

## 1. International human rights background

- 1.1 New Zealand's "international obligations" in relation to the civil rights affected by terrorism and counter terrorism activity are found in the International Covenant on Civil and Political Rights ('ICCPR'). The most relevant international obligations to counterterrorism are ICCPR Articles 2(3), 6, 11, 17, 19, 20 and 26
- 1.2 Contrary to what is generally believed, measures to counter terrorism do not involve balancing human rights and security. The proper balance can, and must be found, within human rights law itself<sup>1</sup> recognising that States have a legal and moral duty to protect the fundamental human rights of their citizens which, as a result of Article 6 of the ICCPR, includes an obligation to adopt measures to counter terrorism and its impacts.
- 1.3 Careful consideration needs to be given to any changes to ensure that resulting laws or regulations are consistent with New Zealand's international obligations relating to human rights standards. Measures introduced in haste or in response to a specific situation can be unduly intrusive. United States Supreme Court Justice Brennan summed this reality up as he saw it as follows:

"...here is considerably less to be proud about, and a good deal to be embarrassed about, when one reflects on the shabby treatment civil liberties have received in the United States during times of war and perceived threats to national security ... After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along."
- 1.4 Central to a human rights approach is the need to balance the rights of everyone, favouring the most vulnerable where there is a conflict of rights - for example, the right to personal security of victims (Article 6 ICCPR) may take precedence over the right to privacy or freedom of assembly of those who espouse violence as a means to an end.
- 1.5 The United Nations has developed a number of standards that apply in this context. These standards build on the rights in the basic human rights instruments. They include a resolution adopted by the General Assembly in January 2014 (and supported by New Zealand) on *The Right to Privacy in the Digital Age*<sup>2</sup> which calls on States to
  - respect and protect the right to privacy, including in the context of digital communication;
  - take measures to put an end to violations of those rights and create conditions to prevent such violations, including by ensuring that relevant national legislation complies with their obligations under international human rights law;
  - review their procedures, practices and legislation regarding the surveillance of communications, their interception and the collection of personal data, including mass surveillance, interception and collection, with a view to upholding the right to privacy by ensuring the full and

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<sup>1</sup> Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Ten areas of best practice*, Martin Scheinin A/HRC/16/51 (2010)

<sup>2</sup> A/RES/68/167

effective implementation of all their obligations under international human rights law;

- establish or maintain existing independent, effective domestic oversight mechanisms capable of ensuring transparency, as appropriate, and accountability for State surveillance of communications, their interception and the collection of personal data

1.6 In June 2014 the General Assembly adopted a resolution (supported by New Zealand) reaffirming and updating the global counter-terrorism strategy developed by the United Nations in 2006<sup>3</sup> and designed to ensure that measures taken to counter terrorism comply with international law in particular international human rights, refugee and humanitarian law. The resolution reiterates strong and unequivocal condemnation of terrorism in all its manifestations and stresses the importance of keeping the strategy relevant in the light of emerging new threats and evolving trends in international terrorism.

It emphasises:

- the importance of tolerance and dialogue among States and the enhancement of interfaith and intercultural understanding;
- that any measures taken to counter terrorism should not be based on profiling or resort to stereotypes;
- the importance of encouraging the active participation of civil society to reinforce government measures;
- ensuring access to effective remedies where fundamental human rights have been violated;
- recognition of the increasing use of the internet and communication technology in inciting and planning terrorist activities and, at the same time, the power they can have in countering the spread of terrorism;
- the right to privacy set out in the Universal Declaration of Human Rights and Art.17 of the ICCPR;
- the need for legislation to prohibit incitement to commit a terrorist act or acts

1.7 In September 2014 the Security Council adopted a resolution calling on States to cooperate in preventing the international movement of terrorist fighters to and from conflict zones<sup>4</sup>. To a large extent it duplicates issues in the earlier resolution but focuses on a comprehensive approach designed to address the marginalisation, long standing conflicts and other factors that can attract individuals to extremism. Broadly speaking the Security Council's resolution requires States to establish:

