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PREVENTATIVE DETENTION: A NECESSARY NATIONAL SECURITY TOOL

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Contents

Abstract

In the last 20 years governments around the world have asserted that the threat of terrorism requires the adoption of preventative detention strategies to authorise the detention of terrorism suspects before they carry out their intended actions. In Australia, the United Kingdom and Canada, parliaments have amended their respective criminal codes to authorise preventative detention in cases of terrorism. This paper examines the preventative detention strategies employed in those jurisdictions, as well as the human rights implications and interaction between the criminal law and terrorism law. It then examines the preventative detention measures adopted in all three jurisdictions including the safeguards to in place to ensure restrictions are consistent with the fundamental principles and values underlying the criminal justice system and human rights obligations relevant in those jurisdictions. Finally, the paper outlines some of the policy challenges which remain to be addressed if New Zealand considered the introduction of preventative detention.

Word length

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Subjects and Topics

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I Introduction

In response to the increased scale of harm and rising frequency of terrorist events following the terror attacks in the United States of America in September 2001 (9/11 attacks) a shift in the public policy discourse has occurred.[1] This triggered increased law enforcement responses including enhanced powers and harsher penalties.[2] Rather than focusing on punishment after terrorist attacks, prevention is now a key focus in combating terrorism risks. Disruption during the radicalisation and mobilisation stage is seen as critical to success. Subsequent terrorist events including the Bali bombings in October 2002, the Madrid bombings in March 2004 and the London bombings in July 2005 saw a further consolidation and extension of the post 9/11 response.[3] Consequently, national, regional and multilateral structures have often developed at pace without wide consultation. The jurisdictions examined in this paper (New Zealand, Australia, the United Kingdom and Canada) have all experienced terror events and enacted legislative responses. Legislative has been enacted on national security grounds and refined or expanded as risk levels have fluctuated. All jurisdictions (except New Zealand), have introduced preventative detention provisions. Often, these provisions severely limit, and in some cases completely depart from basic legal principles.[4] Fundamental concepts such as the rule of law and basic human rights have been minimised as jurisdictions have balanced human rights and national security interests.

Part one of this paper summarises the international human rights framework and examines if preventative detention is able to be accommodated from an international human rights perspective? The second part of the paper examines the relationship between terrorism legislation and the criminal law finding that tensions exist but the two systems are able to coexist. The third part of this paper considers preventative detention legislation enacted in the three jurisdictions reviewed and identifies the parameters and safeguards which have been put in place to address the issues raised in parts one and two. Part four considers the New Zealand context, and identifies key factors for further consideration.

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[1] Eran Shor and others "Counterterrorist Legislation and Respect for Civil Liberties: An Inevitable Collision?" (2018) 41(5) Studies in Conflict & Terrorism 339 at 340

[2] Tiberiu Dragu "Is there a trade-off between security and liberty? executive bias, privacy protections, and terrorism prevention" (2011) 105(1) The American Political Science Review 64 at 65

[3] Ben Golder and George Williams "Balancing national security and human rights: Assessing the legal response of common law nations to the threat of terrorism" (2006) 8(1) Journal of Comparative Policy Analysis 43 at 44

[4] Golder and Williams, above n 3, at 44

A Scope

Considering the enactment of preventative detention in New Zealand leads to a number of complex and interrelated topics which are outside of the scope of this paper. Where these topics arise, they are acknowledged and briefly discussed.

1 Definition of a Terrorist Act

Questions regarding the definition of terrorism are outside the scope of this paper. However, it is important to note that there is no globally agreed definition.[5] In New Zealand a legislative definition has been in place since 2002, however the recently introduced Counter-Terrorism Legislation Bill (CT Bill) proposes amendments to this definition.[6] This paper adopts the current definition in the Terrorism Suppression Act 2002 (TSA).[7]

2 Other forms of detention or control

This paper will not consider other forms of the deprivation of liberty that may be described as preventative detention. This includes remand in custody[8], detention of an intoxicated person[9], detention during immigration proceedings[10], detention for mental health reasons[11] or indeterminate-length jail sentences for convicted offenders[12]. Detention for these purposes may have a prevention purpose especially when linked to national security purposes. However, discussion in this paper is limited to peacetime detention of a person suspected of planning or carrying out terrorism despite insufficient evidence to arrest, hold or charge them with a terrorism-related crime. Within this narrow framing, judicial review is limited to a consideration of the detention. Finally, related topics including pre- or post-conviction control orders, rights of suspected terrorists in criminal trials and rights not to be detained or sent to another country are not addressed. Control orders have been scoped out of this paper because they are civil orders made by the High Court and therefore have a significant level of judicial oversight. While they allow for restrictions to be placed on an individual in the community this does not generally equate to detention. Control orders seek to support a person's rehabilitation and reintegration which is a different purpose to

[5] R v Gul (Mohammed) [2013] UKSC 64 at [44] citing Al-Sirri v Secretary of State for the Home Department (UN High Comm'r for Refugees intervening) [2013] 1 AC 745 at [37]. For the United Kingdom definition see: Terrorism Act 2000, s 1. For the Canadian definition see: Canadian Criminal Code RSC 1985 c. C-46, Part II.1, s 83.01(1). For the Australian definition see: Criminal Code Act 1995 (Cth), Part 5.3, s100.1
[6]Counter-Terrorism Legislation Bill 2021 (29-1), cl 6
[7] Terrorism Suppression Act 2002, s 5
[8] See the provisions of the Bail Act 2000
[9] Policing Act 2008, s 36
[10] Immigration Act 2009, ss 309 - 314
[11] Mental Health (Compulsory Assessment and Treatment) Act 1992, s 109
[12] See the Public Safety (Public Protection Orders) Act 2014 for Public Protection Orders and the Parole Act 2002, Part 1A for Extended Supervision Orders

preventative detention which focuses on ensuring that a terrorist event is prevented or that evidence of a terrorism event can be collected by law enforcement.

