in some instances, a warrantless search power will be required to enable authorities to act quickly to address an escalating threat. The safeguards currently in place to ensure the powers are not misused are that the person exercising the power must have reasonable grounds to believe certain matters essential to the exercise of the power exist (such as a real risk that a person is posing a serious and imminent threat); and that they must only be used in very limited circumstances, that is, when there are exceptional, rapidly evolving circumstances, where a warrant could not have been readily obtained. The second requirement of exceptionality is however only addressed in the common law and could be made clearer if stipulated in the legislation.[75]

50. The Commission refers to the commentary of the Law Commission in its 2016 review of the SSA that the legislation should require enforcement officers to first be satisfied that it is not practicable to obtain a warrant. The approach would proactively promote the protection of privacy interests, rather than enabling authorities to engage warrantless powers then leaving it to the Court to determine the reasonableness of the those powers after the fact (when considering a potential breach of section 21 of NZBORA), and only if the conduct is challenged.[76]

51. In any event, the Commission would recommend against extending warrantless search powers to cover terrorism-related offences, when – as indicated above – those terrorism related offences are not defined in accordance with New Zealand's human rights obligations.

52. **The Commission recommends removing the power of New Zealand Police to conduct warrantless searches of places and vehicles with respect to terrorism-related offences. If the definition of terrorism is amended to align with the international model definition as set out above, the Commission recommends requiring enforcement officers to first be satisfied that it is not practicable to obtain a warrant, before conducting a warrantless search.**

Surveillance of electronic devices

53. With respect to surveillance of electronic devices, the Commission reiterates its concerns set out at paragraph 3.6 of its 2014 Submission[77]. Former Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue has noted

[74] Law Commission *Review of the Search and Surveillance Act – Issues Paper*, November 2016 at [1.2].
[75] See *SF v R* [2014] NZCA 313 at [46] and *Hall v R* [2018] NZCA 279. See also Law Commission *Review of the Search and Surveillance Act – Issues Paper*, November 2016 at [7.10].
[76] Law Commission, above n 74 at 7.28
[77] That is, the Commission finds it difficult to conceive of a situation where the need for surveillance is so immediate that a warrant cannot be obtained. A person does not become radicalised overnight and it takes time to make travel arrangements to leave the country. There should be sufficient time to invoke the process for obtaining a warrant. In our view, therefore, the warrantless search power may amount to unreasonable search and seizure. The Committee should seek to understand exactly why any warrantless surveillance is justified. In the Departmental Disclosure Statement (page 5) it is stated that "a number of hours can pass before a warrant may be issued." As 48 hours is two days the Committee needs to consider whether this length of time is justified.

that while "concerns about national security and criminal activity may justify the exceptional use of communications surveillance" given its significant intrusion on the rights to freedom of expression and privacy, it could still threaten the foundations of a democratic society.[78]

54. Mr La Rue analysed the implications of States' surveillance of communications on the exercise of the human rights to privacy and to freedom of opinion and expression and found that "legislation has not kept pace with the changes in technology".[79] He thus recommended that legislation must stipulate that State surveillance may only occur under the most exceptional circumstances, exclusively under the supervision of an independent judicial authority. He also recommended that individuals should have a legal right to be notified that they have been subjected to communications surveillance or that their communications data has been accessed by the State.[80]

55. Given the high degree of intrusion of the right to privacy caused by warrantless surveillance of electronic devices, even with the proposed safeguards in place, extending police's warrantless search and surveillance powers under the SSA may amount to unreasonable search and seizure, in breach of New Zealand's obligations under Article 17 of the ICCPR and s 21 of the NZBORA.

56. Nevertheless, the Commission recognises that electronic devices can contain crucial evidence which could easily be deleted if it is not seized expeditiously. Accordingly, the Commission considers the Law Commission's "middle option" of requiring a warrant to be obtained before conducting a search of an electronic device, while also providing the power to seize (but not search) the device to preserve the evidence while a search warrant is obtained, could enable police officers to both uphold its human rights obligations while also preserving potentially important evidence[81].

