New Zealand Law Society
Te Kāhui Ture o Aotearoa

Counter-Terrorism Legislation Bill

25/06/2021

Submission on the Counter-Terrorism Legislation Bill

1. Introduction

1.1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Counter-Terrorism Legislation Bill (**Bill**).

1.2. The omnibus Bill amends the Terrorism Suppression Act 2002 (**TSA**), the Terrorism Suppression (Control Orders) Act 2019 (**TSCOA**) and the Search and Surveillance Act 2012. The Bill's explanatory note states the amendments "are part of the Government's initial response to the Report of the Royal Commission of Inquiry into the Terrorist Attack on Christchurch Mosques on 15 March 2019" by implementing part of recommendation 18 of that report. Recommendation 18 included prioritising the creation of precursor terrorism offences in the TSA.

1.3. This submission is confined to the proposed amendments to the TSA and the TSCOA.

1.4. The Law Society has significant concerns with the Bill's proposed amendments to the TSCOA. Further to our submission on the TSCOA prior to its implementation,[1] the Law Society considers that the proposed amendments in this Bill do not comply with the right against double jeopardy protected under section 26(2) of the New Zealand Bill of Rights Act 1990 (**NZBORA**). We recommend these amendments should not proceed without further consideration of whether the Bill's underlying policy objective can be equally well met through the criminal justice system and the Sentencing Act 2002.

1.5. The Law Society is also concerned with several aspects of the Bill's proposed amendments to the TSA. We recommend the following amendments are carefully scrutinised by the Committee:

a. The new definition of "material support" in clause 5(8)(a) of the Bill.

b. The new offence of planning or preparing to carry out a terrorist act in clause 9 of the Bill.

c. The new offence of weapons training or combat training for terrorist purposes in clause 15 of the Bill.

d. The new offence of travelling intending to commit a specified offence in clause 16 of the Bill.

1.6. Finally, the Law Society comments on several drafting issues in relation to clauses 6, 7, 8, 10, and 13 of the Bill.

1.7. The Law Society wishes to be heard.

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[1] New Zealand Law Society submission, *Terrorism Suppression (Control Orders) Bill*, 13 November 2019. Accessed here: https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/0014-141305-Terrorism-Suppresssion-Control-Orders-Bill-13-11-19.pdf.

2. Proposed amendments to the Terrorism Suppression (Control Orders) Act 2019

2.1. In contrast with the truncated process adopted in respect of the TSCOA, the Law Society commends Parliament for following normal parliamentary process in considering this Bill.

2.2. However, in view of the Regulatory Impact Assessment prepared by the Ministry of Justice,[2] which notes that control orders are rarely used even overseas and have not been made in New Zealand since the TSCOA came into force,[3] the Law Society considers it would have been preferable for the Ministry to have been afforded adequate time to consult publicly on the design of this aspect of the Bill. The measures in this Bill include substantial in-roads on individuals' human rights and therefore warrant careful reflection, which takes time.

2.3. The Law Society previously expressed concerns that the TSCOA control order regime allows for the imposition of sanctions that are equivalent in their effect to criminal penalties – but without any of the protections afforded by the criminal justice system.[4] It is fundamental under New Zealand law that measures which, in substance, are criminal penalties, should only be made through the criminal law with the protections provided by the criminal justice system.[5]

2.4. Those concerns are underscored by the Bill's proposed extension of the control orders regime to persons who have been convicted in New Zealand and completed their sentence of imprisonment. The Law Society considers that this extension raises serious issues with the right against double jeopardy under section 26(2) of the NZBORA.

Clause 44: amended meaning of "relevant person"

2.5. A control order can only be made in relation to a person who is a "relevant person" as defined in section 6 of the TSCOA.

2.6. Clause 44 extends the definition of "relevant person" to include a person who has been convicted in New Zealand of a terrorism-related offence, has been sentenced to a defined term of imprisonment for that offence and is about to complete that sentence.

2.7. The amendment therefore enables a control order to impose significant constraints on a person's liberty *after* they have completed the sentence imposed on their conviction. Such an order would unquestionably constitute a second penalty for the same offending. This is inconsistent with the right against double jeopardy under section 26(2) of the NZBORA.