3 Definition of preventative detention

The use of the terms preventative or preventive detention occur predominantly in common law jurisdictions.[13] The first recorded use of the term occurred in the judgement of Lord Wrenbury in R v Halliday.[14] More recently the term is used to describe detention for political, national security, public order, or public safety reasons. A number of synonyms for preventive detention are used globally. Administrative detention is more commonly used in civil law jurisdictions.[15] International norms do not generally define preventative detention, instead using expressions such as "persons arrested or imprisoned without charge".[16] In international humanitarian law, the International Committee of the Red Cross (ICRC) favours the term 'internment' meaning "deprivation of liberty ordered by the executive authorities when no specific criminal charge is made against the individual concerned".[17] The significance of the language used to describe the detention becomes clear when considering the intrinsic value-laden, connotations arising in the public consciousness when comparing the terms administrative and preventative detention.[18] This influences public discourse about the appropriateness of such detention. In this paper, the term preventative detention means detention without charge in order to prevent or disrupt an immediate terrorist act. This is differentiated from detention for criminal procedure purposes because it is not conducted with a view to a criminal trial.[19] The use of the term preventative detention has been adopted because all of the jurisdictions being compared derive from the common law tradition. Preventive detention during armed conflict, is outside the scope of this paper.

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[13] Stella Burch Elias "Rethinking preventive detention from comparative perspective: Three frameworks for detaining terrorist suspects", 41(1) Columbia Human Rights Law Review 99 at 110

[14] R v Halliday [1917] AC 260 (HL)

[15] International Commission of Jurists "Memorandum on International Legal Framework on Administrative Detention and Counter-Terrorism" (December 2005) <https://www.icj.org/icj-memorandum-on-international-legal-framework-on-administrative-detention-and-counter-terrorism> at 3

[16] See for example Rule 122 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), A/RES/70/175 at 33

[17] Stella Burch Elias, above note 14 at 110

[18] Stanislaw Frankowski and Dinah Shelton (eds) *Preventative Detention: A Comparative and International Law Perspective* (2nd ed, Martinus Nijhof, Dordrecht, 1992)

[19] Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (Oxford University Press, 2011) at [9.5]

The International Human Rights Framework

International human rights law (IHRL) applies whenever and wherever a State exercises its jurisdiction over a person. Human rights engaged by terrorism include, the right to life, privacy, freedom of association, political participation, freedom of expression, a fair trial, and the right to compensation for breaches. Further rights invoked when responding to terrorism include the right not to be arbitrarily detained or tortured. All jurisdictions reviewed in this paper have positive obligations resulting from IHRL. Canada also has explicit obligations to uphold rights under the Charter of Human Rights and Freedoms[20] (Charter) which forms part of the Canadian Constitution. The United Kingdom has obligations under the Human Rights Act 1998[21] (HRA) which incorporates the European Convention on Human Rights (ECHR) into domestic law. The HRA came into force in October 2000 and has been used to challenge the legality of preventative detention measures. Courts can not declare that primary legislation is invalid, however they are subject to a duty to interpret legislation, in a manner compatible with ECHR. Where the Court finds that statutes are incompatible with ECHR, a declaration of incompatibility is made. This has no effect on the validity, continuing operation or enforcement of the provision and is not binding on the parties to the proceedings. In New Zealand, the New Zealand Bill of Rights Act 1990[22] (BORA) protects the civil and political rights of all New Zealanders. All Bills are checked for consistency with BORA before they are introduced into Parliament. If there is an inconsistency, the Attorney-General must inform Parliament. While this does not prevent Parliament passing inconsistent laws, it does ensure that any potential issues are known. The Human Rights Council has noted that the legal framework in New Zealand regarding the right not to be arbitrarily deprived of liberty is well developed and is generally consistent with IHRL.[23]

This paper considers the deprivation of liberty including the safeguarding conditions which have been developed in the terrorism context. Internationally, Courts have held that initially lawful detention can become arbitrary and contrary to law if the detention is not subject to periodic review.[24] While IHRL is central to the operation of modern western liberal democracies, the rights afforded to individuals are not inviolable. Rights and freedoms

[20] Constitution Act 1982 (Canada)
[21] Human Rights Act 1998 (UK)
[22] New Zealand Bill of Rights Act 1990
[23] Human Rights Council *Report of the Working Group on Arbitrary Detention* (OHCHR, 6 July 2015) A/HRC/30/36/Add.2
[24] Alfred de Zayas "Human rights and indefinite detention" (March 2005) 87 (857) International Review of the Red Cross 15 at 18

must be applied to everyone. Further, the rights of an individual can be and have been abrogated or modified in the pursuit of countervailing societal objectives, including the protection of national security. Further, the presumption of innocence is not unlimited and may be trumped by other concerns.[25] The starting hypothesis of this paper is that IHRL allows jurisdictions to enact preventative detention.[26] Therefore, this paper contends that the method for assessing preventative detention, is to adopt a balancing approach.

B International protection of human rights

The Universal Declaration of Human Rights (Declaration) sets out fundamental human rights. Many of the rights are now regarded as having achieved the status of customary international law. The key right engaged by preventative detention is the right not to be subject to arbitrary detention. The Declaration has influenced the development of IHRL and the debate about the lawfulness of preventative detention. Since the adoption of the Declaration, many other international human rights instruments have also been developed. These include the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR). Further, in common-law jurisdictions lawful detention is tested before a competent and impartial tribunal through the writ of habeas corpus. In continental-law jurisdictions it is codified in specific statutes. A full examination of the implications of the writ of habus corpus is outside the scope of this paper.

4 Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights

Article 9 of the Declaration, provides that "no one shall be subjected to arbitrary arrest, detention or exile"[27]. The corresponding provision in the ICCPR states:[28]

> "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

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[25] Rinat Kitai-Sangero "The Limits of Preventive Detention" (2016) 40 McGeorge L. Rev. 904 at 923
[26] Douglass Cassel, International Human Rights Law and Security Detention, (2007-2009) 40 Case W. Res. J. Int'l L. 383
[27] United Nations General Assembly *Universal Declaration of Human Rights* G.A. Res. 217A (III), U.N. Doc. A/810 (10 December 1948) at Art 9
[28] United Nations General Assembly *International Covenant on Civil and Political Rights* 999 UNTS (opened for signature 16 December 1966, entered into force 23 March 1976) at Art 9

The United Nations Human Rights Committee (Committee) has noted that Article 9 of the Declaration is applicable to all deprivations of liberty whatever the purpose.[29] Paragraph 3 of Article 9 requires that in criminal cases any person arrested or detained must be brought promptly before a judge. As indicated in the Committee's General Comment No 15:[30]

> "The enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness … who may find themselves in the territory or subject to the jurisdiction of the State Party."

