SUBMISSION ON THE COUNTERING TERRORIST FIGHTERS LEGISLATION BILL

28 November 2014

SUBMITTERS

1. This submission is made on behalf of Amnesty International New Zealand’s almost 15,000 supporters and the Human Rights Foundation of Aotearoa New Zealand to the Foreign Affairs, Defence and Trade Select Committee for their inquiry into the Countering Terrorist Fighters Legislation Bill 2014 (the Bill).

2. Amnesty International is a global movement of more than 7 million people who campaign to promote and defend the observance of all human rights enshrined in the Universal Declaration of Human Rights and other international standards.

3. The Human Rights Foundation is a non-governmental organisation, established in December 2001, to promote and defend human rights through research based education and advocacy. They have made submissions on new laws with human rights implications and work to monitor compliance and implementation of New Zealand’s international obligations in accordance with the requirements of the international conventions New Zealand has signed.

4. The Human Rights Foundation endorses this report in its entirety.
INTRODUCTION

5. Amnesty International recognises that a major role of any government is the protection of its citizens and others within its territory and jurisdiction. However, any measures taken by states to ensure such protection must also comply with all of the state’s other human rights obligations, including those relating to fair trials and due process and the rights to privacy, freedom of expression, and freedom of movement.

6. Countering terrorism strategies will not be successful if human rights are not respected and protected. Human rights are an essential component of the rule of law and have been recognised by the UN Global Counter-Terrorism Strategy as the “fundamental basis of the fight against terrorism.”

7. Amnesty International is dismayed at the extremely short time period allotted for organisations and the New Zealand public to provide submissions to the Foreign Affairs, Defence and Trade Select Committee on this significant legislation. The Organisation’s concerns are set out in brief below but as necessitated by the very condensed timeframe Amnesty International is unable to submit a comprehensive assessment of the human rights implications of the Bill. Rather, the points below outline key concerns.

PURPOSE

8. The stated purpose of this bill is to “address the threat posed by foreign terrorist fighters (FTFs) as well as violent extremists locally, regionally and internationally” by making “targeted amendments to enhance powers to monitor and investigate, and to restrict and disrupt travel” of FTFs and other violent extremists.

CONSIDERATION OF HUMAN RIGHTS IMPLICATIONS

9. With reference to the international context surrounding this legislation, the Explanatory Note to the Bill makes reference to the United Nations Security Council (UNSC) Resolution 2178 as a justification for the measures it proposes. Resolution 2178 places a strong emphasis on the importance of respecting human rights both in the preamble and paragraph 5, making note that:

“...respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort”

And that:

“Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human

2 Explanatory Note to the Bill, p 1.
3 Explanatory Note to the Bill, p 2.
rights law, international refugee law, and international humanitarian law, and notes
the importance of respect for the rule of law”.5

10. Amnesty International urges the Select Committee to conduct a robust consideration of the
human rights implications of the Bill to ensure that any amendments are in accordance with
New Zealand’s domestic and international human rights obligations. This includes ensuring
there are adequate safeguards in place to ensure each act taken under the proposed laws will
comply with New Zealand’s human rights obligations. The Organisation notes that Martin
Scheinin, the former Special Rapporteur on the promotion and protection of human rights and
fundamental freedoms while countering terrorism, recommended that:

“Compliance with all human rights while countering terrorism represents a best
practice because not only is this a legal obligation of States, but it is also an
indispensable part of a successful medium- and long-term strategy to combat
terrorism.”6

UNSC Resolution 2178 should not be used to justify the haste with which this Bill is being
processed.

URGENCY

11. The speed at which this Bill is being rushed through the legislative process is of grave concern
to Amnesty International. While the Government has stressed the purported need for urgency,
there seems to be no justifiable basis for the legislation to be fast tracked with such extremely
limited scope for consultation. Amnesty International has previously raised concerns at the use
of urgency to pass legislation with significant human rights implications.7 Such restrictions
place significant limitations on the ability of both civil society and the Select Committee to
consider the human rights implications of the proposed legislation as well as any unintended
consequences and how these may be addressed.