2.8. Section 26(2) of the NZBORA provides:

> No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again.

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2 Ministry of Justice, Regulatory Impact Assessment, Extended Control Orders, 24 November 2020.

3 This is now incorrect. The first control order in New Zealand was granted by the High Court on 7 May 2021. Ellis J granted the Commissioner of Police's application for an interim control order in respect of R, who is currently detained overseas and set to be repatriated to New Zealand. The control order will be in place for a year (see *Commissioner of Police v R* [2021] NZHC 1022).

4 Above n 1, at [4.3]-[4.4].

5 Ibid, at [7.2].

Limitations on this right are only permitted where they are justified under section 5 of the NZBORA.

2.9. In its advice to the Attorney-General, the Crown Law Office analysed the consistency of this amendment with the right in section 26(2) of the NZBORA.[6] It concluded that the Bill does not limit this right.[7]

2.10. The Law Society considers that conclusion is not supported by Crown Law's own reasoning or the High Court decision in *Chief Executive of the Department of Corrections v Chisnall* that it relies upon.[8] In the Law Society's view, the Bill *does* limit the right against double jeopardy under section 26(2) of the NZBORA and this limitation is not reasonably justified.

2.11. The Law Society agrees with Crown Law that a control order involving the imposition of significant personal restrictions for an extended period of time, including conditions more commonly associated with the criminal justice process (for example electronic monitoring), may well be regarded as a penalty.[9]

2.12. However, the Law Society does not agree with Crown Law's advice that, whether a limitation on section 26(2) NZBORA is justified in a particular case, can be resolved by the Judge at the time that a control order is made:[10]

> We have not been provided with material that could lead us to conclude that the limitation is justified because we have not been provided with material that would explain why it is necessary to address the risks posed by certain defendants through a control order regime rather than building those protections in the sentencing process. However, in the event that a Court was seized with an application for a control order that would amount to a second penalty, it would consider whether the limitation on the right [against double jeopardy] was justified in that particular case.

2.13. Crown Law's advice on this point is also inconsistent with the High Court's decision in *Chisnall*. The High Court held that such a limitation on the right against double jeopardy would be unjustified. Addressing the analogous scheme of public protection orders, the High Court held that a:[11]

> …prospective second penalty of the form, type and potentially indefinite duration envisaged… is not capable of reasonable justification given the derogation that entails from the corresponding immunities affirmed by … s 26.

2.14. While control orders under the Bill have a maximum life of six years, in the Law Society's view this does not alter the outcome of the above analysis.

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6 Crown Law, *Counter-Terrorism Legislation Bill*, Consistency with the New Zealand Bill of Rights Act 1990, 6 April 2021.

7 Ibid, at [51].

8 *Chief Executive of the Department of Corrections v Chisnall* [2020] 2 NZLR 110.

9 Above n 6, at [46].

10 Ibid, at [50].

11 Above n 8, at [144].

The policy objective can be equally well achieved through the criminal sentencing process

2.15. The advice from Crown Law itself identifies an alternative, rational method of imposing penalties of the type envisaged on terrorist offenders – for example through the Sentencing Act 2002. If the control order conditions were imposed as part of the offender's sentence at the time of their conviction, that would not offend against the right against double jeopardy under section 26(2) of the NZBORA.

2.16. The conditions of control orders are similar to (or are the same as) orders that can already be made as part of a criminal sentence under the Sentencing Act 2002.[12] Imposing these conditions as part of the sentencing process would be analogous to the existing preventive detention sentencing process, whereby the Judge must consider whether a lengthy determinate sentence of imprisonment along with a subsequent extended supervision order would be the least restrictive option to mitigate the risk.

2.17. While the objective of protecting society from persons involved in terrorism is of great importance, and there is arguably a rational connection between that objective and the control orders regime in this Bill, it is apparent that there is another way of achieving the objective which is rights-compliant, namely, imposing conditions through the Sentencing Act and the criminal justice system. The Law Society considers that, contrary to the conclusion reached by Crown Law, the Bill authorises the imposition of control orders which breach section 26(2) of the NZBORA and cannot be justified under section 5 of the NZBORA.