Articles 7, 10, and 14 of the ICCPR may be engaged by preventive detention provisions.[31] Article 4 of the ICCPR permits temporary derogation from some but not all articles. Any derogation, must satisfy strict requirements and the Secretary-General of the United Nations must be notified. In the post 9/11 attack context the United Kingdom formally derogated from Article 9 of the ICCPR. In contrast, the United States has not notified any derogation from the ICCPR, notwithstanding the incompatibility of the provisions of the PATRIOT Act[32] and numerous Executive Orders with the rights in the ICCPR. Finally, while it is outside of the scope of this paper, it is important to note that in addition to the protection of IHRL, persons subjected to detention in times of armed conflict enjoy the more specific protection of international humanitarian law.

5 European Convention on Human Rights and Fundamental Freedoms (ECHR)

The ECHR applies to the United Kingdom. Article 5, states:[33]

> "(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law
> …
> (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

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[29] United Nations *Compilation of General comments and General recommendations adopted by Human rights treaty bodies* UN Doc. HRI/GEN/1/Rev.7 (2004) at General Comment, No. 8, 130[1]
[30] United Nations General Assembly, above note 30, at 195[10]
[31] ICCPR, above note 28 at Art 7 which prohibits torture and inhuman or degrading treatment or punishment, Art 10 which provides for humane treatment during detention and Art 14 which guarantees a prompt trial before a competent and impartial tribunal
[32] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act 2001
[33] Council of Europe *European Convention for the Protection of Human Rights and Fundamental Freedoms* ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953) at Art 5

Pursuant to Article 15, the ECHR is subject to derogation. Against the background of the 'war on terror' the United Kingdom derogated from Article 5 of the ECHR in the same way that it did from Article 9 of the ICCPR. However, following the ruling in the Belmarsh case, the House of Lords deemed this derogation invalid.[34]

a. The Belmarsh case

The key question in the Belmarsh case was whether the right to liberty protected by Article 5 of the ECHR could be suspended using Article 15, thereby avoiding any incompatibility between the ECHR and the Anti-terrorism Crime and Security Act 2001[35] (Anti-Terrorism Act). The Court noted that Article 15 set very strict conditions that must be met before a derogation can occur. First, there must be a "war or other public emergency threatening the life of the nation".[36] Second, if there is such an emergency, then a State can only derogate from the ECHR "to the extent strictly required by the exigencies of the situation".[37] The Government argued that the 9/11 attacks amounted to a global terror threat that was sufficiently likely to affect the United Kingdom – and, if it did, that the event was likely to be sufficiently catastrophic – as to amount to an emergency. Eight Lords agreed with the Government that the first condition had been met. Lord Hoffmann disagreed, holding that Al-Qaeda might be a threat to the lives of individual people, however "Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community".[38] This illustrates the difference of opinion regarding the importance of rights when undertaking a balanced consideration between rights and preventative detention. The eight Lords who held there was an emergency then decided whether the circumstances of this case justified indefinite detention. Seven of the eight Lords held it was not justified and that the Government had failed to show that lesser steps would not have sufficed. The Government's failure to show why the detention applied only to foreign terror suspects and not domestic suspects was significant. The outcome saw a majority decision that detention of foreign terror suspects was not a necessary response to the emergency created by the 9/11 attacks. It followed that Article 15 could not be invoked and detainees' right to liberty, under Article 5, remained intact. The derogation order was quashed and a declaration under section 4 of the HRA was issued.[39] The impact of this decision can be seen in the development of the United Kingdom legislation regarding preventative detention discussed in part 3 of this paper.

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[34] A and others v Secretary of State for the Home Department [2004] UKHL 56
[35] Anti-terrorism Crime and Security Act 2001 (UK)
[36] ECHR, above note 36, at Art 15
[37] ECHR, above note 36, at Art 15
[38] A and others, above note 37 at [96]
[39] A and others, above note 37 at [73]

6 Human rights in the New Zealand context

Section 5 of the BORA, enables justified limitations. This has been interpreted to mean that rights can be abrogated if the intervention pursues the legitimate aim of preventing, deterring and punishing terrorist activity, in a way that is rationally connected to that aim and goes no further than is necessary. This means that rights can be limited where necessary to protect national security or public safety. This occurred during the assessment of the Terrorism Suppression (Control Orders) Act 2019[40] which introduced control orders in response to the threat of returning foreign terrorist fighters. Where rights have been limited by the enactment of legislation, domestic and international legal proceedings are possible to address breaches. In the New Zealand context, Ti Tiriti o Waitangi (Treaty) sets out a distinctive statement of human rights as they apply to the people of New Zealand. The Treaty includes both universal human rights and indigenous rights meaning the Treaty and the Declaration are read together. Both documents along with the BORA provide the foundation for the rights enjoyed all New Zealanders. Therefore, it is vital to consider the Treaty when balancing the objectives of preventative detention against the rights and freedoms engaged by a preventative detention policy.

C Preventative detention under the International Human Rights Framework

The introduction of preventative detention models around the world and the subsequent challenges to those models have shown that IHRL is flexible enough to permit preventative detention for national security purposes provided that sufficient safeguards are put in place to protect rights and freedoms. Although written a quarter century ago, the Committee has captured the consensus which has developed within IHRL regarding preventative detention for national security purposes:[41]

> "If so-called preventive detention is used, for reasons of public security, it must be controlled … i.e., it must not be arbitrary, and must be based on grounds and procedures established by law… information of the reasons must be given … and court control of the detention must be available … as well as compensation in the case of a breach ..."

