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**Terrorist Designation and the 'Lone Actor' Problem: Is
Designation Fit For Purpose In the Modern Age**

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington

2021

Abstract

Terrorist designation was one of the counter-terrorism tools granted to New Zealand following the spate of large-scale terrorist acts in the early 2000's. This type of terrorism involved large groups that mostly held extremist Islamic ideologies. Yet the nature of terrorism appears to have shifted, with the threat appearing to originate mainly from so-called 'lone actors' who often have right-wing extremist views. This paper argues that the terrorist designation process is currently ineffective in dealing with this threat. There are great difficulties in applying the framework to a potential 'lone actor' terrorist, whilst there also appears to be a reluctance by the executive to use it against them. It is argued that despite the criticisms acknowledged in this paper, terrorist designation should be used more to combat this threat. At the moment, New Zealand is left vulnerable by our lack of ability to effectively respond. Potential changes to the process include making terrorist designation available on a preparatory basis, whilst also adding new restrictions on travel for designated entities. Ultimately, terrorist designation has the potential to be a useful tool in preventing the harm that 'lone actors' may cause, but change must be implemented before then.

Key Words: 'terrorist designation', 'lone actor', 'counter-terrorism', 'Terrorism Suppression Act 2002', 'terrorism'

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I Introduction

On 12th October 2002, 202 people including three New Zealanders were tragically killed in the sudden and merciless “Bali Bombings.” The attack was a reminder to many New Zealanders that the growing threat of terrorism needed to be addressed urgently and effectively. Three weeks later, New Zealand’s Prime Minister responded by using the newly established terrorist designation process to list the group responsible, Jemaah Islamiyah, as a terrorist entity under New Zealand law for the first time.

Nearly 20 years on, the terrorist threat has evolved. It is now increasingly common for the perpetrators of attacks to operate completely independently as ‘lone actors’, which was demonstrated in the 2019 Christchurch Mosque Shootings. This paper considers the terrorist designation framework and inquires as to whether it adequately counters this growing threat. It first provides a general overview of how terrorist designation works, the purposes it is intended to serve, and its legislative history. It will then acknowledge some criticisms of the process before focusing specifically on the ‘lone actor’ problem. In summary, this paper argues that the current framework is ineffective in responding to this threat and this weakness needs to be addressed. Despite shortcomings, terrorist designation should be used more, and after possible adjustments it will reach its intended effectiveness.

II Background

A What does a ‘terrorist designation’ mean?

Under the Terrorist Suppression Act 2002, the Prime Minister has the power to designate a group or individual as a “terrorist entity.” There are two types of designations available: interim or final. They each require different standards of belief that an entity has knowingly carried out or participated in a terrorist act. There is no difference in consequences

regarding reporting obligations or connection with offences when an entity is designated under either one.¹

Designation is a civil procedure, although it is closely linked to various criminal penalties. Following designation, it becomes a criminal offence to interact with the listed entity.² Prohibited interactions include dealing with the listee's property or providing them with financial or similar services.³ Recruiting for a designated organisation is also prohibited.⁴ Participating in a designated group for the purpose of enhancing its ability to carry out terrorist acts whilst either knowing or being reckless as to whether it is designated constitutes an offence.⁵ However, mere membership of a listed group is not criminalised.

A designation affects an entity's property. Property owned or controlled by designated entities is frozen under s 9. Various other actions can be taken against a designated entity's property. For example, customs officials can seize goods or cash where they have "good cause to suspect" they are owned or controlled by designated entities.⁶ In circumstances where the prohibition on dealing is not adequate, the Attorney-General can apply to the Court so that property owned or controlled by designated entities is forfeited to the Crown.⁷

Designation imposes various reporting requirements in relation to suspected terrorist property outlined in s 43. Financial institutions must report their suspicions of terrorist activity to the Police, helping to ensure assets belonging to terrorists are detected. Property that can be derived from the property is also captured by s 43. These requirements have a

¹ Alex Conte *Human Rights in the Prevention and Punishment of Terrorism* (Springer, Berlin, Heidelberg, 2010) at 587.

² "Terrorist Designation Process" <<https://www.police.govt.nz/sites/default/files/publications/terrorist-designations-process-legal-framework-paper-03-10-2017.pdf>> at (3).

³ Terrorism Suppression Act 2002, s 10.

⁴ Section 12.

⁵ Section 13.

⁶ Section 47A.

⁷ Section 55.

potentially wide application, and failure to report suspicions can be punishable by a year's imprisonment.⁸

Interim and final designations require formal notification to the concerned entity. Section 26 states the notice must contain the section under which the designation is made, and whether they are being designated as a terrorist entity or an associated entity. However, the notice does not require the reasons underlying the designation to be set out. A designation is also not invalidated if the formalities are not fully complied with.⁹

B Interim or Final

The main difference between the two types of designations is that interim designations expire after 30 days, provided they are not revoked earlier or made into final designations.¹⁰ They may also only be made once and cannot be renewed like final designations.¹¹ Interim designations require a lower threshold of belief than final designations; the Prime Minister must have "good cause to suspect" the accused has knowingly carried out or participated in a terrorist act.¹² Because interim designations can only be made once, the Government is prevented from arbitrarily extending a designation by constantly repeating the process under the lower standard of belief.

Before an interim designation is made, the Prime Minister must consult with the Attorney-General and the Minister of Foreign Affairs and Trade.¹³ They must also advise the Leader of the Opposition of the designation as soon as possible and provide them with the factual basis behind underlying it if requested.¹⁴ After an interim designation is established, there are various notification requirements to inform the public and the entity.¹⁵ If interim

⁸ Section 43(4).

⁹ Section 29.

¹⁰ Section 21(e).

¹¹ Section 21(a).

¹² Section 20(1).

¹³ Section 20(4).

¹⁴ Section 20(5).

¹⁵ See s 21(c) and (d).

designations become subject to judicial review, they continue to operate until those proceedings conclude, which means they are susceptible to being drawn out beyond their intended duration.¹⁶

Final designations expire after three years unless they are revoked under s 34 or renewed under s 35. They have a higher threshold of belief than interim designations, requiring “reasonable grounds” instead of “good cause to suspect.”¹⁷ However, less consultation is required; the Prime Minister must only consult with the Attorney-General and no notice to the Leader of the Opposition is necessary.¹⁸ There is no need for an entity to first be designated in the interim before being finally designated.¹⁹

If a final designation has been revoked, the entity may be finally designated again but only on the basis of some new information not considered in the earlier one.²⁰ Renewal is made on the basis that the Prime Minister believes there are still reasonable grounds for a designation to continue.²¹ A report must be made to the Intelligence and Security Committee following a renewal, but there is no constraint on how many renewals can be made.²² Like interim designations, it is a requirement that the public and entity are notified.²³

C Associated Entity

An individual or group may be designated as an “associated entity” rather than a “terrorist entity.” It requires the Prime Minister to have either an interim or final threshold of belief that an entity:²⁴

¹⁶ Section 21(f).