57. **Further to the proposal set out in the Law Commission's Review of the SSA in 2016, the Commission recommends that the Bill should remove the power of the New Zealand Police to conduct warrantless surveillance of electronic devices for terrorist acts. Instead, to comply with human rights standards while also preserving potential evidence, the Bill should empower police to seize a device while a search warrant is properly obtained.**

Other concerns of note

Safeguards: Need for more robust oversight mechanisms

58. The former UNSRCT recommends that:[82]

    1. Proposals for new legislation or amendments to existing laws shall include a written statement bringing to the attention of the Legislature any provision in the proposal

[78] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, UN Doc A/HRC/23/40, 17 April 2013, at [3] and [81].
[79] At [50].
[80] At [81] – [83]
[81] Law Commission, above n 74 at [7.44], [7.54] – [7.57].
[82] UN Doc A/HRC/16/51, 22 December 2010, above n 6 at [7] – [8].

that appears to be inconsistent with the purposes and provisions of norms of international human rights and refugee law that are binding upon the State.

2. The Legislature shall, through a specialized body or otherwise, review and ensure that any law approved by it conforms to the norms of international human rights and refugee law that are binding upon the State.

59. The former UNSRCT also recommends:[83]

- Annual government review of and reporting on the exercise of powers under the counterterrorism laws;
- Annual review by an independent person or body on the operation of the law and its compatibility with human rights, provided with adequate resourcing;
- Periodic Parliamentary reviews facilitated by public consultation.

60. The former UNSRCT notes the importance of reviews as they "enable the Legislature to consider whether the exercise of powers under counter-terrorism laws has been proportionate and thus whether, if they continue, further constraints on the exercise of such powers should be introduced, and/or whether the overall operation of counterterrorism laws calls for their modification or discontinuance".[84]The former UNSRCT notes further that checks should be implemented through internal and external supervision of agencies and public servants, as well as through the adoption and comprehensive implementation of codes of conduct, in accordance with international human rights standards.[85]

61. In New Zealand, s 7 of the NZBORA requires the Attorney-General to bring to the attention of the House of Representatives any provision in a Bill that appears to be inconsistent with any of the rights and freedoms affirmed in the NZBORA. The reports, however, are not binding on the legislature. Moreover, unlike United Kingdom's Independent Reviewer of Terrorism Legislation[86] or Australia's National Security Legislation Monitor[87], New Zealand lacks any independent oversight of terrorism legislation beyond the functions of the Inspector-General, Intelligence and Security Committee and the periodic review process under the Intelligence and Security Act 2017[88], which are focused on the ISA and the intelligence and security agencies only[89].

62. Accordingly, the Commission is concerned that the Bill may not enable sufficient oversight mechanisms for regular reviews of the legislation. Clause 54 of the Bill simply amends s 38 of

[83] At [19] – [20].
[84] At [20].
[85] At [15].
[86] See *Independent Reviewer of Terrorism Legislation* <www.terrorismlegislationreviewer.independent.gov.uk>
[87] Australian Government INSLM Independent National Security Legislation Monitor <www.inslm.gov.au>
[88] See Part 6 and ss 235-241.
[89] The Commission notes further that Government will bring forward an independent statutory review of the ISA from September 2022 to July 2021, pursuant to the RCOI Report's recommendation to review all legislation related to the counter-terrorism effort. However, the Government has omitted to conduct a review of the legislation that is the subject of this Bill.

the COA to require the Minister to commence a review "as soon as practicable" after the second anniversary of the day in which the Counter-Terrorism Legislation Act 2021 comes into force, assessing the "operation and effectiveness of the Act" and preparing a report on that review to be presented to the House of Representatives following consultation with "people and organisations that the Minister thinks appropriate". Further, unlike the review functions in the ISA[90], there is no explicit requirement that the Minister considers human rights or adverse impacts on affected communities in his or her assessment of the operation and effectiveness of the Act.