This opens up the opportunity for policy makers to consider the unique circumstances of New Zealand's human rights framework. A review of the New Zealand law shows that the

[40] Ministry of Justice "Regulatory Impact Statement - Agreement to introduce new counter-terrorism legislation to manage the risk posed by a small number of returning New Zealanders who engage in terrorism-related activity overseas" (18 July 2019) <https://www.treasury.govt.nz/publications/risa/control-orders> at 5

[41] United Nations, above note 30, at 131[4]

rights in the BORA are also not sacrosanct. Justified limitations are permissible and have been allowed with regard to national security purposes in related powers. This is particularly the case where terrorism and violent extremism have proven an enduring global threat which continues to evolve–both internationally and domestically. New Zealand agencies engage in a wide range of counter-terrorism activities to protect the safety, rights, and freedoms of New Zealanders and to contribute to the global counter-terrorism effort. They require the tools and clear legal authority to intervene to identify, disrupt, and prevent terrorist activities. The New Zealand system permits the development of these tools and this will be explored further in part four of this paper.

II Interaction between counter terrorism offences and the criminal law

Part one demonstrates that if preventative detention provisions are grounded in an efficient and transparent justice process that respects the principles of the rule of law and human rights, they can offer a valid response to terrorism. However, some commentators have asserted that dedicated counter-terrorism measures are not needed because terrorism is the commission of common crimes already proscribed by law and terrorism offences are merely an exercise in political relabelling of existing crimes. [42] This paper rejects that assertion and takes the perspective that terrorism is different in scale and harm when compared to common criminal acts. Counter terrorism measures including the development of preventative detention models are necessarily a separate system to the criminal law. This part of the paper will explore the relationship between the criminal law and counter terrorism specific legislation. A review of some of the reasons put forward in the literature regarding challenges to criminal law principles arising from preventative detention will be undertaken. Finally, a suggested way forward will be proposed to ensure that the criminal law and terrorism provisions can work coherently to face the ongoing risk posed by terrorism.

D Terrorism and the Criminal law

There are three issues which arise when considering the impact of specialist terror legislation on the criminal law. They are the impact of criminalising association, issues associated with inchoate offences, and the criminalisation of politics.[43]

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[42] Commonwealth, Senate Legal and Constitutional Legislation Committee *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 (No 2); Suppression of the Financing of Terrorism Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002; Telecommunications Interception Legislation Amendment Bill 2002* (2002)

[43] David Small "The uneasy relationship between national security and personal freedom: New Zealand and the 'War on Terror'" (2011) 7(4) International Journal of Law in Context 467 at 473

7 Criminalisation association

The first issue centres around the concept that there should be no punishment without law. In this regard commentators have noted the Australian law which imposes prison terms for membership of a terrorist organisation and for meeting or communicating with people involved in a terrorist group.[44] It is argued that these offences punish people for who they associate with not for what they have done. This same lens can be applied to the discussion about preventative detention whereby information gathered about a person's associations rather than their actions could lead to a period of detention without them having committed any crime. This raises the possibility of indictable terrorism provisions eroding the criminal law principle of legality. The current New Zealand law does not go as far as the Australian law; however, policy makers will need to be aware of this issue when determining the appropriate model which could be applied in the New Zealand setting. A full analysis of intersectionality between existing criminal law offences which involve an element of association and the possibility for those offences to be applied to groups which would not normally be described as 'terrorist' organisations is outside of the scope of this paper. However, when these groups are targeted the complexity of enabling preventative detention becomes most obvious and arguments about the desirability of such provisions arises.

8 Inchoate offences

The second issue is the impact of terrorism laws on criminal law inchoate offences. Commentators have argued that terrorism offences were criminal acts long before they were acts of terror.[45] Currently, actions including conspiracy, attempt and incitement have the potential to culminate in an offence without the requirement that the action be committed. The policy rationale being that if the resulting conduct is sufficiently harmful to be criminalised then any preparation, attempt, or conspiracy should also be criminalised. Inchoate offences allow law enforcement to stop offending before it is committed, thereby reducing harm and maintaining national security while still bringing a prosecution against the offender. However, inchoate offences bring with them a range of issues.[46] A key question being when does conspiracy, planning and preparation, incitement or an attempt become sufficiently close to the intended offence that it constitutes a real danger to the public such as to justify intervention? Answering this question is challenging because if the threshold is set too high public safety can be compromised. If the threshold is set too

[44] Bernadette McSherry "Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws" (2004) 27(2) UNSWLJ 354

[45] Kent Roach "The New Terrorism Offences and the Criminal Law" in Ronald Daniels, Patrick Macklem and Kent Roach, (eds) *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press, Toronto, 2002) 151–72

[46] AP Simester and WJ Brookbanks *Principles of Criminal Law* (Brookers, Wellington, 2002) at ch 8

low, there is a risk that people are criminalised for conduct which is merely an unexecuted thought. The inherent difficulties in the criminal law regarding inchoate offences is magnified when applied to preventative detention because there is a lot at stake. The impact of terrorism events is felt by whole communities rather than single individuals who may be the intended victim of criminal offence. Therefore, law enforcement and the judiciary are likely to err on the side of caution when responding to a threat leading to over criminalisation. Further, the possibility for terrorist offences to be inchoate forms of crimes which are in themselves inchoate (i.e., attempting attempt) can have the unintended consequence of expanding criminal liability in unforeseen, complex and undesirable ways.[47] A suggestion to address these problems, is to expand the use of judicially authorised surveillance.[48] However, this has its own problems given the expanding nature of surveillance technology and the inherent bias which has been identified in criminal justice systems around the world. The challenge of the interaction between criminal law inchoate offences and terror offences is not easily resolved and this paper does not intend to do so. Instead, this area is highlighted for further investigation by policy makers.