¹⁷ Section 22(1).

¹⁸ Section 22(4).

¹⁹ Section 23(a)(i).

²⁰ Section 23(c).

²¹ Section 35(2).

²² Section 35(5).

²³ See s 23(e) and (d).

²⁴Section 20(3) and S 22(3).

- (a) is knowingly facilitating the carrying out of 1 or more terrorist acts by, or with the participation of, the terrorist entity (for example, by financing those acts, in full or in part); or
- (b) is acting on behalf of, or at the direction of,—
 - (i) the terrorist entity, knowing that the terrorist entity has done what is referred to in subsection (1); or
 - (ii) an entity designated as an associated entity under subsection (2) and paragraph (a), knowing that the associated entity is doing what is referred to in paragraph (a); or
- (c) is an entity (other than an individual) that is wholly owned or effectively controlled, directly or indirectly, by the terrorist entity, or by an entity designated under subsection (2) and paragraph (a) or paragraph (b).

Designation as an associated entity allows the framework to capture the support network that the perpetrators of ‘terrorist acts’ rely on.

D When will a designation be made?

The process begins with the Police collecting relevant data and consulting the appropriate Government departments to make an assessment.²⁵ Based on the evidence, the Police decide whether to pursue an interim or final designation. Generally, they seek final designations because of their greater duration, but not if the circumstances require a faster response. All this material is compiled into an application and directed to the Prime Minister for review.²⁶

²⁵ John E Smith *New Zealand’s Anti-Terrorism Campaign: Balancing Civil Liberties, National Security, And International Responsibilities* (Fullbright, 2003) at 52.

²⁶ At 52.

The material on which a designation may be based is “any relevant information” which includes ‘classified security information’. Classified security information is defined as being:²⁷

- (a) relevant to assessing a designation for an entity
- (b) held by a specified agency
- (c) and has been certified by the head of a specified agency that its disclosure would breach various obligations or have prejudicial effects

The potential impacts of using this information will be commented on later in this paper. The premise for its confidentiality is to avoid jeopardizing our national security and the intelligence arrangements with our international allies.²⁸

Although an entity may meet the legal test under s 22, the Prime Minister still has discretion whether to make the designation. Not every entity that satisfies the test must be designated. There are no factors outlined to guide this discretion, but it can be assumed that the purpose of the Terrorism Suppression Act and obligations of Resolution 1373 are relevant considerations. New Zealand will exercise the power to designate where they believe the “balance of interests lies”, intending to target those who endanger New Zealand or its citizens. It is not intended to be a “crusade” that designates as much as possible.²⁹

Despite this, another way in which an entity may be designated is through designation by the UN. Following the Terrorism Suppression Amendment Act 2007, entities listed by the UN Security Council Sanctions Committee are automatically designated without the need

²⁷ Terrorism Suppression Act 2002, S 32.

²⁸ Law Commission *National Security Information In Proceedings* (NZLC IP38, 2015) at (1.3).

²⁹ Interview with Phil Goff, Minister of Justice and Minister of Foreign Affairs and Trade (Wellington, October 2003) as cited in Smith, above n 25, at 51.

for the Prime Minister to review the applications. This mitigates a delay in designation which could risk allowing a ‘terrorist entity’ to evade sanctions.

E Purpose of Terrorist Designation

Designations serve a pre-emptive purpose. One of their overarching objectives is to reduce terrorist activity. They fill the gap when there is insufficient evidence to prove an entity has definitively committed a ‘terrorist act’ by allowing restrictions to be imposed and preventative powers to be engaged. By sidestepping the potential delay of a trial, they allow decisive action to be taken.

Designations are intended to help cripple an entity’s ability to carry out ‘terrorist acts.’ Powers like freezing orders or the various prohibitions reduce the means available to them. Criminalizing any engagement or participation with listed entities also deters membership and the facilitation of activities that an entity may benefit from. These ultimately help to stifle out an entity’s existence.

Using the designation process fulfils our international obligations. In particular those that arise under United Nations Security Council Resolutions 1267, 1989, 2253, 1988 and 1373.³⁰ These Resolutions require us to take action against specific terrorist entities and outlaw the financing, participation and recruitment to terrorist entities in general.³¹ By quickly freezing assets before they can be dissipated, we discharge our duties and contribute to the so-called international ‘war on terror.’

The designation of an organisation or individual as a terrorist entity denounces the ideology that they hold. Deeming the ideology to be terrorism has a symbolic effect which reflects society’s condemnation of it. A study concluded that a classification of terrorism may be equally influenced by symbolism as terrorism as much as a real assessment of threat.³²

³⁰ “Designated Terrorist Entites” New Zealand Police <<https://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities>>.

³¹ See generally United Nations Security Council Resolutions 1267, 1989, 2253, 1988, 1373.

³² Colin Beck and Emily Miner “Who Get’s Designated and Why” (2003) 91 *Social Forces* 837 at 841.

However a balance is struck. Not every organisation with objectionable views can or should be designated. Mr Goff reiterated when he was both Minister of Justice and Minister of Foreign Affairs and Trade “as much as we dislike a number of groups... it is not a crime to be a member of the Nazi Party... or the Mongrel Mob.”³³

Finally, the public and formal nature of a listing acts to guide financial institutions and businesses regarding with whom they can conduct business. This upholds greater certainty in law and commerce. Keeping the public informed reduces the risk that they unknowingly deal with a terrorist entity, and unintentionally provide them with support to mount an attack.

III Legislative History

The origins of the designation process began in 1999 after the United Nations Security Council passed Resolution 1267, giving mandate to the Al-Qa’ida and Taliban Sanctions Committee to list or de-list individuals.³⁴ Yet not long after, the tragic events September 2001 occurred. It was evident following this that an urgent response to counter the growing threat of ‘terrorism’ was needed. The international community accepted that the current framework was inadequate and ill-equipped to deal effectively deal with this risk.

The ensuing series of events evidence the strong link between historical acts of terrorism and a resulting reaction in counter-terrorism legislation. Following 9/11, the Committee’s focus was extended beyond Afghanistan to apply to any individuals or entities regardless of location.³⁵ All UN member states are required to designate as terrorist entities the individuals or groups listed by the UN Sanctions Committee.³⁶

³³ Interview with Phil Goff, Minister of Justice and Minister of Foreign Affairs and Trade (Wellington, October 2003) as cited in Smith, n 25, at 77.

