

TERRORIST DESIGNATION PROCESS

Purpose

1. The purpose of this paper is to set out the legal framework and process for terrorist designations under the Terrorism Suppression Act 2002 ("TSA"). It also explains the Prime Minister's discretion in making terrorist designations.

Legal framework for designation – Terrorism Suppression Act 2002

2. In October 2002, New Zealand enacted the TSA. The TSA establishes a legal framework for the suppression of terrorism. In particular, it is the mechanism by which New Zealand gives effect to the United Nations Security Council ("UNSC") mandatory resolutions requiring UN Member States to take certain steps to suppress terrorism. An important feature of this framework is the Prime Minister's power under the TSA to designate individuals or groups as terrorist or associated entities. Designation can be on an "interim" (s 20 TSA) or "final" (s 22 TSA) basis. Final designations expire after 3 years unless renewed by the Prime Minister (s 29B TSA).
3. The TSA criminalises various forms of interaction with designated entities. It is an offence under the TSA to deal with a designated entity's property or provide such an entity with property, financial or related services. It is also an offence to knowingly recruit for a group which is a designated entity, or participate in a group for the purpose of enhancing its ability to carry out a terrorist act, knowing, or being reckless as to whether the group is a designated entity. Simple membership of a designated entity, however, is not an offence.
4. The TSA also enables action to be taken against designated entities' property. For example, the TSA empowers Customs officials to seize and detain goods or cash they have good cause to suspect are owned or controlled by designated entities. In certain specified circumstances, the TSA also permits an application by the Attorney-General to the High Court for orders that property owned or controlled by designated entities be forfeited to the Crown.
5. There are two broad categories of entities that are affected by the TSA - entities listed by the UN as terrorist entities (by the UNSC's 1267 and 1988 Committees) and non-UN listed entities designated under the TSA.
6. UN listed entities are defined as designated terrorist entities in the TSA and so engage the criminal provisions of the TSA without the need for further designation under s 22. The UNSC listing process involves only Islamic State in Iraq and the Levant (Da'esh), Al-Qaida, the Taliban and associated individuals, groups, undertakings and entities.
7. The legal consequences that flow from designation under the TSA are primarily a response to international legal obligations. The two categories of entities described above reflect two different obligations:
 - 7.1 First, New Zealand is specifically obliged to take action against those terrorist entities listed by the UNSC 1267 and 1988 Committees.
 - 7.2 Secondly, and by contrast, while UNSC Resolution 1373 obliges New Zealand (inter alia) to outlaw the financing of, participation in and recruitment to, terrorist entities, it does not specifically identify those entities. The Resolution effectively leaves it to Member States to identify the entities against which they should act.

The Prime Minister's discretion to designate

8. The Prime Minister has the power under the TSA to designate individuals or groups as terrorist entities. Section 22 provides that the Prime Minister may designate an entity as a terrorist entity if 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. Further, in considering whether to make a designation, the Prime Minister may take into account any relevant information, including classified security information (s 30 TSA).
9. It does not follow, however, that every entity that meets the legal test in s 22 must be designated. Section 22 confers a discretion on the Prime Minister ("the Prime Minister may designate ...") as to whether to designate an entity that meets the legal test for designation. No specific factors are identified for the Prime Minister's consideration when exercising his discretion. However, it would be reasonable to suggest that both the TSA's purpose (as stated in s 3 of the TSA) and the matrix of obligations in UNSCR 1373 that the TSA was enacted, in part, to implement, point to the guiding consideration being whether designation of the relevant entity would effectively assist the suppression of terrorism.

Defining terrorist acts

10. A terrorist act is defined in s 5 of the TSA. It provides that an act is a terrorist act if it:
 - 10.1 Is intended to cause one or more of the following outcomes:
 - 10.1.1 the death of, or serious bodily injury to, one or more persons (other than a person carrying out the act);
 - 10.1.2 a serious risk to the health or safety of a population;
 - 10.1.3 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 one or more outcomes specified in paragraphs 10.1.1, 10.1.2 and 10.1.4;
 - 10.1.4 serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life;
 - 10.1.5 introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country; and
 - 10.2 Is carried out for the purpose of advancing an ideological, political, or religious cause; and
 - 10.3 Is intended to either:
 - 10.3.1 intimidate a population; or
 - 10.3.2 coerce or force a government or an international organisation to do or abstain from doing any act; and
 - 10.4 Is not an act that occurs in a situation of armed conflict and which is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

11. An act against a specified terrorism convention and a terrorist act in armed conflict are also terrorist acts under the TSA.

The formal process

12. The process for advancing the designation of non-UN listed terrorist entities is managed by a Terrorist Designations Working Group, currently chaired by New Zealand Police. It includes officials from the Department of Prime Minister and Cabinet, the National Assessments Bureau (part of DPMC), the New Zealand Defence Force, Crown Law, the Ministry of Foreign Affairs and Trade, and the New Zealand Security Intelligence Service.
13. In 2003 Cabinet agreed to a process for advancing requests to designate non-UN listed terrorist entities. This is set out in the Cabinet Minute CAB (03) 34/15A. In 2010 Cabinet refined this process (as set out in the DES Cabinet Minute (10) 2/5) and updated the agreed factors that may be relevant to officials in deciding whether to recommend to the Prime Minister the designation of a non-UN listed terrorist entity that meets the s 22 TSA criteria:
 - 13.1 the need for New Zealand to contribute to the international security environment by preventing activities such as recruiting, harbouring, participating in or financing of terrorist entities that fall outside the scope of the UN listing process;
 - 13.2 the threat posed by the entity to New Zealand, New Zealanders or New Zealand interests, including offshore;
 - 13.3 the entity's New Zealand or regional presence, or links with New Zealanders; and
 - 13.4 the nature and scale of the entity's involvement in terrorist acts or support activity.
14. The process formally agreed to by Cabinet requires the Working Group to refer recommendations relating to non-UN listed entity requests to the National Security Board, chaired by DPMC's Deputy Chief Executive Security and Intelligence. NSB is to make the final determination on whether to proceed with presenting the recommendation to the Prime Minister. In making this determination, the Working Group and NSB consider those factors identified by Cabinet that are relevant.
15. Upon presentation of the recommendation for designation to the Prime Minister, the Prime Minister must then be satisfied that the entity falls within the scope of the designation power in s 22 of the TSA. The Prime Minister may take into account any relevant information when considering whether to make a designation.
16. If the Prime Minister considers that the entity meets the legal criteria for designation as a terrorist entity, the Prime Minister must then consult the Attorney-General about the designation. After consultation, the Prime Minister may then exercise his discretion under s 22 as to whether to designate, bearing in mind New Zealand's international obligations under UNSCR 1373 and the guiding consideration of whether designation would effectively assist the suppression of terrorism.
17. The letters of designation from the Prime Minister are addressed to the Commissioner of Police for them to be acted upon.

18. The TSA requires that the designation be publicly notified in the Gazette and also that a notice indicating the designation has been made is given with all reasonable speed to the designated entity, if practicable and where the entity or a representative of it is in New Zealand.
19. The designated entity, or a third party with an interest in the designation, can apply in writing to the Prime Minister for the designation to be revoked on the grounds that the entity does not satisfy the s 22 TSA test or that the entity is no longer involved in any way in acts of the kind that made, or that would make, the entity eligible for designation. Judicial review proceedings are also possible in respect of a designation under the TSA.