9 Criminalising motive and politics

The third issue is the inherently political, religious or ideological dimensions of terrorism.[49] Most counter terrorism legislation including the TSA uses a definition including actions for the purpose of advancing an ideological, political or religious cause with the intention to induce terror in the civilian population or to compel or force a government or international organisation to do or abstain from doing an action.[50] Problems arise when motive is unable to be distinguished from intent. When there are people within ideological groups acting with criminal intent and when there are people within criminal groups who have ideological motives the complexity of prosecution increases. The situation compounds the challenge faced by prosecutors when seeking to prove intention. This blurring of the line between the two factors which have previously been quite separate within the criminal law has led to some commentators suggesting that terrorism provisions "do not fit comfortably within the traditional framework for serious crimes because they focus on why the conduct was performed and at whom it was aimed, rather than on what was done"[51]. This mingling of intention and motive is a challenge for policy and law

[47] Kent Roach, above note 46 at 160
[48] Martin L Friedland "Police Powers in Bill C-36" in Ronald Daniels, Patrick Macklem and Kent Roach, (eds) *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (University of Toronto Press, Toronto, 2002) at 274
[49] David Small, above note 44, at 473
[50] Terrorism Suppression Act 2002 s 5(2)
[51] Bernadette McSherry, above note 45 at 355

makers, particularly as it applies to preventative detention because as outlined in part one preventive detention is also inconsistent with basic notions of human autonomy and free will and engages competing rights.

E Preventative detention for national security purposes and the criminal law

Since the 9/11 attacks the policy rationale for separate terrorism laws has been founded in the view that a global response is the only way terrorism can be successfully combatted. [52] This response can be traced through the series of anti-terrorist conventions beginning with UN Security Council Resolution 1373. Courts have also demonstrated this changing policy rationale. The Canadian Supreme Court in Suresh v. Canada (Minister of Citizenship and Immigration) declared that since 2001 it has no longer been valid to suggest that terrorism in one country did not necessarily implicate other countries.[53] This international shift in the responses to terrorism has led to increased use of preventative detention schemes across the jurisdictions reviewed in this paper.

The challenges with counter terrorism legislation generally have been outlined above. However, there are also specific implications for the use of preventative detention and the existing criminal law. This includes the fact that the new terrorism offences (including acts and preparation which is linked to preventative detention) have the potential to orient the attention of law enforcement and intelligence agencies to gathering data and forming opinions about certain political and cultural groups sometimes to the exclusion of other groups. There is further potential for certain people or groups to become the target of investigations simply for advancing a social, political or ideological change which is not in line with the current predominant norm.[54] When investigations lead to a loss of liberty, the repercussions of these operational decisions is brought into sharp focus.

Other questions regarding the use of preventative detention in response to terrorism as a separate scheme rather than using the provisions in the criminal law include that preventative detention relies on predictions about future behaviour and no one is able to accurately predict the future all the time. Decision makers often fall back on stereotypes and conscious or unconscious biases as a proxy for perceived dangerousness. Methods such as enhancing intelligence gathering, diplomatic engagement in geo political security decision making bodies and securing borders can all help to prevent terrorist attacks. However, the potential for detention simply on the basis of prediction remains. Secondly,

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[52] David Small, above note 44 at 471

[53] Suresh v Canada (Minister of Immigration and Citizenship) [2002] 1 SCR 3

[54] See for example the Urewera Raids (described in R v Emily Felicity Bailey, BC200964443) and Zaoui v Attorney-General (No 2) [2006] 1 NZLR 289

the risk of unnecessarily detaining innocent people is high. This risk arises because as noted above the consequences of getting a decision wrong are so high when responding to potential terrorist events. If someone is detained who would not have committed an offence had they not been detained that error is generally invisible to the public whereas someone who is allowed to go free and then commits a terror attack widely known. Therefore, preventative detention should be limited to the most extreme circumstances where the criminal process cannot adequately address a particularly serious threat.

F National security and the criminal law – a way forward for New Zealand

In order to reconcile the challenges with the anti-terrorism measures and basic legal principles there are two possible responses. The first is to rewrite the current criminal law to address as efficiently as possible gaps in the current legislative framework to reduce the harms resulting from terrorism events. The second is acknowledge that the criminal law as currently framed is incapable of dealing with the challenges of terrorism and that a separate system is the only way forward. Commentators have argued both options are legitimate. [55] This paper supports the second option. Given the intrusive nature of national security intelligence tools there must be a line drawn between the powers of national security responses to terror and the criminal law. Without such separation the potential for the criminal law to be unduly influenced by the activities and techniques of national security responses is too great. Therefore, the response to terrorism must sit outside the criminal law. This is the option that the New Zealand law has taken to date and the development of preventative detention provisions would be an extension of this option.

Part two of this paper has reviewed the interaction between the criminal law and counter terrorism laws and found that separate systems are necessary to ensure that the principles of the criminal law can be maintained. Part three will now outline the case for preventative detention before exploring the various models which have been enacted in the United Kingdom, Australia and Canada to identify whether these models could be introduced in New Zealand.

III The case for preventative detention

All Governments have a primary responsibility to ensure the security and territorial integrity of the nation, including protecting the institutions that sustain confidence, good

[55] Bruce Ackerman *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism* (Yale University Press, New Haven, 2006) at 39

governance, and prosperity.[56] This includes the safety of its citizens. In New Zealand this has been described as "the condition that permits the citizens of a state to go about their daily business confidently and free from fear and to be able to make the most of opportunities to advance their way of life."[57] To achieve national security, governments must necessarily look at what powers the law enforcement agencies may need in future instead of waiting until current powers have proven inadequate.

The introduction of or an increase in, preventative detention periods is a distinctive feature of legislation across the jurisdictions reviewed. However, as outlined in part two of this paper, such detention offends the basic premise that anyone who has committed a criminal offence should be tried in a criminal court and only be deprived of their liberty if convicted. The criminal standard is not easy to meet, especially when suspicion of terrorist intent falls short of the proof necessary to obtain a criminal conviction. This dilemma is brought into focus in two key situations. Firstly, when the evidence against the suspect is based on information provided by an informer whose life would be at risk if they had to give evidence in court. Secondly, when information is based on intercepted communications which it would be contrary to the public interest to disclose in court. Therefore, the rationale for the introduction of preventative detention arises from the need to enable detain and therefore prevent an event when the executive is unable, or for operational reasons unwilling, to prosecute a suspected terrorist for criminal offences or to enable law enforcement the time needed to gather the evidence required to charge a person with a terrorism offence.