³⁴ Conte, above n 1, at 586.

³⁵ At 586.

³⁶ At 586.

The United Nations Security Council also hastily adopted Resolution 1373, creating vast and strict obligations on member states to introduce counter-terrorism legislation. The seriousness of the threat was reflected in the fact that it was the first resolution to impose significant binding legal obligations upon states.

A notable omission from Resolution 1373 was a definition of terrorism. This was apparently deliberate to avoid the deadlock in reaching consensus among states. This left New Zealand to develop its own framework to meet these new responsibilities. The Terrorism (Bombings and Financing) Bill already before parliament was significantly amended to give them effect, being renamed the “Terrorism Suppression Bill.”³⁷ There was a great sense of urgency in establishing this legal structure and the legislative process was advanced as quickly as possible; officials feared letting the UN down despite concerns of the potential consequences of rapidly implementing complex legislation.³⁸

Parliament struggled to find a balance between fulfilling these obligations and upholding national security, whilst also defending human rights.³⁹ Many MP’s called for “extraordinarily tough measures” to be enacted in order to fight the ‘war on terror.’⁴⁰ Parliament initially contemplated some strict proposals under urgency and drew criticism for declining public submissions, which it eventually went back on.⁴¹ In relation to designation, the proposals included denying judicial review or appeal to designated entities, and possibly including the ‘innocent’ employees of a business owned by a terrorist.⁴² These would have had a serious impact on human rights, and the Committee Chairman was dismayed at the wide range of proposals considered in hindsight.⁴³

³⁷ Smith, above n 25, at 23.

³⁸ At 20.

³⁹ At 21.

⁴⁰ At 21.

⁴¹ At 23.

⁴² At 22.

⁴³ At 21.

Another proposal suggested that court approval be required before assets were frozen.⁴⁴ This would allow the Court to consider the influence of a designation made by the UN or other countries and how much this should impact domestic designation. But this was scrapped in favor of granting the power to the Government so that assets could be frozen more quickly, which was the approach other jurisdictions had taken.⁴⁵ In this way, it is clear that designation is intended to be swift to prevent any associated assets evading seizure.

The Committee appointed to the bill made many other substantial revisions to the original designation process to improve safeguards for human rights. The first of the major amendments was to include a knowledge requirement so that an ‘entity’ must “knowingly” have participated in a terrorist act.⁴⁶ This would exclude those who are in some way connected with a designated terrorist entity but are unintentionally involved.

Another amendment was to shorten the final designation period from five to three years.⁴⁷ If the designation was to be extended, an application to the Attorney-General along with Court approval was required.⁴⁸ Reducing the amount of time for which someone’s assets can be frozen without judicial oversight protects against an arbitrary use of power. A shorter expiry date ensures information remains relevant by being reviewed more frequently, helping to keep designations updated.

The final amendment related to the classified information procedure. Instead of allowing judicial review purely on matters of law, the committee proposed that classified information could be shared with the Court without sharing it with the designated entity or their counsel.⁴⁹ Restricting appeals as originally suggested would severely limit the accused’s rights. This would provide greater access to justice without compromising

⁴⁴ At 22.

⁴⁵ At 22.

⁴⁶ At 28.

⁴⁷ At 28.

⁴⁸ At 28.

⁴⁹ At 28.

national security. The Committee also suggested that third parties who are extremely close to the designated entity be allowed to appeal the designation.⁵⁰

Despite certain calls for more robust laws to be put in place, the Committee's amendments reveal there was concern for individual liberties. But it is still plain that the historical context in which the designation process was created prioritised speed and the ability to effectively respond to the terrorist threat of the time; large networks of Islamic extremists. Public sentiment also supported this. Shortly after parliamentary debate ended, the Bali Bombings which tragically killed two New Zealanders reinforced this need.⁵¹ The process was put to work immediately; only two weeks after the bulk of the Terrorism Suppression Act 2002 took effect, the Prime Minister designated the perpetrators of the Bali attack as a "terrorist entity."⁵²

IV Criticisms

The focus of this section sets out of some of the noted shortcomings of the designation framework, or the aspects commentators have most scrutinized.

A Human Rights and National Security

The designation process poses a potential threat to our human rights. In particular, the right to peaceful assembly, the right to freedom of association, and the right to a fair hearing along are among the most at risk.⁵³ Counter-terrorism by nature is almost paradoxically designed to protect our human rights by violating them in some ways by reason of 'national security.'

Our Courts are yet to define what 'national security' means, but it is generally understood as the protection of New Zealand's interests and people against threats or potential

⁵⁰ At 28.

⁵¹ At 30.

⁵² At 30.

⁵³ Conte, above n 1, at 585.

threats.⁵⁴ Maintaining national security includes the protection of democracy.⁵⁵ The New Zealand Law Commission notes the tension within national security to not encroach too deeply on human rights as it is inherently designed to upkeep them.⁵⁶ It is seemingly contradictory to deviate away from natural justice despite the condition to observe democratic principles.⁵⁷

This tension is observable through the way the UN dually orders states to maintain counter-terrorism measures whilst also warning them to abide by human rights obligations.⁵⁸ Upholding them is not only an obligation but is also considered to be beneficial to ‘national security’ given that violations often help facilitate the spread of terrorism.⁵⁹ Under s 5 of the New Zealand Bill of Rights Act, the rights and freedoms granted can only be subject to “reasonable limits” that can be “demonstrably justified.” Notably, our designation process can impose severe criminal penalties but is more characteristic of civil procedure. This may allow the scope of the law to be unduly distorted by being expanded beyond its given limits.

New Zealand does not criminalize membership of a designated organization. This is less stringent than some of our commonwealth counterparts; Australia criminalizes membership which includes “informal members” of terrorist organisations.⁶⁰ However in practicality, it seems hard to prove mere ‘passive membership’ due to the number of considerations that can evidence support. This may threaten the right to association, as rather harmless individuals are subject to restrictions without materially contributing to terrorism. Canada recognizes this tension by only criminalizing “known participation” in a

⁵⁴ “Defining National Security” (September 2017) Department of the Prime Minister and Cabinet <https://dpmc.govt.nz/sites/default/files/2017-09/fact-sheet-3-defining-national-security_1.pdf>.

⁵⁵ See the House of Lords decision *Secretary of State for the Home Department v Rehman* [2001] UKHL 47, [2003] 1 AC 153 (HL) at [16]–[17].

⁵⁶ Law Commission, above n 28, at 14.

⁵⁷ Law Commission, above n 28, at 14.

