

COUNTERING TERRORIST FIGHTERS LEGISLATION BILL

Human Rights Commission Submission to the Foreign Affairs, Defence and Trade Committee

27 November 2014

1. Introduction

- 1.1 The Human Rights Commission (the Commission) appreciates the opportunity to make this submission on the Countering Terrorist Fighters Legislation Bill. The Commission has earlier prepared a briefing document on the wider issues. This is available on our website and has been shared with political party leaders. We have attached a copy of that document. We have also attached a copy of United Nations General Assembly (Third Committee) Resolution A/C.3/69/L.26 which was passed yesterday and highlighted some relevant parts of that resolution.
- 1.2 The Bill is designed to ensure that New Zealand is able to address the evolving threat posed by foreign terrorist fighters. The Commission notes that currently there is no intention to amend the provisions of the existing criminal law. There may be need to be more explicit legislation in the future to deal with the threat presented by foreign terrorist fighters.
- 1.3 The Commission considers that what is proposed is in many ways a balanced and careful approach to complying with the obligations in UN Security Council Resolution 2178. That said there are a number of important changes that could be made.
- 1.4 The Commission would like to emphasise the following points, which are discussed further later in this submission:
 - 1.4.1 The Commission emphasises the importance of developing relationships with affected communities and fostering social solutions to the broader issues of terrorism and extremism. The Commission urges the Committee to recognise that the solution to these problems does not lie solely in legislation and law reform.
 - 1.4.2 The Commission is concerned about the urgency with which the legislation is being progressed. Given the potentially significant human rights implications it is essential that an appropriate opportunity is provided for genuine public involvement and input. We do acknowledge though that care has been taken to ensure this is limited interim legislation and that there has been careful consideration of the human rights issues involved in the preparation of the Bill.
 - 1.4.3 The Commission makes specific recommendations intended to make aspects of the Bill relating to video surveillance, cancellation of passports and appeal rights more compliant with New Zealand's human rights obligations.

1.4.4 The Commission has had an opportunity to review the submission of the New Zealand Law Society since it was made and the Commission concurs with the suggested amendments suggested by the New Zealand Law Society in its submission.

2. The Urgency and Importance of New Zealand taking the measures set out in Pillar 1 of the United Nations Global Counter Terrorism Strategy

2.1 The introduction to the Security Council Resolution recognises that, while legislation to stem the spread of terrorism is necessary in the short term, the real answer lies in a comprehensive approach to addressing the marginalisation that attracts individuals to radicalisation. This involves working with communities to develop ways of counteracting issues likely to predispose some people to adopt extremist positions.

2.2 In Pillar 1 of the United Nations Global Counter Terrorism Strategy (UN General Assembly Resolution A/RES/60/288) the UN General Assembly (including New Zealand) makes clear what is required. It stresses the critical importance of actions “to promote a culture of peace, justice and human development, ethnic, national and religious tolerance, and respect for all religions, religious values, beliefs or cultures by establishing and encouraging, as appropriate education and public awareness programmes involving all sectors of society” and actions “to pursue and reinforce development and social inclusion agendas at every level as goals in themselves, recognising that success in this area, especially in youth unemployment, could reduce marginalisation and the subsequent sense of victimisation that propel extremism and the recruitment of terrorists.”

2.3 The Global Counterterrorism Forum, a new multilateral counterterrorism body with 30 founding members (including New Zealand), issued a memorandum earlier this year on *Good Practices for a More Effective Response to the FTF Phenomenon*¹, which identified the first step for dealing with violent extremists as “investment in the long term cultivation of trusted relationships with communities susceptible to recruitment, taking into account the broader set of issues and concerns affecting those communities”.

2.4 The Commission has worked for over a decade with the Police, other national and local government agencies and civil society organisations to promote harmonious relations between the increasingly diverse peoples of New Zealand. We cannot be complacent about social cohesion and peace in New Zealand. We have done this most recently and raised our concerns in the context of attacks on Jewish and Muslim New Zealanders in New Zealand this year.

3. Visual surveillance on private property

3.1 The Bill will allow the NZSIS to carry out visual surveillance with a warrant. It will also allow surveillance without a warrant in situations of emergency and urgency for 48 hours subject to certain safeguards.

3.2 The Commission recognises that the search and surveillance measures will be achieved by amending the New Zealand Security Intelligence Service Act 1969 (NZSIS) which stipulates that functions performed under that Act must be carried out in accordance with “all human rights standards recognised by New Zealand law” unless they are specifically modified by another enactment. However, we note the right to privacy in the ICCPR is not recognised in New Zealand law. It is not incorporated in NZBORA. The Commission has made clear that

² Article 17

the right to privacy of New Zealanders will only be properly protected when it is. This is a matter that could be considered in the upcoming review.