The Law Society's recommendation

2.18. There is no obvious reason for haste in implementing these amendments. The Law Society accordingly recommends that these amendments should not proceed without further consideration of whether the policy objective of the Bill would be better met through the criminal justice system and the Sentencing Act 2002.

3. Proposed amendments to the Terrorism Suppression Act 2002

Clause 5(8): new definition of 'material support'

3.1. Clause 5(8) inserts a new definition of "material support" into section 4 of the TSA. This definition is primarily relevant to the offences in sections 8 and 10 of the TSA, as well as section 11.[13]

3.2. Paragraph (a)(i) of the definition defines "material support" to mean "support that—does, or may, assist in, contribute to, or make easier, the carrying out of 1 or more terrorist act".

3.3. Paragraph (a)(ii) of the definition contains a crucial exception for humanitarian work. But it only applies to support that does no more than satisfy "essential human needs".

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12 Above n 1, at [7.7]-[7.8].

13 These include the offence of financing terrorism, the prohibition on making property, or financial or related services, available to a designated terrorist entity and authorisations by the Prime Minister.

3.4. "Essential human needs" is not defined in the Bill. It presumably includes the provision of food, water, shelter, and medical treatment. However, it is unclear whether it would also extend to, for example, pre- and post-natal support for mothers of children conceived to and perhaps living with terrorists; or assistance to, and education, for their children.

3.5. In this context, the Law Society notes that paragraph 16 of United Nations Security Council Resolution 2178 recognises the importance of matters such as education, social inclusion and cohesion in countering violent extremism in order to prevent terrorism. That paragraph states:[14]

> *Encourages* Member States to engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, including by empowering youth, families, women, religious, cultural and education leaders, and all other concerned groups of civil society and adopt tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion;

3.6. The Law Society recommends that a broader and clearer exception for humanitarian work is required – one which includes work legitimately done by recognised humanitarian agencies and which recognises the importance of education, welfare, and healthcare (particularly of children).

Clause 9: new offence of planning or preparing to carry out a terrorist act (new section 6B TSA)

3.7. Clause 9 creates a new offence of planning or preparing to carry out a terrorist act (new section 6B of the TSA).

3.8. The Law Society is concerned that the scope of the new section 6B offence is unclear and will be difficult to apply in practice.

3.9. The new section 6B offence would criminalise planning and preparation for a terrorist act which is too remote to constitute an attempt ("planning to act"), but excludes liability for:

a. planning or other preparations to plan or make other preparations to carry out the act ("planning to plan");

b. planning or other preparations to make a credible threat to carry out the act ("planning to threaten"); and

c. planning or other preparations to attempt to carry out the act ("planning to attempt to act").

3.10. The Law Society considers that the creation of any new criminal offence requires the existence of a clear and demonstrable need for the offence, together with appropriate drafting to ensure that the offence is tailored to its purpose and is not overbroad.[15]

3.11. Clarity of drafting is particularly important in the criminal context. Otherwise there will be significant difficulties in practice when it comes to prosecuting an offence. The prosecutor,

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14 United Nations Security Council Resolution 2178 on Foreign Terrorist Fighters, at [16].

15 Above n 1, at [5].

defence, judge, and jury all need to be able to easily understand the elements of the offence and how they apply to the facts in a particular case.

3.12. The Law Society recognises the broad policy objective underlying the new section 6B offence. It appears that "planning to plan", "planning to threaten" and "planning to attempt" are too remote from actually "acting", which is the criminal harm at the centre of the TSA.

3.13. But it is difficult to capture that policy objective with more precision. The proposed new section 6B offence is also somewhat narrower and more targeted than the equivalent provisions in the United Kingdom[16] and Australia.[17] While this is positive, it comes at the expense of clarity.

3.14. The Law Society is particularly concerned that "planning to act" (which would be an offence) is almost indistinguishable from "planning to plan" or "planning to attempt to act" (which would not). It is not clear, for example, how the facts of *R v S* [2020] NZHC 1710 would fall under the new provision. This is a concern as that case is cited in the explanatory note as evidence of the problem that the new section 6B offence attempts to resolve.