- effective border control to stop the movement of terrorists and controls on the issue of identity documents;
- evidence based risk assessment of travellers and screening procedures that do not involve profiling or discriminatory criteria;
- exchange of information;
- suppressing the recruitment and training of individuals wishing to travel to participate in terrorist activities;
- ensuring that those supporting terrorism are brought to justice and prosecuted under the criminal law;
- taking steps to prevent the financing of terrorism;

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<sup>3</sup> A/RES/68/276

<sup>4</sup>Resolution 2178 (2014)

- preventing the transit of individuals where there is credible evidence of their involvement in terrorist activities;
- advance passenger screening by airlines;
- engagement with local communities and NGOs to develop strategies to counter violent speech that can incite terrorist acts

1.8 In the Commission's view, there are measures and legislation in place in New Zealand that have the potential to deal with some, if not most, of the matters outlined in the UN Resolutions. The issue is how they are implemented and whether appropriate steps are taken to ensure that human rights principles are respected and observed. The review the Government is undertaking may show that there are gaps.

1.9 The Commission also agrees with the statements made about the relevant ICCPR articles by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism submitted to the General Assembly of 23 September 2014. We note that the current Special Rapporteur has endorsed the reports of the previous Rapporteur in this regard. We have attached these reports and highlighted the relevant paragraphs.

## **2 Privacy**

2.1 The Commission agrees with the statements made about the right to privacy under Article 17 of the ICCPR by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms. We note that the current Special Rapporteur has endorsed the report of the previous Rapporteur in this regard.

2.2 Privacy is the most obvious right engaged in the context of surveillance activity related to counter terrorism. In addition to the UN principles outlined in para 1.5 the Human Rights Council issued a report on the right to privacy in the digital age in June<sup>5</sup>. That report refers to the need for vigilance to ensure the compliance of any surveillance policy or practice with human rights law. The Commission recognises that some element of surveillance is inevitable and justifiable in the context of counter terrorism but there is nothing to suggest that this cannot be carried out in a manner that is consistent with human rights principles.

2.3 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 expression<sup>6</sup>. While conceding that "concerns about national security and criminal activity may justify the exceptional use of communications surveillance technologies"<sup>7</sup> 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 society<sup>8</sup>.

2.4 Including an explicit reference to human rights principles in relevant legislation and placing an onus on those charged with implementing it to ensure they respect

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<sup>5</sup> *The right to privacy in the digital age: Report of the Office of the High Commissioner for Human Rights A/HRC/27/37* (2014)

<sup>6</sup> A/HRC/23/40

<sup>7</sup> At [para 3]

<sup>8</sup> At [para 81]

human rights when carrying out their statutory roles<sup>9</sup> would go some way to addressing the concerns that New Zealand is rapidly becoming an ever more encompassing surveillance society.

### **3. Border control – preventing people entering New Zealand**

- 3.1 The Immigration Act 2009 already allows for advance passenger screening. People can be prevented from entering the country if they are considered to be a risk to public order or security or they are a member of a designated terrorist entity<sup>10</sup>. The problem is that a person may be defined as a security threat because of classified information that may be withheld at the discretion of the Chief Executive of a relevant agency making it difficult to challenge.
- 3.2 The Commission has always argued that it is important that there is a process for reviewing executive power – for example, by judicial review - in such cases. It is essential that this be taken into account in any legislative change proposed. The Commission's view is reinforced in UN best practice guidance which states that where the law relating to terrorism confers discretionary powers on public agencies, there must be adequate safeguards to ensure that discretionary powers are not exercised arbitrarily or unreasonably<sup>11</sup>.
- 3.3 The practice of interdiction can stop people boarding an aircraft coming to New Zealand. Racial profiling or stereotyping people because of membership of a particular ethnic group or on the ground of religion is often linked with interdiction. The need for greater evidence based risk assessment would make profiling less likely.