⁵⁸ Conte, above n 1, at 585.

⁵⁹ At 585.

⁶⁰ Security Legislation Amendment (Terrorism) Act 2002 (Cth), ss 102.1, 102.3.

terrorist group, which requires proof of additional conduct more than just passive membership.⁶¹

1 Natural Justice

Our common law establishes that the right to natural justice applies despite explicit reference to it in the rules and regulations of a public authority.⁶² However, it is visible within s 27 of the Bill of Rights Act. Natural justice helps to ensure the Crown does not have an unfair procedural advantage over the person at trial,⁶³ and is most harmed by non-disclosure of information.

As mentioned before, the notice of a designation is not required to state the reasons upon which it is based. The justification for this omission is to uphold the confidentiality and security of the agencies involved. By revealing this information, the purpose of the regime to freeze relevant assets before their dissipation could potentially be jeopardized. However, the omission is markedly different from the UN Sanctions Committee procedure which requires a “narrative summary” of the reasons for inclusion.⁶⁴

It also conflicts with the public interest in transparency and accountability which dictates that decision makers should give reasons for their decisions.⁶⁵ One of the main purposes of notification is to provide an entity with the ability to decide whether they can appeal or judicially review the decision.⁶⁶ Internationally, the UK Court of Appeal held that a “merit based review” of the reasons for the listing must be provided but we are yet to do the same.⁶⁷ Conducting the process in this manner provides scope to strike a better balance with public interest and the disclosure of sensitive information.

⁶¹ Criminal Code RSC 1985 c. C-46, s 83.18.

⁶² *Ngati Apa Ki Te Waipounamu Trust v Attorney-General* [2004] 1 NZLR 462 (CA) at 471.

⁶³ Law Commission, above n 28, at 11.

⁶⁴ Conte, above n 1, at 607.

⁶⁵ At 607.

⁶⁶ At 607.

⁶⁷ At 607.

Following the 2007 amendments the automatic listing of UN designated entities limits New Zealand to only make domestic designations independently. Despite s 33 allowing for judicial review of designations, this limitation means that UN listed entities and individuals are unable to apply.⁶⁸ This directly contrasts the recommendations made by the Special Rapporteur.⁶⁹ There is no avenue for these types of entities to challenge their designation, which violates the principles of democracy and fairness.

The United Nations Human Rights Committee also voiced their concern in 2016 surrounding the lack of means for an entity to challenge their listing. It was particularly troubled that New Zealand had no “plan[s] to amend the Terrorism Suppression Act... to include provisions that would enable people to launch legal proceedings to challenge designations.”⁷⁰ It stated that the procedure “fell short of what international human rights law required.”⁷¹

Continually, the de-listing process is somewhat stricter than in other jurisdictions. In Canada, the listing must be reassessed every two years to establish whether there are still reasonable grounds to list an entity,⁷² compared to the three required in New Zealand. Despite the allowance for applications revoking the designation, this still gives rise to a risk that the order relies on outdated information. Other jurisdictions also have greater consultation requirements before a designation is made. In the United States, the whole of congress is given seven days to review the decision. Although speed is essential to the process, this requirement better preserves natural justice by reducing the potential for executive bias.

⁶⁸ At 617.

⁶⁹ At 617.

⁷⁰ John Ip, *New Zealand and the Global Security Law Complex*, Advance copy for publication in Hertogen & Hood, *International Law in Aotearoa New Zealand* (ThomsonReuters, forthcoming) at 24.

⁷¹ At 25.

⁷² Conte, above n 1, at 592.

2 *Classified Security Information*

The New Zealand Government works closely to gather and share intelligence with our international allies, which gives rise to the need that this information and collecting practices are kept confidential.⁷³ The use of so called “classified security information” in the designation process is an area of concern that may thwart the right to a fair hearing, particularly as it is not disclosed to either the designated entities or their solicitors.

The “Zaoui” case illustrates this issue in New Zealand. Mr Zaoui had sought to become a refugee in New Zealand after destroying his false travel documents once he had arrived. Before refugee status was approved, he was issued in a separate set of proceedings with the first ever security risk certificate deeming him to be a threat to national security. The “classified security information” that had been used in issuing the certificate was kept secret from him. The Minister of Immigration eventually denied his refugee application after choosing to rely on the fact that the certificate was issued.

The Zaoui case was criticized for unfairness due to the suspicion that much of the evidence kept as “classified security information” originated from the Algerian government, which at the time had just undergone a military coup and was purging political opposition. But these suspicions could not be verified; entities challenging their designations are given a non-classified summary of the evidence approved by Court under s 38(4) only to the extent that the summary doesn’t disclose anything that could compromise security.⁷⁴ This places doubts on the accuracy of the information. Because it cannot be challenged, some observers consider that it is inherently untrustworthy.⁷⁵ The Inspector General conceded the use of classified information was not fair but stated that fairness was not possible in the field of national security.⁷⁶

⁷³ Law Commission, above n 28, at 3.

⁷⁴ Terrorism Suppression Act 2002.

⁷⁵ Smith, above n 25, at 64.

⁷⁶ At 64.

Overseas Courts have made similar declarations. The European Court of Justice considered how the right to natural justice was affected by the designation process in *Kadi v Council of the European Union*.⁷⁷ Its decision stated that the denial of evidence which had been used against the accused was a breach of rights under article 6 of the ECHR, and thereafter annulled the restrictive measures.⁷⁸ .

These cases demonstrate that designation does infringe our human rights. For every successful appeal, many more cases of violation remain in the dark. It is unclear how much information is actually required to be able to adequately challenge a ruling. This could give rise to the unacceptable scenario that some circumstances carry a risk of compromising security so great, it would justify redacting information to the extent that a ruling would never practically be able to be appealed. A defendant is unable to know if there is even sufficient information provided. *A and others v United Kingdom* demonstrated this fear when the defendant was essentially unable to mount a challenge.⁷⁹

New Zealand is additionally obliged through our international obligations under Article 14(1) of the ICCPR to provide fair hearings. The use of “classified security information” has the most potential to violate this. Without a special advocate, the Court is deprived of the benefit of having fully informed submissions from the affected person’s counsel.⁸⁰ There is an inherent unfairness that resides within the procedure that is hard to mitigate, even with special advocates that would better uphold natural justice.⁸¹ It is part of the “necessary evil” that counter-terrorism tools require.⁸² Even though the practice of the authorities is to rely on open source and unclassified materials, the danger of using this type of information remains.⁸³

⁷⁷ C-402/05 P *Kadi v Council of the European Union* [2008] ECR I-06351.

⁷⁸ At [374].