3.15. The need for clarity is further underscored by the fact that the new section 6B offence also unlocks a number of warrantless search and surveillance powers under the Search and Surveillance Act.[18] Consistent with the Supreme Court's analysis in *Hansen*, such powers should infringe on NZBORA rights "as little as possible".[19] This requires that their scope of application be clearly and precisely defined. That is difficult where the underlying offence itself is complicated and open to different interpretations.

3.16. The Law Society accordingly recommends that the Committee carefully reviews the new section 6B offence to ensure that it is clearly tailored to its purpose, is precise and capable of being applied in practice.

3.17. To assist, the Law Society suggests that new sections 6B(1) and (2) could be redrafted as follows:

> (1) A person commits an offence if the person carries out a terrorist act (within the meaning of section 5A(1)(a)) by planning or making preparations to carry out the act, whether the act is actually carried out or not.
>
> (2) The following conduct is not included in subsection (1):
>
> (a) planning or making preparations that, for the purposes of section 72(2) of the Crimes Act 1961, constitute an attempt to commit an offence against section 6A(1); or
>
> (b) planning or preparing to plan or prepare to carry out the act, whether it is actually carried out or not; or
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> (c) planning or preparing to make a credible threat to carry out the act, whether it is actually carried out or not; or
>
> (d) planning or preparing to attempt to carry out the act.

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16 Terrorism Act 2006, section 5.

17 Criminal Code Act 1995, section 101.6.

18 See clauses 38 to 40 of the Bill.

19 Above n 13.

Clause 15: new offence of weapons training or combat training for terrorist purposes (new section 13AA TSA)

3.18. Clause 15 creates a new offence of providing or receiving weapons training or combat training for terrorist purposes (new section 13AA of the TSA).

3.19. The Law Society is concerned that the new section 13AA offence is both unnecessary and unclear.

3.20. The new section 13AA offence is duplicative of other offences in the TSA. Any person who provides weapons training will have provided "material support" contrary to section 8 of the TSA (as amended by clause 10 of the Bill). The new definition of "material support" in clause 5(8) of the Bill includes "advice, or other services, derived from acquired skills or knowledge (for example, agency, brokerage, translation, driving or pilotage, or training to impart skills)".

3.21. The Regulatory Impact Assessment indicates the Ministry of Justice has not overlooked this duplication.[20] But there are two aspects which remain unexplained:

a. The new weapons training offence appears to require actual knowledge that the training will benefit a terrorist entity, while the offence of providing material support requires mere recklessness. The policy rationale behind this distinction is not clear.

b. The penalty for providing weapons training is considerably lower than that for providing material support (7 years versus 10 or 14 years, respectively). Again, the policy rationale behind this distinction is not clear. The new weapons training offence requires a more serious mens rea (actual knowledge) and is as (if not more) connected to the harm caused by terrorism as other forms of material support.

3.22. The Law Society is also concerned that the Bill does not define what is meant by "weapons training or combat training". This may lead to an undesirable level of uncertainty on questions such as:

a. Whether aircraft, ships or motor vehicles are, or can be, weapons.[21]

b. Whether a computer system is, or can be, a weapon.

c. The parameters of "combat training" – i.e. whether it can encompass training for purely defensive purposes.

3.23. The Law Society recommends the Committee carefully considers whether the new section 13AA offence is, in fact, necessary given the offence of providing material support in section 8 of the TSA and, if so, clarify the drafting of the offence.

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[20] Ministry of Justice, Regulatory Impact Assessment, Strengthening New Zealand's counter-terrorism legislation, 24 November 2020, at p 2.

[21] Notwithstanding that there is some judicial authority for the proposition that a motor vehicle can be a weapon: see *Dawson v Police* HC Rotorua CRI-2003-463-73, 3 February 2004.

Clause 16: new offence of travelling intending to commit specified offence (new section 13F TSA)

3.24. Clause 16 creates a new offence of travelling to, from or via New Zealand while intending to commit one of several specified offences (new section 13F of the TSA).