12. Of further concern is that despite the Bill being sent to select parties last week in order to allow
them to provide submissions to the Select Committee, it was not actually made public until
leaked on 23 November 2014.

13. Public submissions were opened on 26 November 2014 and are due on 27 November 2014.
The Select Committee is due to report back to Parliament on 2 December 2014.8

14. Amnesty International expresses its concern that the Governmental review on the threat of
foreign fighters upon which the Bill is based was never collated in written form and has not
been made publicly available. This has had serious impacts on the ability of the public,
interested parties and experts to provide meaningful submissions to the Select Committee and
for carrying out a proper scrutiny of the Bill and its compliance with international standards.

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5 UNSC Resolution 2178 S/RES/2178 (2014), preamble, accessed from

6 Scheinin, M Report of the Special Rapporteur on the promotion and protection of human rights and fundamental
freedoms while countering terrorism: Ten areas of best practices in countering terrorism (26 December 2010) accessed

7 Amnesty International Submission ahead of New Zealand’s Universal Periodic Review in January 2014, accessed from

8 New Zealand Parliament, Countering Terrorist Fighters Legislation Bill (25/11/14), accessed from
27/11/14.
15. Amnesty International is aware that the measures are not intended to be permanent, as provided by the Bill’s sunset clause under which the legislation will expire on 1 April 2018. However, it is not clear to Amnesty International why a full three years is required to complete the comprehensive review of legislative framework that is to commence before 30 June 2015 under the Intelligence and Security Committee Act 1996.9

RECOMMENDATIONS

16. Amnesty International recommends that legislative process to pass this Bill before Christmas 2014 be halted, and the Select Committee be given adequate time to consider the human rights implications of the Bill and to consult with the appropriate parties and the public.

17. Alternatively, Amnesty International recommends that the public submission period is extended to allow the public, experts and other interested parties to make informed submissions. This will ensure proper consultation and consideration of the broader implications of the bill including possible unintended consequences which may have an adverse impact on human rights, and how they may be addressed.

18. Amnesty International supports the call of the New Zealand Law Society for the sunset clause of the Bill to be changed to 1 October 2016.

AMENDMENTS TO THE PASSPORT ACT 1992

19. Clauses 4 and 5 will amend the Passport Act 1992 to allow the Minister to refuse to issue a passport on the grounds of national security or a threat to a country other than New Zealand. The Minister will also be able to cancel or retain travel documents10 on the grounds of national security or a threat to a country other than New Zealand for a period of up to 36 months. This period can be extended for a further 12 months by High Court order. The Minister will also be able to temporarily suspend travel documents for up to 10 days.

20. While Amnesty International is aware that—notwithstanding some media reports—these provisions will not render a person stateless, lead to deprivation of citizenship, or affect the ability to obtain journey-specific emergency travel documents in order to return to New Zealand, there may nevertheless be serious human rights implications for a person left outside New Zealand without valid travel or identification documents.

21. These provisions have a significant impact on the right to freedom of movement which is guaranteed under international law. Article 13 of the Universal Declaration of Human Rights confirms “Every person has the right to freedom of movement …. Everyone has the right to leave any country, including his own, and return to his country.”

22. Article 12 of the International Covenant on Civil and Political Rights (ICCPR), to which New Zealand is a State Party, guarantees the right to freedom of movement, including the right to leave any country, including one’s own, and the right to enter or return to one’s own country.

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10 For the purposes of this submission, “travel documents” means passports, certificates of identity, emergency travel documents other than journey specific emergency travel documents issued to allow a person to return to New Zealand and refugee travel documents.
23. The UN Human Rights Committee has underlined that the concept of “one’s own country” is broader than that of the country of one’s nationality – that is, it is not limited to nationality in a formal sense, but includes those who have special ties to the country.\textsuperscript{11} Under international human rights law, no one may be arbitrarily deprived of the right to enter their own country.\textsuperscript{12} Other aspects of the right to freedom of movement, including the right to leave any country, including one’s own, may not be subjected to any restrictions other than those which meet the test of necessity and proportionality for one of the specific legitimate purposes recognised under international human rights law, which include national security; any such restrictions must be consistent with all other rights recognised in the ICCPR, and must not impair the essence of the right.\textsuperscript{13}