- 3.3 The right to freedom of expression and privacy and the right to life and security are the most obvious human rights engaged in the context of communication surveillance². In June this year the Human Rights Council issued a report on the right to privacy in the digital age which refer to the need for vigilance to ensure the compliance of any surveillance policy or practice with human rights law³. Yesterday the Third Committee of the United Nations General Assembly passed a resolution which New Zealand supported. It reaffirmed “the human right to privacy, according to which no one shall be subjected to unlawful interference with his or her privacy, family, home or correspondence, and the right to protection of the law against such interference” and recognised “that the exercise of the right to privacy is important for the realisation of the right to freedom of expression and to hold opinions without interference and the right to freedom of peaceful assembly and association and is one of the foundations of a democratic society”. The Commission commends New Zealand’s support of the resolution. We believe it properly characterises the importance of the fundamental freedoms and rights at issue here. They are foundations of our democracy.
- 3.4 In 2013 the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, submitted a report to the Human Rights Council on the implications of States’ surveillance of communications and the exercise of the human rights to privacy and freedom of opinion and expression⁴. While conceding that “concerns about national security and criminal activity may justify the exceptional use of communications surveillance technologies”⁵ he noted that communications surveillance should be regarded as a highly intrusive act that potentially interferes with the rights to freedom of expression and privacy and threatens the foundations of a democratic society⁶.
- 3.5 If Pillar 1 of the United Nations Global Counter Terrorism Strategy measures fail, the Commission accepts that some form of surveillance will at times be necessary. The Bill provides for significant oversight and safeguards in cases where a warrant is necessary. However, we note and endorse the New Zealand Law Society’s submission on clause 9 of the Bill on ways in which these safeguards could be further strengthened such as through enhanced oversight of the issuance and execution of visual surveillance search warrants. The situation relating to warrantless visual surveillance is more concerning. The Attorney-General’s report notes that there is a consistent body of case law which suggests that use of a warrantless power may not be lawful notwithstanding that the conditions for its exercise are satisfied, where it would have been reasonably possible to obtain a warrant.
- 3.6 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.

² Article 17

³ *The right to privacy in the digital age: Report of the Office of the High Commissioner for Human Rights* A/HRC/27/37 (2014)

⁴ A/HRC/23/40

⁵ At [para 3]

⁶ At [para 81]

4. Amendments to the Passports Act

- 4.1 The Bill will amend the Passports Act by introducing several new provisions which would allow the Minister to refuse to issue a passport on the grounds of national security if he or she believes on reasonable grounds that the person is a danger to the security of a country other than New Zealand and the danger they present to that other country cannot be averted by any other means. Basically the Bill will extend provisions that currently apply only to New Zealand, to other countries.
- 4.2 The right to a passport and to decide one's destination is fundamental to the right to leave a country and is required by Art.2(2) ICCPR. The UN General Comment on Freedom of Movement⁷ recognises that the ICCPR authorises a State to restrict the right in exceptional circumstances to protect national security, public order, public health or morals and the rights and freedoms of others.
- 4.3 To comply with the international standards, any restrictions must be provided by law, necessary in a democratic society and consistent with other rights in the Covenant. Where a measure derogates from a right in the ICCPR, it must only be for a limited time and for the duration of the emergency⁸. The Commission recognises that the ability to refuse to issue a passport may be necessary to protect national security and that the Bill is intended to do this in a way which infringes the right as little as possible.
- 4.4 Preventing people leaving New Zealand impacts on s.18(3) New Zealand Bill of Rights Act (BORA) and the right to freedom of movement. While denial or cancellation of a passport is an aspect of the Bill that clearly infringes this right, the Commission considers that what is proposed is a reasonable limitation in terms of s.5 BORA and the test imposed in *Hansen v R*.⁹

5. Statelessness

- 5.1 Cancelling, or not issuing, passports for reasons of national security (including when the subject is not in the country) has been described as rendering a person stateless. This is not the case¹⁰. A person whose passport has been taken is not rendered stateless but rather they will be unable to travel for up to as much as 36 months (plus a further 12 months if a High Court Judge allows it).
- 5.2 Preventing someone from leaving the country is comparatively straightforward. It is less clear how the situation of people whose passports have been cancelled while they are out of the country will be addressed, particularly if they have a change of heart and wish to return to New Zealand. The Commission assumes that people in this position could get emergency travel documents and help to reintegrate into New Zealand society while those who return unrepentant might face charges under the criminal law or terrorism legislation. Whatever the situation, it cannot be correct that New Zealand citizens will be prevented from returning permanently.
- 5.3 Many countries use risk based interdiction and diversion to deal with returning terrorist fighters¹¹. Such measures are often based on risk assessments developed following the

⁷ *General Comment No.27: Freedom of Movement (Art. 12):02/11/1999 CCPR/C/21/Rev.1/Add.9*

⁸ *General Comment 29 of the Human Rights Committee on States of Emergency*

⁹ [2007] NZSC 7 [123]

¹⁰ There are no changes proposed to the Citizenship Act (although at present that Act does allow the Minister to deprive a person of their citizenship if they have acquired the nationality or citizenship of another country or acted in that capacity in manner that is contrary to the interests of New Zealand).