3.25. The Law Society has two concerns with the new section 13F offence:

a. First, the relationship between this offence and the new section 6B offence of planning to carry out a terrorist act.

b. Second, it is unclear what is meant by "to, from or via New Zealand".

Relationship with new section 6B offence

3.26. The new section 6B offence applies to planning or other preparations to carry out a terrorist act. This would include travel to, via, or from New Zealand for the purposes of carrying out a terrorist act.

3.27. It is therefore surprising that the new section 6B offence is also included in the list of specified offences in the new 13F offence.[22] This criminalises a person travelling to, via or from New Zealand while *intending* to plan a terrorist act whether or not they have taken any steps to *actually* plan the act.

3.28. In other words, the combination of the new section 13F(1)(b) and the new section 6B effectively criminalises "planning to plan". This is a concern because:

a. "Planning to plan" is expressly excluded from the new section 6B offence by new section 6B(2). It is unclear why a different approach should be taken to international travellers under new section 13F(3)(b).

b. There is a relatively weak connection between the conduct ("intending to plan") and the criminal harm that the legislation intends to prevent. This involves two layers of abstraction, each of which would fall short of the usual Crimes Act 1961 definition of "attempt". Despite this, section 13F not only criminalises the conduct, but also creates a serious offence which would attract a maximum penalty of 3 years' and 6 months' imprisonment.[23] In the Law Society's view, that is an unjustifiably heavy-handed response.

3.29. Further, it is difficult to see how the Crown could prove an intent to plan a terrorist act in the absence of any concrete actions having been taken by the alleged terrorist. It is arguable that prosecutions would only be brought if there was evidence that a person intended to commit a terrorist act where they had already undertaken planning. In such a case, the defendants' conduct would be satisfactorily caught by new section 13F(3)(a) (travel with intent to commit terrorist act).

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22 New section 13F(3)(b).

23 See new Schedule 4E.

3.30. Given these problems, the Law Society recommends that new section 13(F)(3)(b) (travel with intent to plan to commit terrorist act) be deleted.

New section 13F(2) –"to, from or via New Zealand"

3.31. The new section 13F offence applies to persons travelling "to, from or via New Zealand". New section 13F(2) seeks to clarify the meaning of "to, from or via New Zealand" without limiting it.

3.32. The Law Society is concerned that new section 13F(2) is unclear and may create more complication than is necessary:

a. First, prospective terrorists seeking to travel to, from, or via New Zealand may actively try to avoid Customs places and Customs officers. In that case, they would not fall under new section 13F(2). However, it appears the intention is that they should still be covered by the new section 13F offence.

b. Second, there is an undesirable degree of ambiguity as to the meaning of "via New Zealand", given that new section 13F(2) explicitly preserves the generality of new section 13F(1). An aircraft or ship which transits through New Zealand's territorial sea without landing or touching at a port could be viewed as travelling "via" New Zealand. But this would not currently fall within new section 13F(2). Therefore, it is unclear whether the Bill intends to capture prospective terrorists merely transiting the territorial sea. If that is the intention, the Bill should explicitly state that in line with the principle of legality.

3.33. To avoid these ambiguities, the Law Society recommends the meaning of "to, from or via New Zealand" be clearly and exhaustively defined. New section 13F(2) could be amended as follows:

a. Amend subsection (2)(a) to provide: "disembarks from a craft in New Zealand."

b. Amend subsection (2)(b)(ii) to provide: "embarks onto a craft in New Zealand."

c. Add a new subsection providing that "craft" and "New Zealand" have the meanings assigned to those terms by section 5(1) of the Customs and Excise Act 2018.

d. Omit the following words from subsection (2), namely "and without limiting the generality of that subsection."

3.34. The effect of these changes would be that a person travelling in connection with terrorism would be covered by new section 13F(2) once they approach a Customs checkpoint, embark onto or disembark from an aircraft or ship anywhere in New Zealand, including New Zealand's territorial sea (if that is Parliament's intent). It would also cover a person who transships from one vessel to another within the territorial sea.