Preventative detention has been described as an essential tool to enable a society to protect itself from future harm and maintain national security. The United Kingdom Metropolitan Police Commissioner has argued that the complexity of investigating terrorism cases, difficulty in obtaining admissible evidence, and the importance of protecting the public from terrorist attacks terrorism mean these cases require longer periods detention than set out in the United Kingdom's criminal law.[58] The power to arrest and detain individuals based upon the reasonable suspicion threshold has been described as:[59]

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[56] New Zealand Department of Prime Minister and Cabinet *National Security Handbook* (August 2016) at 6

[57] Commonwealth of Australia *Australian Security Intelligence Organisation Annual Report 2016–17* (October 2017) at 7

[58] Secretary of State for the Home Department (UK) *The Government reply to the nineteenth report from the Joint committee on human rights Session 2006-07 - Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning* (HL Paper 157, HC 394, September 2007) at 10

[59] Secretary of State for the Home Department (UK) *The Government Reply to the Fourth Report from the Home Affairs Committee Session 2005-6 – Terrorism Detention Powers* (HC Paper 910, September 2006) at 22

> "one of the most important powers available to the police in the fight against terrorism … the principal usefulness of the power … [is that] it allows arrests to be made at an earlier stage than if there was a requirement for suspicion of a specific offence."

This may have both a disruptive and preventative impact on terrorism planing.

The Australian Security Intelligence Organisation (ASIO) noted that "a heightened terrorism threat environment, combined with the trend towards low-capability attacks requiring limited planning has sustained a high volume and tempo for counter-terrorism investigations and operations."[60] Across Australia law enforcement agencies have reiterated the need to protect the community from terrorist acts and emphasised the need for law enforcement and security agencies to be suitably equipped with the legislative tool necessary to respond to the security environment. The calls for increased law enforcement powers following significant terror events and the focus on earlier intervention has presented challenges to ensuring the security of citizens while also balancing the protection of human rights and freedoms. All jurisdictions have dealt with these considerations in different ways based on a common understanding of how legal systems should operate and the rights obligations of each jurisdiction.

G Overview of preventative detention models

10 The United Kingdom

As a result of the tension in Northern Ireland in the late 1970 and early 1980s the Prevention of Terrorism (Temporary Provisions) Act 1984[61] (PTA) was enacted allowing the Secretary of State for the Home Department to authorise the detention of a person for up to seven days. These powers were controversial and in 1988 the European Court of Human Rights ruled that unless the detention was judicially authorised, it was a breach of Article 5(3) of the ECHR. In order to retain the relevant provisions of the PTA the British government derogated from Article 5(3). It was against this background that in 2001 that the British government had to determine the most effective, least controversial method to meet its obligations under the various UN resolutions passed in response to the 9/11 attacks and ensure national security was maintained at a time when the terrorism threat level was trending up.

Since the 9/11 attacks and particularly after the London bombings in July 2005 (the 7/7 attacks) the United Kingdom has continued to expand its existing counter terrorism

[60] Commonwealth of Australia, above note 58 at 3
[61] Prevention of Terrorism (Temporary Provisions) Act 1984 (UK)

legislation. This has resulted in significant new law enforcement powers. The threat to the United Kingdom (England, Wales, Scotland and Northern Ireland) from terrorism is currently 'Substantial' meaning a terrorist attack is considered likely.[62] This was lowered from 'Severe' in February 2021 after it being raised in November 2020 following terrorist attacks in Europe. The threat to Northern Ireland from Northern Ireland-related terrorism remains 'Severe'.

Currently, anyone arrested on suspicion of terrorism is subject to a special regime for pre-charge detention under Schedule 8 of the Terrorism Act 2000.[63] This regime includes longer maximum periods of detention than permitted in criminal cases. Restrictions on obtaining legal advice are also imposed in certain circumstances. In 2000, when the law was passed the maximum period of detention for terrorism suspects was originally set at seven days. This was increased to 14 days in 2003.[64] Following the 7/7 attacks the government announced proposals to extend preventative detention to 90 days. The proposal was defeated in the House of Commons in late 2005, but an alternative measure was passed to extend the maximum period of detention to 28 days.[65] During the summer of 2008, the Government again attempted to extend the preventative detention period to 42 days, but this was ultimately unsuccessful.

The preventative detention model currently in force in the United Kingdom is that a person may be detained without charge for an initial period of forty-eight hours. Additional periods of detention, in seven-day increments, may then be granted up to a total of 14 days. Detention from 14 to 28 days may then be granted by a High Court judge. The preventative detention period in the United Kingdom (28 days) is the longest among the jurisdictions reviewed for this paper. It is claimed that the provisions are designed to protect the public from an immediate terrorist act.

To safeguard the rights of the terror suspect, applications for extension of detention are made by the Crown Prosecution Services' Counter Terrorism Division, rather than the police. Specific detention treatment, review and extension conditions apply. The HRA applies and legislation must also be consistent with the ICCPR. The United Kingdom also has oversight measures in the form of the Joint Committee on Human Rights (JCHR), the European Court of Human Rights and the Independent Reviewer of Terrorism Legislation. The JCHR reviews all legislation and makes recommendations to the government. They

[62] Security Service – MI5 "Threat Levels" <https://www.mi5.gov.uk/threat-levels>
[63] Terrorism Act 2000 (UK), s 41
[64] Criminal Justice Act 2003 (UK), s 306
[65] Terrorism Act 2006 (UK), s 23

have released several papers examining counter terrorism legislation. The Independent Reviewer's role is to inform public and political debate on anti-terrorism law in the United Kingdom. The Reviewer prepares regular reports for the Home Secretary or Treasury, which are tabled in Parliament, reviewed in evidence to parliamentary committees and debated in articles and speeches. This includes an annual review of terrorism legislation. A person can also take a case to one of the relevant United Nations treaty bodies if they would like to make a claim against the Government's actions.