⁷⁹ *A and others v United Kingdom* (2009) ECHR 3455/05, 19 February 2009 (Grand Chamber).

⁸⁰ Law Commission, above n 28, at 46.

⁸¹ At [4.51].

⁸² Smith, above n 25, at 62.

⁸³ Ip, above n 70, at 7.

B Political Conception

Although originally proposed, there is no neutral third party like a Court involved before designations are made.⁸⁴ The power is solely vested in the Prime Minister who is only constrained by meagre consultation requirements. As briefly mentioned before, this gives rise to the concern that the executive control of designations makes it prone to political bias. International concern or hegemonic interest have been concluded to bear little influence on designation in practice,⁸⁵ meaning much of the decision can be based upon the subjective view of the decision maker. Designation by the United States alone influences the designations of other countries even after accounting for various factors.⁸⁶ These considerations create some doubt that despite declarations asserting the designation framework is a sanctioning tool against terrorism, they are always used for that purpose.⁸⁷

International history has revealed some of the problems with political biases in designations. Indonesia recently designated rebels in West Papua as “terrorists”, which has been heavily criticized by human rights watch as causing greater racism and human rights abuses in the region.⁸⁸ The fear is that under greater counter-terrorism powers, suspects could be detained for longer without charge and therefore face a greater risk of torture or abuse.⁸⁹ It grants the government considerable leeway to label those who have legitimate independence aspirations as “terrorists” and to resultingly suppress political discourse they dislike.⁹⁰ Human Rights Watch states that “violating human rights in the name of counter-terrorism merely benefits armed extremists over the long-term.”⁹¹

⁸⁴ Smith, above n 25, at 61.

⁸⁵ Beck, above n 32, at 857.

⁸⁶ At 857.

⁸⁷ At 857.

⁸⁸ “Terrorist tag in West Papua could worsen racism: rights group” *Radio New Zealand* (online ed, 7 May 2021).

⁸⁹ Above n 86.

⁹⁰ Above n 86.

⁹¹ Above n 86.

The risk that our Government could be pressured into designating groups that are not necessarily regarded as terrorist organisations is worrying and far from negligible. World history is fraught with examples. At one stage, one of the most influential figures fighting for freedom Nelson Mandela was recorded on a terrorist list. Closer to home, the attempt at charging the Urewera Four in New Zealand with a “terrorist act” in 2007 sparked major public outcry and allegations that the Government was trying to suppress political discourse.

The deadlock in international consensus on terrorism is also problematic. Groups or individuals can be designated by one country but not by others. What distinguishes between ‘freedom fighters’ and terrorists is often a subjective matter. This tension can make it difficult to assess the true nature of a threat. Furthermore, as designations are often prepared on open-source information that may originate from other countries, there is the chance of incorporating the countries’ own political biases. It may be just as troublesome to rely on this information as relying on ‘classified security information.’

C Outdated Tool

Terrorist designation could potentially have undesirable practical effects that undermine its effectiveness. Although it provides preventive measures to cripple an organisation, designation does nothing to facilitate tracking terrorist groups better.⁹² It may actually make monitoring and determining their actual threat level more difficult by pushing them underground. This could result in more resources being expended to detect future terrorist acts.

Members may also react more violently to their ideology being condemned by the Government. Their ideology can canvas a range of lesser to more extreme views and designation should be careful to only target followers that pose a legitimate risk. It is not

⁹² Emilia Columbo, Judd Devermont and Jacob Kurtzer “Mozambique: The Problem with Foreign Terrorist Organization (FTO) Designations (12 March 2021) Center For Strategic & International Studies <<https://www.csis.org/analysis/mozambique-problem-foreign-terrorist-organization-fto-designations>>.

illegal to hold somewhat objectionable or offensive views. In fact, it is a basic human right to have freedom to do so. Casting a ‘blanket’ designation over a whole organisation ignores the fact that members who hold less extreme views can sometimes have a “pacifying effect” on more extreme members.⁹³

Designating an organization may increase its notoriety. This gives it a more legitimate stance in the eyes of some individuals, which could aid recruitment despite the prohibition. An independent review of the UK’s counter-terrorism legislation warned of this potential consequence.⁹⁴

Designation in practice may do little to stifle an organization. Before the events of March 2019, the designations of New Zealand were criticized for being merely symbolic to show the international community that New Zealand was contributing to the war on terrorism.⁹⁵ Furthermore, after the Canadian Government designated the far-right group “Proud Boys Canada” as terrorists, it formally dissolved itself.⁹⁶ Yet many members may still continue to propagate their hateful ideology despite the disbandment,⁹⁷ meaning a dissolution might be in “name only.”⁹⁸ The “die-hard” members do not walk away even though they need to be sanctioned the most.

Organisations are likely to slightly alter their identity and name then re-emerge.⁹⁹ Constantly designating groups which emerge out of the ashes of a former group is a fruitless task. It is potentially worse considering they seem to re-appear even more extreme

⁹³ Hayden Crosby “Treating NZ’s far right groups as terrorist organisations could make monitoring extremists even harder” *The Conversation* (online ed, 16 April 2021).

⁹⁴ Jamie Grierson “Watchdog urges caution over call to ban far-right hate groups” *The Guardian* (online ed, 28 Aug 2019).

⁹⁵ Ip, above n 70, at 12.

⁹⁶ “Proud Boys Canada dissolves itself, months after designation as terrorist entity” *The Guardian* (online ed, 3 May 2021).

⁹⁷ Emma Paling “Proud Boys Canada may have disbanded ‘in name only’ researchers warn” *CBC* (online ed, 2 May 2021).

⁹⁸ Paling, above n 97.

⁹⁹ Paling, above n 97.

and aggressive.¹⁰⁰ Groups like Al-Shabab have spent years on the list but remain intact and operating.¹⁰¹

It may be doubtful if the financial limitations imposed by a designation are actually effective. Historical acts of terrorism have required significant amounts of funds and large support networks to carry out. 9/11 cost an estimated USD 400,000 to 500,000. However recent history both internationally and seen in the Mosque Attack show attacks require low sophistication.¹⁰² Attackers have been seen to be less formally organized or operating independently.¹⁰³ This reduces the effect that financially constraining an entity has.

Other bodies have also brought the efficacy of the measures into question. The US 9/11 Commission reflected in 2004 that “trying to starve terrorists of money is like trying to catch one kind of fish by draining the ocean.”¹⁰⁴ Effective limitation may depend on where the entity’s finances are sourced from. If they come from criminal enterprises, the effect will be small.¹⁰⁵ Many rely on activities including drug smuggling, kidnapping, and arms dealing that already heavily conceal their profits.