4. Drafting comments

Clause 6: amended definition of 'terrorist act'

4.1. The Law Society notes that clause 6 of the Bill broadens the definition of "terrorist act" in section 5 of the TSA in four ways:

a. It replaces the phrase “induce terror in a civilian population” with “induce fear in a population” in section 5(2)(a).

b. It replaces “unduly compel” with “coerce” in section 5(2)(b).

c. It replaces “an infrastructure facility” with “critical infrastructure” in section 5(3)(d).

d. It replaces “devastate” with “cause major damage to” in section 5(3)(e).

4.2. The Law Society acknowledges that section 5(2) and section 5(3) operate in tandem. While the proposed amendments appear sensible when assessed individually, the Committee must also bear in mind their cumulative effect. In this regard, the Law Society cautions the Committee against any further broadening of either section 5(2) or section 5(3) beyond that proposed in the Bill.

Clauses 7, 8 and 9: carrying out and facilitating terrorist acts

4.3. Clause 7 creates new section 5A of the TSA, which defines “carrying out” a terrorist act to include any one or more of the following:

a. planning or other preparations to carry out the out, whether it is actually carried out or not;

b. a credible threat to carry out the act, whether it is actually carried out or not;

c. an attempt to carry out the act; and

d. the carrying out of the act.

4.4. Clause 8 then amends the offence in section 6A of the TSA to encompass only options (b), (c) and (d) of the above list. Planning or other preparations (in option (a)) is covered by the new section 6B offence (discussed at paragraphs 32 to 42 above).

4.5. The drafting of clauses 7 and 8 raises two primary issues:

a. First, it is not clear whether “*credible* threat” (in new section 5A(1)(b)) refers to a *mens rea* element of the offence (i.e. the terrorist hopes their threat will be believed) or the *actus reus* (i.e. the terrorist’s threat is in fact believed) or both. On its face, it might be both. It would be helpful to separately define “credible threat”.

b. Second, the drafting of these two clauses is difficult to follow. Clause 7 sets out four options for “carrying out” a terrorist act, while clause 8 only includes three of those options, and clause 9 includes one (planning or other preparations). It would be clearer to list all the applicable definitions of “carrying out” a terrorist act within the relevant section (i.e. section 6A or 6B), rather than separately listing all the options in new section 5A.

4.6. The Law Society recommends the Committee seek guidance from Officials and the Parliamentary Counsel Office to provide drafting assistance on these points.

Clause 10: amended Financing of, or provision of material support for, terrorism

4.7. Clause 10(2) of the Bill replaces the current provisions of section 8 of the TSA in their entirety. It is not clear why the drafters have elected to enumerate the subclauses following subclause (1) as subclauses (1A), (2A), and so on. The Law Society suggests that the drafting of new section 8 would be improved by following the usual numeric sequence of subclauses within a provision.

4.8. If the Law Society's suggestion is adopted, consequential amendments will also be required to the explanatory note and clauses 5(6) and 31(3), as well as Schedule 2 (insofar as it inserts a new Schedule 4E to the TSA) and Schedule 3 in respect of the amendments to the Criminal Proceeds (Recovery) Act 2009, the Oranga Tamariki Act 1989, and the Sentencing Act 2002.

Clause 13: amended prohibition on making property, or financial or related services, available to designated terrorist entity

4.9. Clause 13(2) replaces section 10(1) of the TSA with an offence of, *inter alia*, making certain support available to an "entity", knowing that or being reckless whether that entity is a designated terrorist entity.

4.10. Under section 4(1) of the TSA, an entity simply means "a person, group, trust, partnership, or fund, or an unincorporated association or organisation". Therefore, it appears that the offence could be committed even if it is not proved that the entity is a designated terrorist entity, so long as it is proved that the defendant was reckless about whether it was a designated entity.

4.11. The Law Society anticipates that it may not be the intention of Parliament to permit the prosecution of persons under the TSA for supporting an entity which has not been deemed a designated terrorist entity. Accordingly, the words "designated terrorist" should be inserted before "entity" in new section 10(1) to make the distinction clear.

Herman Visagie
Vice-President

25 June 2021