### **4. Freedom of movement – right to leave New Zealand**

- 4.1 Preventing people leaving New Zealand impacts on ICCPR Article 11 and the right to freedom of movement contained in section 18 (3) BORA. The right to a passport and to determine one's destination is fundamental to the right to leave a country and is required by Art.2(2) and Article 11 ICCPR. Passports are issued under the Passport Act. The Act allows the Minister to refuse to issue a New Zealand passport to a person if he or she believes on reasonable grounds that the person is a danger to the security of New Zealand because they intend to engage in, or facilitate, a terrorist act within the meaning of [section 5](#) of the Terrorism Suppression Act 2002.
- 4.2 The UN General Comment on freedom of movement<sup>12</sup> 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. To be permissible restrictions must be provided by law, necessary in a democratic society and consistent with other rights in the Covenant.
- 4.3 Where a measure that derogates from a right in the ICCPR then it must only be for a limited time and only for the duration of the emergency<sup>13</sup>. In order to ensure

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<sup>9</sup> There are already references to human rights principles in the Policing Act 2008: s. 8(d) "policing services are provided in a manner that respects human rights"; and the Search and Surveillance Act 2012: s.5 "The purpose of this Act is to facilitate the monitoring of compliance with the law and the investigation and prosecution of offences in a manner that is consistent with human rights values -..."

<sup>10</sup> Section 16 IA 2009

<sup>11</sup> Op.cit at para [15]

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

<sup>13</sup> General Comment 29 of the Human Rights Committee on States of Emergency

that this is the case, therefore, best practice would require regular review of the measure to ensure it is still necessary and the inclusion of a sunset clause so that extraordinary measures do not become “normalised”.

## **5 Non-discrimination - profiling**

- 5.1 A basic premise of measures designed to address terrorism is that they should not be discriminatory. If they were they could breach Article 26 ICCPR and section 19 NZBORA. The UN Global Terrorism Strategy reaffirms that terrorism cannot, and should not be, associated with any religion, nationality or civilisation<sup>14</sup>. Evidence based traveller risk assessment and screening procedures should be relied on rather than profiling based on stereotypes founded on the grounds of discrimination prohibited by international law<sup>15</sup>.
- 5.2 Anyone who believes that his or her rights have been infringed must be able to seek redress, and should be able to do so by bringing a complaint to a court or an independent institution such as an ombudsman or human rights commission<sup>16</sup>. At present the New Zealand Commission is unable to become involved in immigration matters because of s.392 of the Immigration Act which prevents it dealing with complaints about the content or application of the Act or any immigration instructions. It also cannot bring court proceedings or become involved in immigration cases as amicus or intervener.
- 5.3 Section 392 is designed to prevent the Commission from second guessing immigration decisions or questioning policies that are inherently discriminatory. It is a moot point whether the section needs to be as wide as it is to achieve this. It should be possible for the Commission to appear in court proceedings where allegations of profiling are made.

## **6 Freedom of speech and incitement to terrorism**

- 6.1 Freedom of expression is guaranteed by Article 19 ICCPR and section 14 NZBORA. Freedom of expression may become an issue in the context of incitement of terrorist activities. While it is axiomatic that there needs to be some way of limiting incitement of terrorism, it is unclear whether the law in New Zealand is adequate to deal with this at present.
- 6.2 Individuals can be prosecuted under s.131 of the Human Rights Act which prohibits threatening, abusive or insulting publications or speech likely “to excite (or incite) hostility against or bring into contempt any group of people in New Zealand by reason of their race, ethnicity or country of origin”<sup>17</sup>. Although the New Zealand government has repeatedly claimed that s.131 meets the requirements of Art.20 ICCPR relating to incitement to hostility or violence, there are several problems with s.131. Primarily because it can be difficult to identify when provocative behaviour amounts to incitement as it requires assessing both the need to prove a subjective intention to incite as well as an objective likelihood that a hostile act will occur. Also it only applies to New Zealand and is limited to the race grounds in the HRA.

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<sup>14</sup> Op. cit

<sup>15</sup> See *A & Ors v Secretary of State for the Home Department* [2004] UKHL 56 for a discussion of when detention on the basis of membership of a particular group is unlawful in terms of the international standards.