24. The right to freedom of movement is guaranteed under art 18 of the New Zealand Bill of Rights Act 1990 (NZBORA). This right may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.\textsuperscript{14}

25. The Ministry of Justice has concluded that the restrictions on s 18 of NZBORA (and consequently art 12 of the ICCPR) are justifiable as they comply with the objective of UNSC resolution 2178,\textsuperscript{15} which urges states to restrict the movement of foreign fighters.\textsuperscript{16} However, the UNSC resolution also urges states to conform with international human rights law and requires any restrictions on the exercise of these rights meet the tests of necessity and proportionality. The Government has not provided sufficient evidence justifying why these additional restrictions are necessary and why lesser measures will not suffice. This is compounded by the absence of a full and meaningful written report on the four week review on foreign fighters carried out earlier this year.

26. Under the Bill persons whose travel documents are cancelled or retained are able to provide the Minister with a written submission which requires the decision to be reviewed. The decision may also be judicially reviewed. However, Amnesty International has unanswered questions around whether the existing provisions in the Passport Act that provide a regime to manage and protect classified security information for appeals will allow a meaningful summary of the classified information to be provided to the individuals whose passports are cancelled as part of the review.

27. Amnesty International echoes concerns raised by the New Zealand Law Society regarding the limited 30 day period for a person to be able to object to the Minister about the length of time the Minister cancels or retains possession of a passport if the period exceeds 12 months.

28. The 48 hour consultation period has also left Amnesty International with insufficient time to assess whether legal aid would be available to individuals where the Minister has taken a decision to extend the period of cancellation for up to three years.

\textsuperscript{11} Human Rights Committee, \textit{General Comment 27: Freedom of Movement (art 12)}, UN Doc CCPR/C/21/Rev.1/Add.9 (1999), [20].
\textsuperscript{12} Article 14, International Covenant on Civil and Political Rights.
\textsuperscript{13} Human Rights Committee, \textit{General Comment 27: Freedom of Movement (art 12)}, UN Doc CCPR/C/21/Rev.1/Add.9 (1999), [11] and [13].
\textsuperscript{14} Section 5, New Zealand Bill of Rights Act 1990.
RECOMMENDATIONS

29. Ensure that any decisions to restriction freedom of movement are subjected to effective judicial and Parliamentary oversight, including, for example, oversight by Independent Commissioners and Parliamentary bodies.

30. Human rights law requires that affected individuals have access to a remedy for any violation of their rights. Amnesty International recommends that the Bill be amended to ensure that individuals who have been subjected to restrictions on their right to freedom of movement have access to an effective remedy for any violations of these rights.

31. Amend the Bill to provide that individuals who have had their travel documents cancelled are given an explanation of reasons for the cancellation, in writing, including a meaningful summary of any of the information which is confidential or classified, in order to be able effectively to exercise the right of appeal or review against the decision, ultimately to the courts and that legal aid is provided for such appeals or reviews.

AMENDMENTS TO THE CUSTOMS AND EXCISE ACT 1996

32. Clause 7 of the Bill gives the Chief Executive of the New Zealand Customs Service the power to allow authorised persons from the NZSIS and the Police to have direct access to Customs databases to search for information for counter-terrorism investigation purposes.

33. Without further time to consider the potential impact of the legislation, Amnesty International remains concerned that there may be insufficient safeguards to ensure that the information is not shared in a way that endangers the individual or others rights to life under section 8 of the NZBORA, and section 9, the right not to be subjected to cruel, inhuman or degrading treatment or punishment.

34. Without sufficient safeguards there would be a risk that people may not understand the sensitive nature of that information – for example if it related to an asylum seeker where enquires regarding the information into their country of origin could put both the person or others, including family members, at risk.

RECOMMENDATION

35. Amnesty International urges the Select Committee to ensure there are sufficient safeguards over the sharing of information between agencies to ensure that Government agencies don’t use the information in a way that can put individuals at risk.