63. The RCOI Report makes several recommendations for improving oversight of the national counter-terrorism framework[91], via the expansion of the Auditor-General's functions to undertake performance audits across the intelligence and security agencies and the establishment of an Advisory Group on Counter-terrorism comprised of members from the community, civil society, local government and the private sector. However, these recommendations have not been incorporated into this Bill.

64. Accordingly, there appear to be inadequate procedural mechanisms to ensure that the proposed legislation – and the operations conducted under it – adhere to human rights standards. The Commission is also concerned that the Bill is being introduced ahead of any implementation of the RCOI recommendations.

65. **The Commission recommends that the Bill:**

- **Provides for regular scheduled reviews by government and designated independent bodies to ensure its compliance with international human rights standards; and**

- **Incorporates the recommendations of the RCOI for improving oversight of relevant agencies.**

Rights to remedy for breach of human rights via counter-terrorism measures

66. The former UNSRCT notes further that those whose rights have been violated by counter-terrorism law and practice must have free access to speedy, effective, and enforceable remedies. [92]

67. In New Zealand, the courts have affirmed the right of individuals to obtain redress, including declarations of a breach of NZBORA[93] as well as compensation[94] for breaches of the NZBORA. In *Taunoa*[95], the Supreme Court observed – with reference to the broad discretion of the Human Rights Review Tribunal to award damages under s 92M of the Human Rights Act 1993 – that "[e]verything relevant to compensating for what the plaintiff has suffered as a result of

[90] See s 193(1)(e)(i) for example.
[91] See Recommendations 5-8.
[92] UN Doc A/HRC/16/51, 22 December 2010, above n 6 at [22] – [23]
[93] *Attorney-General* v *Taylor* [2018] NZSC 104.
[94] *Simpson v Attorney-General* (***Baigent's Case***) [1994] 3 NZLR 667 (CA).
[95] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

the breach is potentially available here" as part of the "remedial package" including economic loss as well as "compensation for non-economic or intangible damage or detriment".

68. The Commission notes that the ss 171 – 174 of the ISA contain complaint provisions, enabling those who have been adversely affected by acts or omissions of intelligence and security related operations to bring complaints to the Inspector-General. The Bill however provides no such similar provisions.

69. **The Commission recommends inserting a complaints mechanism into the proposed legislation, similar to that provided under the ISA, to enable those whose rights have been violated by operations conducted under the legislation to obtain speedy, effective and enforceable remedies.**

Rights to reparations for victims of terrorism

70. The United Nations has recognised that States have a duty to ensure that victims of crimes of terrorism are able to enjoy rights to a remedy[96]. In March 2021, the Commission reported on the rights to remedy for victims of terrorism in its *Reflections on the Report of the Royal Commission of Inquiry into the terrorist attacks on Christchurch Masjidain on 15th March 2019*.[97] As set out at page 7 of that report, these rights include:

    - Equal and effective access to justice including:
        (i) information about available remedies
        (ii) provision of proper assistance to victims seeking access to justice, including all appropriate legal means
        (iii) development of procedures to allow groups of victims to present claims for reparation and to receive reparation, as appropriate.

    - Adequate, effective and prompt reparation for harm suffered including:
        (i) access to relevant information concerning reparation processes
        (ii) establishing a national programme for reparation and assistance to victims
        (iii) Restitution – which means restoring the victims, so far as possible, to their original situation, and includes restoration of employment
        (iv) Compensation – not just for physical and mental harm suffered, but also compensation for material damage and lost opportunities (such as loss of earnings or business), and the costs of legal or expert assistance.
        (v) Rehabilitation, which includes not only medical and psychological care, but also legal and social services as well.

[96] *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, UN Doc A/RES/60/147, 21 March 2006, Chapter VI, at [11].
[97] New Zealand Human Rights Commission, *Reflections on the Report of the Royal Commission of Inquiry into the terrorist attacks on Christchurch Masjidain on 15th March 2019*, March 2021: https://www.hrc.co.nz/files/3716/1588/7040/HRC_Reflections_on_the_report_of_the_RCI_on_terrorist_attacks_on_Christchurch_Masjidain_FINAL.pdf

(vi) Satisfaction, which includes the processes, judicial and investigative, aimed at stopping violations from occurring in future, as well as official statements of apology, acknowledgement of facts and responsibility.