<sup>16</sup> A/HRC/14/46, practices 9 & 10 and para [16]

<sup>17</sup> S.61 is the civil version of this and applies to persons coming to New Zealand as well as those communities already here. Section 61 does not allow for prosecution. Complaints under the section are resolved through mediation

- 6.3 Section 311 of the Crimes Act prohibits the incitement, counselling or attempt to procure a person to commit an offence when the offence is not committed. This could cover incitement to terrorism but in the absence of an actual offence, a sentence is likely to be inappropriately short. The same difficulty arises in connection with seditious offences. There are jurisdictional issues in relation to the Terrorism Suppression Act as it does not address the situation of people in New Zealand who counsel others to commit terrorist acts overseas.
- 6.4 If specific legislation is considered necessary, it is worth noting that where it has been introduced in other countries (such as the UK) the legislation has been considered to have a disproportionate impact on freedom of expression.

## **7 Creation of new offences**

- 7.1 The Special Rapporteur suggests that best practice is for counter-terrorism law and practice to be consistent with the principle of normalcy<sup>18</sup>. That is, not rely on standalone legislation administered by a specialist body but rather on existing legislation administered by civilian authorities. If it is accepted that this is appropriate in New Zealand, given the gaps in the law as it stands at present, some amendment may be necessary to the Crimes Act (and possibly the Passports Act).
- 7.2 Any legislation should also be transparent and acceptable to the wider public. It would be unfortunate if urgency was used to pass the proposed legislation without an opportunity for public input. The Commission strongly recommends therefore that the legislative process is not unduly truncated by the use of urgency and bypassing the Select Committee procedure.

## **8 The importance of enhancement of interfaith and inter cultural understanding, non- discrimination and the involvement of civil society, particularly the involvement of the law abiding and peaceful New Zealand Muslim community and its leaders**

- 8.1 The General Assembly resolution referred to in paragraph 1.6 makes clear that the involvement of civil society in counter terrorism is critical. It emphasises:
- the importance of tolerance and dialogue among States and the enhancement of interfaith and intercultural understanding;
  - that any measures taken to counter terrorism should not be based on profiling or resort to stereotypes;
  - the importance of encouraging the active participation of civil society to reinforce government measures.
- 8.2 The September 2014 Security Council Resolution also stresses the importance of the engagement with local communities and NGOs.
- 8.3 The reference to the “importance of tolerance and dialogue among States and the enhancement of interfaith and intercultural understanding” is as critical within the State as among States. We cannot afford to assume that the peace of the past will remain in the future. Steps must be taken to further enhance interfaith and intercultural understanding in New Zealand.

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<sup>18</sup> Op cit. 1 at para [17]

- 8.4 We have noted above the importance of measures taken to counter terrorism not being based on profiling or resort to stereotypes. It becomes much more difficult to involve civil society and particularly the leaders of the affected communities if it is.
- 8.5 We note the “importance of encouraging the active participation of civil society to reinforce government measures”. We draw attention to the requirement to involve civil society in counter terrorism solutions. In the Commission’s view this is perhaps the most crucial matter to consider. Involving peaceful Muslim New Zealanders in designing and implementing solutions to minimise extremism and to reintegrate people who have held extreme views is critical.
- 8.6 The people in New Zealand's Muslim community organisations, in particular FIANZ and its leaders are well known to the Police and the Commission. The Police and Commission and these organisations have worked together to keep the peace before. We all believe that the threats that have led to the current situation and the backlash already being felt by peaceful and law abiding Muslim New Zealanders require all of us to work with the leaders in the Muslim community in a deeper way.
- 8.7 It will be very important that this grassroots work is designed by and done by the most affected people. There is a real danger in experts in the stands designing solutions for the people in the game.
- 8.8 We note that both the New Zealand Defence Forces and the New Zealand Police have a deserved international reputation for respecting human dignity and rights in peacekeeping. The same approach to peacekeeping and peacemaking that we apply overseas needs to be applied in New Zealand. We need to gain and maintain the confidence of the affected people. We will only achieve this if we involve them in the solutions to issues.