There may also be some deviation between the lists and their practical application. Technology companies rely on the lists to help them moderate terrorist activity on their online platforms.¹⁰⁶ Yet the lists themselves have been argued to be unsuitable as the sole source of information.¹⁰⁷ The confusion of an entity being designated in one country but

¹⁰⁰ Paling, above n 97.

¹⁰¹ “The ‘domestic terrorist’ designation won’t stop extremism” *The Conversation* (online ed, 29 June 2020)

¹⁰² Ministry of Justice “Coversheet: Strengthening New Zealand’s counter-terrorism legislation” Treasury of New Zealand <<https://www.treasury.govt.nz/sites/default/files/2021-04/ria-justice-snzc-apr21.pdf>> at 1.

¹⁰³ At 9.

¹⁰⁴ National Commission on Terrorist Attacks Upon the United States *The 9/11 Commission Report* (Government Printing Office, Washington DC, 2004) at 382.

¹⁰⁵ Columbo, above n 92.

¹⁰⁶ Daniel Byman “How to create a terrorism designation process useful to technology companies” Brookings (online ed, 5 August 2019).

¹⁰⁷ Byman, above n 106.

not in another can make it difficult to comply with the regulations. There is a lack of extra sources to help guide technology companies through this issue.¹⁰⁸

V Responding to the ‘Lone Wolf’ Threat

The perpetrators of terrorism have become increasingly decentralized post 2001 and a growing number of attacks are being committed by sole actors. This phenomenon has been noted globally but particularly in Europe and the USA. New Zealand had its own encounter with this type of ‘lone wolf’ attack in 2019 which occurred imminently with little warning, proving difficult to predict. This section raises doubts about the efficacy of using the designation framework to counter the threat these individuals pose but suggests there is still some merit in using it. Possible changes to the regime could also help alleviate some of the deficiencies outlined.

A Lone Actors

‘Lone actor’ attacks often require little sophistication and can cause significant amounts of damage with minimal planning and tools. Yet a US study found that ‘lone actor’ attack outcomes are often more severe than those perpetrated by other terrorists.¹⁰⁹ It seems increasingly futile to use the designation framework against them as the consequences of designation may do little to stop them. Freezing their assets may have a negligible effect in preventing terrorist activity given the small amount of equipment required to carry out an attack. As ‘lone actors’ do not rely on large networks for financing, there may be limited assets to target regardless.

Additionally, restricting their interactions with others may be redundant as they are usually disconnected from society. It may actually be more harmful to push them away from people surrounding them considering the profile of these individuals describes ostracized

¹⁰⁸ Byman, above n 106.

¹⁰⁹ Noah Turner, Steven Chermak and Joshua Freilich “An Empirical Examination on the Severity of Lone-Actor Terrorist Attacks” (2021) 6(3) SAGE Journals Online.

loners.¹¹⁰ It has been noted that there is a higher rate of mental illness amongst lone right-wing extremists.¹¹¹ Although mental illness does not indicate a causal relationship between mental health and terrorist activity,¹¹² further ostracizing these individuals makes it more difficult for them to get help before they lash out.

The lack of direct links to terrorist networks poses other problems. Operating independently means that designation as an ‘associated entity’ is essentially purposeless. A ‘lone actor’ may simply be inspired by other ‘lone actor’ attacks occurring all over the world, engaging in “copy-cat” behaviour. In nearly half cases of ‘lone actor’ attacks studied in Europe and the USA, “attack planning” was caused by a “trigger event” such as seeing violence carried out overseas.¹¹³ The contribution of technology will be discussed later in this section.

Besides these practical complications, there is another weakness. Although designation serves a pre-emptive purpose, it is difficult to apply to ‘lone actors’ before they carry out an attack. A designation requires the individual to have *carried out or participated in* a ‘terrorist act.’ It cannot be applied on the basis of *planning or preparing* to carry out or take part in a ‘terrorist act.’ This is problematic considering the prevalence of suicide and martyrdom amongst ‘lone actors’, meaning often one major attack is planned instead of concurrent ones. Therefore, there may be little that a designation can do before one actually occurs.

The lack of ability to respond to preparatory activity was recently shown to be an “Achilles heel” in the counter-terrorism framework when a ‘lone wolf’ ISIS supporter could not be charged under the Terrorism Suppression Act; he was only prosecuted under lesser

¹¹⁰ Menna Rose and John Morrison “An exploratory analysis of leakage warning behavior in lone-actor terrorists” (2021) Taylor and Francis Online at 2.

¹¹¹ At 3.

¹¹² At 3.

¹¹³ Bart Schuurman, Paul Gill, and Noemie Bouhana “Lone Actor Terrorist Attack Planning and Preparation: A Data-Driven Analysis” (2018) 63(4) J Forensic Sci 1191 at 5.

charges.¹¹⁴ The Royal Commission into the Christchurch attacks noted this failure in the architecture breaches our UN international obligations.¹¹⁵ This is supposedly the circumstances in which the framework is meant to be engaged, denying the potential attacker the means to attack and formally branding them a ‘terrorist.’ Yet it was not used, which may confirm the workability doubts in regard to this particular problem. Potential solutions will be explored further on.

A further issue may arise. Designation relies upon interaction with the ‘terrorist act’ outlined under the act. The definition requires a political, ideological or religious purpose to qualify.¹¹⁶ Yet this can be hard to ascertain, again making it hard to use the designation process. Although some lone actors like Anders Brevik have published manifestos pre- or post-attack which make their intentions plain, this does not always occur. Additionally, different scholars have used different methods of classifying ‘lone actor’ motivations, but it can generally be agreed upon they fall under either ideological, personal or psychological categories.¹¹⁷ ‘Lone actors’ are rarely driven solely by one,¹¹⁸ which could be difficult to reconcile with the definition in proving a purpose that comes under the Act.

Ascertaining motivation in this way is an essential inquiry, but far from an easy one. This is also because the question of motivation or purpose distinguishes a ‘lone actor terrorist’ from a ‘mass murderer’ for example. The distinction between the two is not clear cut; in fact, they share many common characteristics.¹¹⁹ But it is important not to engage counter-terrorism law in instances that are not terrorism. To do so would diminish its symbolic significance and confuse the public on the ideology being denounced. Thus, even if a

¹¹⁴ Sam Hurley and Jared Savage “Why Isis supporter who allegedly planned ‘lone wolf’ attack in Auckland could not be charges as a terrorist” *The New Zealand Herald* (online ed, 16 August 2021).

¹¹⁵ Hurley, above n 114.

¹¹⁶ Terrorism Suppression Act 2002, s 5(2).

¹¹⁷ Boaz Ganor “Understanding the Motivations of Lone Wolf Terrorists” (2021) 15(2) *Terrorism Research Institute* 23 at 27.