AMENDMENTS TO NEW ZEALAND SECURITY INTELLIGENCE SERVICE ACT 1969

36. Clause 9 expands the NZSIS surveillance powers to include visual surveillance on private property with a warrant and, in situations of emergencies or urgency, without a warrant for 48 hours. Warrants for visual surveillance on private property may be issued for 12 months. The Explanatory Note for the Bill notes that these powers are modelled on those provided to the New Zealand Police under the Search and Surveillance Act 2012.\(^\text{17}\)

\(^{17}\) Explanatory Note of the Bill, p 3.
37. Surveillance of communications (of content and/or metadata) constitutes an interference with a range of human rights, including in particular the rights to privacy and has a chilling effect on freedom of expression.

38. In consideration of the question as to whether the increased powers of the NZSIS to conduct surveillance in private settings is in compliance with international obligations Amnesty International notes that targeted surveillance is only justifiable when it occurs based on reasonable suspicion, in accordance with the law, is strictly necessary to meet a legitimate aim (such as protecting national security or combating serious crime) and is conducted in a manner that is proportionate to that aim and non-discriminatory.

39. Surveillance measures must be strictly necessary and proportionate to a legitimate aim under international human rights law, such as law enforcement or national security, and the interference shall be the least intrusive method possible to achieve the government’s legitimate aim.

40. Legislation and policy that governs interference with human rights, such as the rights to privacy and freedom of expression, must contain sufficient safeguards to ensure compliance with the above criteria.

41. While Amnesty International acknowledges that the safeguards and oversight that apply to other NZSIS warrants will apply to warrants of visual surveillance, without further time the Organisation is unable to assess whether the additional powers are necessary and proportionate to the aim of the Bill to address the threat of foreign armed fighters and other local extremists. The Organisation is particularly concerned that warrants may be granted for 12 months as this is prima facie a serious violation of the right to privacy, However, given the time constraints, Amnesty International has been unable to assess if, on balance, this complies with the principles of proportionality and necessity. Without further consideration, it is also not possible for the Organisation to determine if there are sufficient safeguards in place to ensure that acts taken under this part of the Bill will meet the tests of necessity and proportionality.

42. The need for visual surveillance without a warrant has been deemed necessary in the Explanatory Note of the Bill in times of urgency which necessitate immediate action, such as where the delay caused by obtaining a warrant may result in the loss of vital intelligence and the person may leave New Zealand. However, the proposed amendment in the Bill only refers to the likelihood intelligence will be lost due to delay. There are no additional criteria, including the imminent departure of a person from New Zealand as mentioned in the Explanatory Note. This gives the NZSIS extremely broad powers to surveil New Zealanders without obtaining a warrant. Accordingly the effect of this amendment extends beyond the justification offered by the Government.

43. While Amnesty International is pleased to note the safeguards that are set out in the Bill, this amendment represents a significant erosion of the right to privacy. While this right is not

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18 Explanatory Note of the Bill, p 4.
explicitly contained in the NZBORA, it underpins a number of rights contained within the Act and is a universal human right protected in art 12 of the Universal Declaration of Human Rights and art 17 of the International Covenant on Civil and Political Rights. This measure moreover is likely to have a chilling effect on the right to freedom of expression as set out in section 14 of NZBORA and not least the threat it poses to the right not to be subject to unreasonable search and seizure.\textsuperscript{19}

44. The time constraints on consultation prevent Amnesty International from conducting any further assessment as to whether the proposed changes can be deemed necessary and proportionate in accordance with international human rights obligations around surveillance. However, Amnesty International urges extreme caution when considering extension of these powers and again calls for an extension of the time for public consultation so these issues can be adequately discussed and addressed.

**RECOMMENDATION**

43. Ensure that any decisions to conduct surveillance are subjected to effective judicial and Parliamentary oversight, including, for example, oversight by Independent Commissioners and Parliamentary bodies.

**CONCLUSION**

44. Noting the significant impact these amendments have on fundamental human rights, it is imperative for additional time be taken to consider the human rights implications of the Bill to ensure that the measures adopted will meet New Zealand’s domestic and international obligations to protect and respect human rights.

45. Amnesty International would be pleased to provide more information to the Select Committee upon request.

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\textsuperscript{19} Section 14, New Zealand Bill of Rights Act 1990.