11 Australia

Post sentence preventative detention has been available in Australia since the 1990s when state and territory laws were passed to extend detention for dangerous prisoners.[66] However, until the 9/11 attacks terrorism was dealt with by the criminal law and there was no preventative detention. Since 2001, 44 new anti-terror statutes, have been passed many of which impact on traditional notions of criminal justice.[67] In June 2018, it was reported the Australia had experienced a terrorist event every 6-8 weeks since September 2014, with the majority of terrorist activity occurring in New South Wales.[68] Australia's general terrorism threat level is currently 'Probable' meaning that there is credible intelligence, to indicate that individuals or groups in Australia have the intent and capability to conduct a terrorist attack.[69] The proliferation of legislation reflects Australia's decision to adapt legislation to their specific threat level and to introduce a range of tools to enable national security.

Preventative detention was first introduced by the Anti-Terrorism Act (No 2) 2005[70] which inserted Division 105 into the Criminal Code Act 1995.[71] The preventative detention model represented a shift from the general principle that arrest and detention should be based on reasonable suspicion of the commission of a criminal offence, to principles of general pre-emption. The section provides for detention where there is a threat of a terrorist attack capable of being carried out, and that could occur, within the next 14 days, and the order might help to prevent it. The power can also be used immediately after a terrorist act if it

[66] Bernadette McSherry 'Indefinite and Preventive Detention Legislation: From Caution to Open Door' (2005) 29 Criminal Law Journal 94

[67] Edwina MacDonald and George Williams, 'Combating Terrorism: Australia's Criminal Code since September 11, 2001' (2007) 16 (1) Griffith Law Review 27 at 27

[68] Department of Justice for the State of New South Wales *Statutory review of the Terrorism (Police Powers) Act 2002* (June 2018) at 8

[69] Australian Government National Security "National Terrorism Threat Advisory System" <https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx>

[70] Anti-Terrorism Act (No 2) 2005 (Cth)

[71] Criminal Code Act 1995 (Cth)

is likely vital evidence will be lost. A person can be detained for a maximum of 48 hours under Commonwealth law, 14 days under state and territory laws or 14 days under a combination of Commonwealth and State models. Australian law enforcement attitudes are evolving alongside the changing threat of terrorism however, the limited use of preventative detention to date highlights the policy that if an arrest based on standard criminal law processes can be made, this will be the favoured route for responding to terror threats.[72]

There are a number of safeguards built into the Australian regime regarding the relevant authorising authority, extensions, restrictions and protection of vulnerable people. This includes preventative detention being distinguished from investigative arrest because a person cannot be questioned while under preventative detention.[73] While Australia does not have a Bill of Rights, rights can be found in the Constitution, common law and some state and territory legislation. Australian counter terrorism frameworks have oversight measures including reporting obligations, sunset clauses and parliamentary scrutiny mechanisms. Australian law enforcement and intelligence communities are subject to parliamentary scrutiny through the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Parliamentary Joint Committee on Human Rights. These committees must consider all proposed counter terrorism legislation and amendments introduced into Parliament. The PJCIS holds public inquiries in which government, independent bodies and individuals can appear to comment on proposed legislation. The PJCIS also has an ongoing scrutiny function. This includes reviewing matters relating to security and intelligence agencies, the terrorism function of the Australian Federal Police, and the operation, effectiveness and implications of detention powers. All reports from the PJCIS are publicly available on the Australian Parliament website.[74] Australian law enforcement agencies must also report to the responsible Minister and the Commonwealth Ombudsman regarding the conduct of terrorism investigations. Counter terrorism legislation is also subject to ongoing review by a number of independent review mechanisms including the Independent National Security Legislation Monitor, Inspector-General of Intelligence and Security, and the Commonwealth Ombudsman.

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[72] Australian Federal Police, *Submission to the Parliamentary Joint Committee on Intelligence and Security Inquiry into AFP Powers* (August 2020)

[73] Criminal Code Act 1995, ss 105.26(1) and 105.42

[74] Parliament of Australia, Parliamentary Joint Committee on Intelligence and Security <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Completed_inquiries>

12 Canada

The Canadian government cautiously approached the enactment of counter terrorism legislation following the 9/11 attacks. Preventative detention (called recognizance with conditions) was originally created in the Criminal Code[75] by the Anti-terrorism Act 2001[76]. These provisions expired in March 2007, but were renewed in July 2013 when the Combating Terrorism Act 2013[77] came into force. The Anti-terrorism Act 2015[78] made additional amendments to the provisions. The amendments made it easier to apply to a court to have reasonable conditions imposed on individuals to prevent the carrying out of terrorist activity and the commission of terrorism offences. The period of detention before a recognizance with conditions hearing is held was raised from three days to a possible seven days, with periodic judicial review. The passage of this legislation was met with significant public criticism and a legal challenge.[79] In June 2019, following a change of policy and extensive public consultation the National Security Act 2017[80] came into force. It further enacted the recognizance with conditions, subject to amendments, and reset the sunset clause. The legislation reverts one of the thresholds for the recognizance with conditions to the higher pre 2015 level. It has been argued that this change strengthens the provision's compliance with the Charter and responds to public criticism of the earlier amendment. Canada's current terrorism threat level is Medium, meaning that a violent act of terrorism could occur, and has been at this level since October 2014.[81]

As noted in part one, Canada has constitutional obligations under the Charter. Specifically, section 7 the right to life, liberty and security of the person. The judiciary uphold the Charter and ensure high level justification is provided when limiting human rights. Scrutiny bodies include the National Security and Intelligence Review Agency (NSIRA). The NSIRA is an independent and external review body which reports to the Canadian Parliament. It reviews all federal national security and intelligence activities to ensure that they are lawful, reasonable and necessary. The NSIRA also hears public complaints regarding key national security agencies and activities. The National Security and Intelligence Committee of Parliamentarians has a mandate to review the legislative,

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[75] Criminal Code RSC 1985, c 46
[76] Anti-terrorism Act SC 2001, c. 41
[77] Combating Terrorism Act SC 2013, c 9
[78] Anti-terrorism Act SC 2015, c 51
[79] John Barber "Canada's anti-terror legislation faces legal challenge by free speech advocates" The Guardian International Edition (online ed, Toronto, 21 July 2015) <https://www.theguardian.com/world/2015/jul/21/canada-anti-terror-lawsuit-bill-c51>
[80] National Security Act 2017 SC 2019, c. 13
[81] Government of Canada "Canada's National Terrorism Threat Levels" <https://www.canada.ca/en/services/defence/nationalsecurity/terrorism-threat-level.html>

regulatory, policy, administrative and financial framework for national security and intelligence and any activity carried out by a department that relates to national security or intelligence.[82]

A review of all jurisdictions has identified a range of models and the adoption of safeguards, within each of the preventative detention provisions examined in this section. All jurisdictions have enacted legislation which responds to the challenges inherent in a preventative detention regime identified in parts one and two. These models provide a starting point for a possible New Zealand model and this will be explored further in part four.