¹¹⁸ At 27.

¹¹⁹ Paul Gill and others “Similar crimes, similar behaviors? Comparing lone-actor terrorists and public mass murders” (2021) 66(5) *J Forensic Sci* 1797.

designation could be made upon a ‘lone actor’ terrorist, there may in some cases be a high evidential burden in proving that it is appropriate to do so.

B Right Wing Extremism

The designation process has been criticized for failing to address the emerging threat of right-wing extremism, instead focusing on a political conception of terrorism that targets Islamic groups. This reliance on a post-2001 understanding of terrorism ignores the contemporary ‘lone actor’ threat that is often a far-right extremist. Currently, the only right-wing extremist listed is the perpetrator of the Christchurch Mosque attack, which arguably does not reflect the reality of the right-wing extremist threat within New Zealand.

Following 9/11, our perception of terrorism has concentrated on Islamic extremism. Before 2001 around 30 percent of listed organizations by the American Foreign Terrorist Organisations were Islamic.¹²⁰ After 2001, 70 percent of the groups added have been Islamic,¹²¹ illustrating that that Islamic organisations are more likely to be designated.¹²² But Islamic organisations do not appear to pose the greatest threat in recent times. Between 2010 and 2019, over 75% of terrorism related deaths in the US were caused by right-wing extremists.¹²³ As overseas intelligence agencies continue to warn against this growing threat,¹²⁴ New Zealand’s list needs to be expanded to accommodate this risk.

Despite around half of our SIS counter-terrorism efforts being dedicated to facing “white identity extremism” it is significantly underrepresented.¹²⁵ The apparent reluctance to designate the far-right has been blamed on the origins of the framework; being created essentially in response to 9/11 means that far-right right extremism in particular of the

¹²⁰ Beck, above n 32, at 854.

¹²¹ At 854.

¹²² At 857.

¹²³ Bruce Hoffman and Jacob Ware “Terrorism and Counterterrorism Challenges for the Biden Administration” (2021) 14(1) CTC Sentinel at 7.

¹²⁴ Marc Daalder “NZ left behind as Australia designates far-right terror group” *Newsroom* (online ed, 8 April 2021).

¹²⁵ Marc Daalder “SIS: Covid-19 could lead to greater terror threat” *Newsroom* (online ed, 1 April 2021).

‘lone actor’ kind was not envisaged to fall within it, as evidenced by the issues raised above.¹²⁶ Others blame the fact that despite many severe attacks, far right violence has not yet reached an event scale comparable to 2001.¹²⁷ Resultingly, there has been no commanding Security Council Resolution issued like Resolution 1373 to spur drastic action, perhaps explaining the slow response.

The underrepresentation is apparently justified on the basis that a listing requires a demonstrated threat to New Zealand.¹²⁸ In practice, this requires evidence of operation on New Zealand soil, meaning ‘lone actors’ overseas are not designated.¹²⁹ Yet the designation framework explicitly states that the “entity... need not be in New Zealand,”¹³⁰ which potentially implies some disconnect between the legislative intention and its actual application. It appears that the assessment of a demonstrated threat fails to consider the rise of technology in facilitating terrorist activity along with the difficulty in detecting ‘lone actors.’

C Arguments for Greater Use and Addressing the Tension

This year, a bill was introduced to amend the Terrorism Suppression Act 2002. The proposed changes have little effect on the designation process and make minor changes to guide interpretation. Despite the evolution of terrorism, the Act has not been significantly amended since 2007. Therefore, the bill presents an opportunity to review the designation process in light of the ‘lone actor’ problem, and amongst the other issues discussed above. As the framework was ultimately developed in response to the unforgettable tragedy of 9/11, we should not wait for a new one to spur change. Change can actually help prevent the occurrence of another.

¹²⁶ Katie Scotcher “New Zealand’s terror list needs to be expanded – experts” *Radio New Zealand* (online ed, 22 March 2021).

¹²⁷ Jason Blazakis and Naureen Fink “The International Far-Right Terrorist Threat Requires a Multilateral Response” (4 April 2021) Lawfare Blog <<https://www.lawfareblog.com/international-far-right-terrorist-threat-requires-multilateral-response>>.

¹²⁸ Daalder, above n 124.

¹²⁹ Daalder, above n 124.

¹³⁰ Terrorism Suppression Act 2002, s 24.

It is clear that the designation process is under used against the right-wing ‘lone wolf’ threat, meaning we are left behind in the international ‘war on terrorism.’ The list needs to be expanded. This paper acknowledges the tension in noting the various shortcomings of the process but still arguing it should be more widely used. The various reasons why are set out below.

Until 2010, New Zealand had not used its power to designate independent of the 1267 regime.¹³¹ Since then, there are currently 20 non-UN designated entities listed.¹³² Underuse of the process means our international contribution is lacking. It is a failure by New Zealand to “add its considerable moral and symbolic voice to the international chorus against terrorist violence.”¹³³ Though the practical effect may vary, the symbolic effect should not be underestimated. Designating the Christchurch Mosque Attack offender was said to be an “important demonstration of New Zealand’s condemnation of terrorism and violent extremism in all forms” even though he was designated after the act.¹³⁴

Contrary to the characterization of being completely independent from society, ‘lone actors’ often communicate with others who share their ideology. In fact, 86% of ‘lone actors’ in a study sample had communicated their extremist ideology online.¹³⁵ The resulting danger in radicalization and ‘copy-cat’ behaviour has been noted. By condemning this behaviour through designation, it may be more readily detected even if it does not desist. Research confirms that many third persons to the ‘lone actor’ are aware of the risk they may pose.¹³⁶ Formally denouncing the ‘lone actors’ actions as terrorism may motivate

¹³¹ Ip, above n 70, at 11.

¹³²“Lists associated with Resolution 1373” New Zealand Police <<https://www.police.govt.nz/advice/personal-community/counterterrorism/designated-entities/lists-associated-with-resolution-1373?nondesktop>>.

¹³³ Smith, above n 25, at 3.

¹³⁴ Beehive New Zealand “March 15 offender designated as terrorist entity” (press release, 1 September 2020).

¹³⁵ Schuurman, above n 113, at 1196.

¹³⁶ Rose, above n 110.

more people to report their concerns, especially given the fact they could themselves become liable for assisting the concerned individual.