¹¹ See for example, Centre for Security Studies, *Foreign Fighters: An Overview of Responses in Eleven Countries* (2014) available at www.ccs.ethz.ch

person's return which allow authorities to ascertain the level of risk that the person presents. In order to decide the appropriate intervention, governments need to be able to identify susceptible individuals when they return to their home country.

5.4 The good practice guidelines referred to earlier state that as wide as possible a range of information sources should be used to anticipate and detect returnees in order to develop programmes to help them reintegrate into society¹². The amendment to the Customs and Excise Act 1996 which would allow the NZSIS and the Police to access information held by customs for counter-terrorism purposes is consistent with this.

6. Appeal rights

6.1 The report of the Special Rapporteur on countering terrorism¹³ notes that a best practice in countering terrorism is ensuring that a person whose rights have been violated in the exercise of counter terrorism powers or the application of counter terrorism law should have access to an effective and enforceable remedy. The BORA also provides in s.27(1) that a person whose rights are affected by a decision of a public authority has the right to the observance of the principles of natural justice. Again the section 5 test is relevant.

6.2 The Bill presents a number of problems in relation to s.27:

- i. There is provision in the Bill for appealing a decision to issue (or not issue) a passport in the Passports Act. The appeals provisions are set out in ss.28 and 29 of the principal Act but an appeal must be lodged within 28 days. This could create problems for potential appellants as an appeal could be difficult to activate in the permissible time frame if the person is out of the country and unable to return.
- ii. The SIS will also be able to strip a person of their travel documents for up to 10 days even if there is no conclusive evidence that they are a terrorist risk. If there is no evidence that a person meets the necessary criteria then the suspension will lapse but the Crown is not liable for any resulting loss or damage unless the actions are grossly negligent or shown to be in bad faith. This is a very high threshold to overcome.
- iii. There could also be a problem if classified information is withheld to maintain confidentiality because of obligations undertaken in relation to the information provided. This can make it difficult to challenge. The Commission has said in the past that this is inconsistent with the right to justice.

6.3 The Attorney-General's section 7 vet recognises that the right to natural justice is inherently flexible and context-specific and that, for a variety of reasons, any limits that the Bill places on the right can be justified in terms of s.5.

6.4 In relation to appealing a decision to withdraw a person's passport, the possibility of issuing emergency travel documents if the subject wishes to return to New Zealand is arguably part of the solution. We also recognise that the Courts have developed remedies for breaches of BORA rights (which could deal with the matter of limiting liability of the Crown for stripping a person of their travel documents).

¹² Op cit. fn.1

¹³ Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin A/HRC/16/51 (2010)

6.5 The issue of withholding classified information is more concerning since a decision on appeal or review could take place in the absence of any supporting evidence. We suggest that consideration is given to establishing some form of independent review to address this concern.

7. **Urgency and Sunset Clause**

7.1 Despite the interim nature of the Bill the Commission is concerned about the urgency with which it is being moved through the legislative process. For legislation such as this to be acceptable, the public needs an adequate amount of time to develop a response. Measures introduced in haste or in response to a specific situation can be unduly intrusive and careful consideration needs to be given to any changes to ensure that resulting laws or regulations are consistent with international human rights standards.

7.2 The Commission is concerned that insufficient time has been given to properly estimating the benefits and costs of its introduction – the fact that the legislation is “time limited” is not a sufficient answer to this¹⁴. The legislation will last until 2018. Three years is a not inconsiderable period of time when there is the possibility of abrogating human rights. This period should be set to the absolute minimum to enable the upcoming review to take place and new legislation to be in place. A shorter operative time period for the interim legislation should be considered by the Committee. The sunset clause should allow for sufficient time for a considered review allowing for civil society engagement while providing an incentive for the Government to draft any necessary legislation.

8. **Conclusion**

8.1 The Commission recognises the importance of this legislation and the contribution New Zealand can make to the fight against terrorism. There are a number of areas where there could be improvements including the ability to carry out warrantless searches, the appeal procedures and the decision to withhold classified information in some cases.

8.2 We strongly recommend that there is engagement with affected communities and civil society to reinforce government measures. Any legislation is inevitably a short term answer. In the long term the answer to dealing with the issue of foreign terrorist fighters lies with the communities themselves. Involving peace loving New Zealanders in designing and implementing solutions to minimise extremism in their communities and in reintegrating people who may have held extreme views is critical.

8.3 We repeat that legislation such as this is more likely to be acceptable to the public if people have had an opportunity to consider and provide comment. A truncated Select Committee process and the use of urgency does not achieve this.

Contact persons:

Sylvia Bell, Principal Legal & Policy Analyst, Human Rights Commission
Direct dial: 09 306 2650
Email: sylviab@hrc.co.nz

Janet Anderson-Bidois, Manager, Legal Research and Monitoring, Human Rights Commission
Direct dial: 09 306 2663
Email: janetab@hrc.co.nz

¹⁴ Departmental Disclosure Statement, 13 November 2014 at 2.5