IV A model for preventative detention in New Zealand?

The 9/11 attacks were a pivotal moment in the way States respond to terrorism. While New Zealand joined the global response including supporting numerous UN resolutions and amending an existing Bill to meet its obligations, it wasn't until the terrorist attack on Christchurch masjidain in March 2019 that the threat of terror became real for many New Zealanders. Until then due to geography and the country's role on the periphery of global politics, New Zealanders avoided experiencing the sort of attacks that drove policy and legislative change elsewhere.[83] Preventative detention measures were adopted by States in response to domestic terror incidents in their jurisdictions however no such measures were progressed in New Zealand. Possible reasons for this include the perception of a low level of risk of domestic terrorism, the strong rights-based system of law and New Zealand's historically independent stance on foreign policy issues all of which put the risk of terrorism well down the New Zealand public consciousness. While some of these factors remain, the perception of risk has changed and the scale of harm that can be caused by a lone offender has been directly felt by New Zealanders.

The findings of the inquiry into the Christchurch terrorist attack recommend a review of all legislation related to the counter-terrorism effort with an emphasis on the creation of precursor offences.[84] The Government has undertaken to review the TSA and the Intelligence and Security Act 2017. This provides an opportunity for recognition of the

[82] National Security and Intelligence Committee of Parliamentarians Act SC 2017, c-15
[83] Andrew Geddis and Elana Geddis "Addressing terrorism in New Zealand's low threat environment" in Ian Cram (ed) *Extremism, Free Speech and Counter-terrorism Law and Policy* (Routledge, Abingdon, 2019) 190 at 205
[84] William Young and Jacqui Caine, *Report of the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain on 15 March 2019* (26 November 2020) at 746

limitations of traditional policing powers in the criminal law to address the unique nature of the terrorism threat environment. Precursor offences and preventative detention are needed to disrupt both terrorist attacks and attack planning. Further, taking a prevention focus, means that agencies may be required to transition to overt action at an earlier stage of an investigation meaning that preventative detention becomes a necessary national security tool.

The preventative detention models outlined in this paper enable law enforcement broad powers. The models provide examples for New Zealand to consider when examining whether current counter terrorism tools are fit for purpose. The existence of these powers within the legal systems of jurisdictions that share similar human rights frameworks and common law backgrounds recognises the ongoing threat of terrorism and need for law enforcement to counter imminent and severe national security threats with little warning. It should provide some level of comfort to critics of preventative detention that these powers while available are rarely used.

However, the practical reality for policy makers is that these issues are complex. Preventative detention is an extraordinary power, which must only be used in exceptional circumstances and not in place of criminal prosecution. Security of the person is a basic human right and the protection of individuals is accordingly a fundamental obligation of government. Alongside this New Zealand has a strong history of protecting and promoting human rights. Supporting strong rules-based international human rights mechanisms is a key plank of New Zealand's diplomatic engagement and is critical to safeguarding existing rights and protecting against serious violations. These factors along with technical and operational implementation issues mean that significant policy work in order to develop a preventative detention regime which would meet the unique New Zealand context.

The period since the 9/11 attacks has seen a dramatic rise in the magnitude and severity of the threat of trans-boundary and domestic terrorism. This changing landscape has challenged States ability to provide security for their citizens. The jurisdictions considered in this this paper are all democratic and have robust legal systems for individual protections. Responding to this ongoing and fluctuating threat while seeking national security solutions within the constraints that the international rules-based systems provide, has forced States to learn from the experience of others facing similar challenges. Australia, the United Kingdom and Canada's legal experience with development and challenges to preventive detention provides a useful starting point for New Zealand to consider whether

it should employ similar measures as a necessary tool in ensuring national security for its citizens.

V Conclusion

In the process of developing counter-terrorism policy and legislation, law-makers around the world have been faced the complex task of balancing the need to secure public safety with protecting human rights and maintaining the rule of law. This paper has outlined two of the key reasons counter terrorism legislation has been criticised – human rights and the interaction between criminal law and terrorism provisions with specific reference to preventative detention. Part one of this paper demonstrated that when countering terrorism and ensuring national security, a State may lawfully detain persons suspected of terrorist activity. Within the rights framework, interventions must have regard to the positive obligations of a State to uphold the rights of the community as well as the rights of suspects. Further balancing is required between the competing objectives of State autonomy and adherence to international norms and obligations. Finally, when safeguards are being considered, there is a need to balance the practical realities of law enforcement while still ensuring that people are free to express themselves. Throughout the policy and legislative development process, strict compliance with IHRL is essential. Any proposed regime in New Zealand must, at the very least, provide for judicial scrutiny and where actions are deemed a breach of rights, and make compensation available.

Part two of this paper examined the relationship between counter terrorism law and the criminal law. There are numerous issues which have been raised regarding the link between association and terrorism offences. Particularly with regard to preventative detention where association, inchoate offences and criminalise motive and politics. The forward proposed in this paper is continuing to develop separate terrorism law. Thereby ensuring the principles of the criminal law can be maintained. Part three of this paper has reviewed the preventative detention models adopted in Australia, the United Kingdom and Canada including the safeguards which have been built into these models to address the issues identified in parts one and two. The different lengths of detention, level of judicial oversight and use of independent statutory and parliamentary review bodies all demonstrate the unique circumstances each jurisdiction has had to negotiate in order to develop a preventative detention regime which complies with their rights obligations and addresses their unique national security needs. Finally, part four has examined some of the key policy questions which remain unanswered and if New Zealand decides to introduce a preventative detention regime as part of its national security toolkit.

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