(vii) A guarantee of non-repetition, which includes reviewing and reforming laws, as well as promoting mechanisms for preventing, monitoring and resolving social injustice and conflicts. Access to relevant information concerning violations and reparation mechanisms, which includes a right to seek and obtain information about the causes and conditions that led to the violation of rights, so that the victims may learn the truth.

71. In light of the State's obligations set out above, the former UNSCRT formulated the following model provision on reparations and assistance to victims, as a best practice in the fight against terrorism:[98]

    Damage to natural or legal persons and their property resulting from an act of terrorism or acts committed in the name of countering terrorism shall be compensated through funds from the State budget, in accordance with international human rights law.

    Natural persons who have suffered physical or other damage or who have suffered violations of their human rights as a result of an act of terrorism or acts committed in the name of countering terrorism shall be provided with additional legal, medical, psychological and other assistance required for their social rehabilitation through funds from the State budget.

72. **The Commission thus recommends inserting a provision into the Bill, like the model provision set out above, expanding the ambit of the Bill to explicitly provide for reparations to victims of terrorism.**

Summary of Recommendations

73. The Commission summarises our recommendations above as follows:

    Te Tiriti obligations

    - **Allow ample time and opportunity to actively engage with tangata whenua on all aspects of the Bill.**

    Addressing human rights of Muslim communities

    - **Amend the purpose section of the Bill to align with New Zealand's human rights obligations.**

    - **Rebalance the Bill's current focus on Islamic-claimed terrorism so that it ensures sufficient and proportionate focus on far-right extremism and other terrorist threats; and**

[98] UN Doc A/HRC/16/51, 22 December 2010, above n 6 at [25].

- **Ensure that appropriate time and opportunity is provided for genuine public involvement from marginalised and affected communities, especially those from Muslim communities.**

Definition of terrorism

- **Adopt a definition of terrorism that aligns with the international model definition.**

Extension of financing terrorism provision to include "material support"

- **Restrict the types of activities defined as "material support" to an exhaustive list of activities that directly contribute to a terrorist act;**

- **Require that the support is provided intentionally; and**

- **Clarify the types of activities that would constitute a "lawful justification" or "reasonable excuse" for someone to escape liability under this section, by providing a non-exhaustive list of examples that would qualify.**

Control orders

- **Review the proposed extension of the control orders scheme to those who have already served their sentence of imprisonment for terrorism-related offences, to ensure that the proposed restrictions do not enable the Crown to breach its obligations under s 26(2) of the NZBORA.**

Extension of warrantless powers of surveillance

- **Remove the power of New Zealand Police to conduct warrantless searches of places and vehicles with respect to terrorism-related offences. If the definition of terrorism is amended to align with international human rights standards as set out above, the Commission recommends requiring enforcement officers to first be satisfied that it is not practicable to obtain a warrant, before conducting a warrantless search.**

- **Further to the proposal set out in the Law Commission's Review of the SSA in 2016, remove the power of the New Zealand Police to conduct warrantless surveillance of electronic devices for terrorist acts. Instead, to comply with human rights standards while also preserving potential evidence, the Bill should empower police to seize a device while a search warrant is properly obtained.**

Oversight mechanisms

- **Provide for regular scheduled reviews by government and designated independent bodies to ensure its compliance with international human rights standards; and**

- **Incorporate the recommendations of the RCOI for improving oversight of relevant agencies.**

Rights to remedy for breach of human rights via counter-terrorism measures

- **Insert a complaints mechanism into the proposed legislation, similar to that provided under the ISA, to enable those whose rights have been violated by operations conducted under the legislation to obtain speedy, effective and enforceable remedies.**

Rights to reparations for victims of terrorism

- **Insert a provision into the Bill like the model provision provided by the former UNSRCT, expanding the ambit of the Bill to explicitly provide for reparations to victims of terrorism.**