The growth of the internet has greatly contributed to the rise of the ‘lone actor’ threat,¹³⁷ Propaganda can be widely disseminated,¹³⁸ enhancing the rate of radicalization. Information on how to prepare for and execute attacks is widely available.¹³⁹ Inattention to this problem is considerably dangerous given “lone actors’ often consume this material to overcome their inner moral barriers before carrying out an attack.¹⁴⁰ Despite ISIS creating an actual caliphate, for white supremacists “the internet is their caliphate.”¹⁴¹

The focus of designation should be a proactive approach rather than a reactive one.¹⁴² Though the tool is not meant to be used as a “crusade”, it’s pre-emptive purpose is defeated by waiting to see evidence on our soil. The requirement for a ‘demonstrated threat’ needs to be assessed with less of focus on geographical boundaries. As we continue through the digital era, New Zealand’s lack of geographical proximity to other countries no longer affords us protection.¹⁴³ The new age of terrorism requires decisive action to stamp it out. Even if an attack never eventuates, merely interacting with others online can incite a future one.

Other countries have already taken this approach. Our close neighbour Australia continues to respond to the threat ahead of us by recently designating far-right group Sonnekrieg Division as a ‘terrorist group.’¹⁴⁴ Whilst making the designation, officials recognized that although Australia does not have any direct involvement with the group, the promotion and

¹³⁷ Ganor, above n 117, at 2.

¹³⁸ At 2.

¹³⁹ At 2.

¹⁴⁰ Schuurman, above n 113, at 1193.

¹⁴¹ William Danvers “Right-Wing Extremism: An International Threat” *Just Security* (online ed, 26 February 2021).

¹⁴² Scotcher, above n 126.

¹⁴³ Law Commission, above n 28, at 3.

¹⁴⁴ Daadler, above n 124.

glorification of ‘lone actor’ attacks it encouraged combined with its easily accessible online propaganda presented a risk that others would be radicalized.¹⁴⁵

By underusing the designation process, we undermine the international effort to combat terrorism. Even though certain individuals may not pose a demonstrable risk to New Zealand, they may still pose a risk to other countries. We should be prudent to form our own individual assessments independent from other states before using the designation process. However, considering the effect of violence on inciting further ‘lone actor’ attacks, there is an indirect risk to New Zealand that we should mitigate against. Without designation, concerned individuals could move freely in and out of the country. They would be free to engage with others to make preparations for attacks. Allowing this exploitable weakness discredits our international reputation and ignores potential future harm.

Whilst mainstream ‘terrorist’ groups are dissipated, the risk of isolated ‘lone wolf’ attacks will continue to rise. ‘Lone actors’ are not just limited to being right-wing extremists.¹⁴⁶ Al-Qaeda, Hamas and ISIS have all called for lone actor attacks coined the leaderless Jihad.¹⁴⁷ As ‘lone actors’ may hold a range of extremist ideologies, the threat is pervasive. There needs to be an attitude change from the traditional conception of terrorism that focuses on groups, to recognising how a few disaffected individuals can be just as or even more dangerous.

D Potential Adjustments

Terrorist designation needs to be used more, but it is far from a panacea. It provides ways to combat terrorism but does not necessarily end it. It is a temporary solution to a long-lasting problem. The context in which it was made required a framework that could quickly be enacted to impair large networks of terrorists. But that context has changed; the

¹⁴⁵ Daalder, above n 124.

¹⁴⁶ Ganor, above n 117, at 3.

¹⁴⁷ At 3.

prevalence of ‘lone actor’ attacks requires adjustments to be made to ensure it is an effective counter-terrorism tool.

The new counter-terrorism bill proposes a new preparatory offence for terrorism. It also suggests a new offence to criminalize the travel of ‘lone actors’ for the purpose of carrying out or facilitating ‘terrorist acts.’¹⁴⁸ However, this paper suggests that adjusting the designation process so that it can be enacted against these activities will also be beneficial. This would mean amending the Act so that designation could be made on a *preparatory* basis, along with attaching restrictions following designation on travel suspected to be for the purpose of terrorism.

The benefit of using designation in this way is its speed. It can impose restrictions quickly in the interim without having to wait for a potentially long court process for sanctions. It operates under a lower standard of belief and can be implemented readily by the Prime Minister. Greater speed better prevents terrorist activity given the noted advancements in technology. The changes to designation make it more applicable to ‘lone actors’, creating breadth for them to be charged before they actually carry out an attack. Finally, the changes put the public and international community more readily on alert whilst also signaling there is zero tolerance for ‘terrorist activity’ in any form.

Some disagree with the proposals made, rather suggesting we should continue to use the existing criminal law which deprives potential perpetrators of the notoriety attached to a terrorism charge.¹⁴⁹ The Royal Commission into the Christchurch Attacks acknowledged a review of the counter-terrorism architecture was needed but did not propose a new preparatory offence; it cited concerns of “overcriminalization and discrimination against Muslim communities.”¹⁵⁰ Although it has been noted that Islamic groups are more likely

¹⁴⁸ Ministry of Justice, above n 102, at 3.

¹⁴⁹ Hurley, above n 114.

¹⁵⁰ Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019 *Royal Commission of Inquiry into the terrorist attack on Christchurch masjids on 15 March 2019* at Part 10, 2.5.

to be designated as terrorists, it does not imply that the framework is biased.¹⁵¹ Rather, the executive has been slow to fully recognize other threats within it.

Even though these suggestions potentially create more room for arbitrary abuse, the broader applicability is needed to allow the executive to respond to the dangers of today. The current designation framework is outdated and cumbersome, leaving a chink in our national security armour. With legislative change, designation can return to serving its pre-emptive and preventative purpose, whilst also best upholding our international obligations. Using lesser charges other than the counter-terrorism framework does not appropriately reflect the seriousness of the threat.

VI Conclusion

20 years after the devastating events of 9/11, the threat of ‘terrorism’ has changed. Back then, the designation framework was rapidly birthed into existence to ensure New Zealand could uphold its international obligations, along with providing some capacity to combat terrorism. Yet the evolution of terrorism has meant that terrorist designation is limited in its effectiveness, notably in responding to the rising trend of ‘lone actors.’ Changes to both our attitude in making designations and the actual legislative regime are needed to remedy this.

Designation should not be abandoned despite its various criticisms. It is not a perfect framework and faces many challenges. However, the process carries great symbolic significance that lies dormant whilst the process is underused. A ‘terrorist designation’ reflects social condemnation of an ideology and the associated deplorable conduct that may be carried out in its name. There is room for some legislative adjustments to be made to help the efficacy of the process and a comprehensive review should be undertaken to truly revive it. In conclusion, designation is still a valuable tool in the counter-terrorism architecture, but only after change can its true value be realized.

¹⁵¹ Beck, above n 32, at 858.

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Word count

The text of this paper (excluding table of contents, footnotes, and bibliography) comprises approximately 7920 words.