



Human Rights
Commission
Te Kāhui Tika Tangata

Operation Eight

A human rights analysis





Human Rights
Commission

Te Kāhui Tika Tangata

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Te Kāhui Tika Tangata is the korowai or cloak of the Human Rights Commission.

Te kāhui embraces those who gather together under the kaupapa of human rights and symbolises both their protective role and the Commission's role in promoting them.

Tika tangata refers to our human rights and responsibilities, suggesting the highest imperatives of respect and conduct.

The design of the Commission's logo derives from the traditional art of Taniko, the weaving used to make korowai. Taniko is a uniquely New Zealand art form. In particular, the knots and hanging threads at the bottom of the cloak are characteristic of the design.

The Commission's logo symbolises the many muka or strands that are woven together, representing both the uniqueness of individuals and our collective identity – our diversity and our unity. The muka emphasise our interconnectedness and interdependence. The pona (knot) secures the threads. Together they make up the korowai of our human rights and responsibilities.

He tangata kē koutou

He tangata kē mātou

I roto i tēnei whare

Tātou tātou ē

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Contents

Preface	5
Purpose of this paper	10
Human rights and Operation Eight	12
The role of the Human Rights Commission	13
Scope of the analysis	13
Summary of events	14
Approaches to the Commission	15
Operation Eight and the law	16
Rights of children and young people	19
Discrimination	20
Use of the Terrorism Suppression Act 2002	20
Role of the media	21
Observations	22
Appendix 1: The Terrorism Suppression Act 2002	24
Appendix 2: Avenues of Complaint	26
Endnotes	27

*E ngā mana, e ngā reo, e ngā kārangatanga maha,
tēnā koutou, tēnā koutou, tēnā koutou katoa.*

*Ki ngā tini aituā kua mene ki te pō,
kua huri ki tua ō te ārai ki Paerau, haere oti atu rā.*

*Ka huri kia koutou ngā kaumātua,
ngā mātua, tae ake rā ki ngā tamariki mokopuna.*

Koutou katoa te hunga kua pā kino nei i tēnei kōarotanga.

*Kimihia, rangahaua ngā kupu kōrero
hei whakamāmāhia ake ngā taimahatanga
kei runga i a koutou, karekau!*

*He tātai whetū ki te rangi ka mau tonu, mau tonu,
he tātai tangata ki te whenua ka ngaro noa, ngaro noa.*

Tihei Mauriora!

To all the authorities: the many voices and diverse callings,
greetings and salutations.

To the many bereavements that are lost to the night,
that have gone beyond the veil to Paerau, farewell.

Acknowledgements to you the elders, the parents,
and to the children and grandchildren.

To you who have been adversely affected.

It is difficult to find the appropriate words
to ease the tensions that have been created.

The myriad of constellations in the sky are constant,
but the genealogy of mankind on earth is ever changing.

Celebrate the breath of life!

Preface

Background: The findings of the Independent Police Conduct Authority

On 22 May 2013 the Independent Police Conduct Authority (IPCA) published its report *Operation Eight: The Report of the Independent Police Conduct Authority* (the IPCA Report). The IPCA report found that Police had acted unlawfully during “Operation Eight” in establishing road blocks in Taneātua and Ruatoki and in detaining and searching people around New Zealand. Operation Eight raised human rights issues about the right to be free of unreasonable search and seizure (as some of the searches were unlawful), the right to freedom of movement (which includes the ability to go where one pleases) and potentially the right to peaceful assembly if those affected were not causing public disorder.¹

The IPCA received numerous complaints about Police conduct in Operation Eight, which began in late 2005 and ended on 15 October 2007. It included the execution of 41 search warrants throughout New Zealand and the establishment of road blocks at Ruatoki and Taneātua. The complaints received ranged from the impact on the community of Armed Offenders Squad (AOS) officers at the road block, to claims of ill-treatment by Police during the execution of search warrants at properties.

As set out in its report, the IPCA found that the decision by the then Commissioner of Police to undertake the operation in Ruatoki Valley and elsewhere on 15 October 2007 was reasonable and justified. The IPCA also found that the road blocks established at Ruatoki and Taneātua were unlawful, unjustified and unreasonable. The IPCA found that although Police were justified in taking steps to address the possible risk to public safety, there was no justification for believing there was a general threat posed by the people of Ruatoki. The IPCA found that Police planning and preparation for the establishment of the road

blocks was deficient and the road block at Ruatoki and the presence of armed Police was intimidating. The IPCA found there was no assessment by Police of the likely impact of this activity on the local community.

The IPCA report also concluded that the detention of the occupants at five properties was unlawful and unreasonable. Ruatoki was not the only place in New Zealand that this took place. Two of the five unlawful and unreasonable detentions were in Ruatoki. Ruatoki and Taneātua were the only locations where roadblocks were set up. The IPCA made a number of recommendations to Police following its investigation, including changes to policy and practice relating to the use of road blocks, the introduction of more general community impact assessments before searches are undertaken in major operations and better planning where children and vulnerable people are involved. The IPCA also recommended that Police re-engage with Tūhoe and take appropriate steps to build bridges with the Ruatoki community.

The New Zealand Human Rights Commission (“the Commission”) is of the view that as a result of Operation Eight, some people in New Zealand had their human rights negatively impacted, and were subjected to unnecessary trauma, inconsistent with international and domestic human rights standards. The Commission understands that Police have made changes to policy and practice relating to the use of roadblocks and community impact assessments. The Commission also understands that Police have begun a re-engagement process with Tūhoe and have taken steps to build bridges with the Ruatoki community. The Commission has spoken with Police and Tūhoe leadership and is aware that there is an ongoing dialogue between the two parties that is focused on reconciliation. The Commission welcomes the positive, forward focused approach being adopted.

The New Zealand Human Rights Commission's involvement in the investigation of Operation Eight

Within days of the termination of Operation Eight, the Commission had received 31 complaints and registrations of concern about the way in which the Police operation had been carried out, how it had impacted on the people of Te Urewera and Ruatoki in particular, and what the Commission's response had been.

People complaining or enquiring about Police conduct were referred to the IPCA. One of the complaints was assessed to meet the threshold of "unlawful discrimination" as defined in the Human Rights Act 1993. That complaint was handled by the Chief Mediator (Human Rights Commission) and the team reporting to her.

The Commission received 35 additional complaints about the way in which the media had covered the situation. The Commission's analysis of the human rights issues related to media coverage is outlined in this Human Rights Analysis.

As the IPCA had also received complaints about Police conduct and there was a possibility that some complainants themselves would face prosecution, the Commission considered in the circumstances it was appropriate for it to provide a human rights analysis of the situation (which could in turn inform the IPCA investigation), along with some basic information about the extent of Police powers at the time that Operation Eight took place. This was explained to the people who had complained to the Commission or resolved concerns through the Commission. Some complainants indicated that they wished to receive a copy of the Commission's human rights analysis when it became available. The draft human rights analysis, which is substantially the same as this final analysis, was shared with Police, the IPCA and some of the complainants in 2008.

While the Commission recognises that its Human Rights Analysis could have been published earlier,

it was committed to ensuring that the final version accurately reflected the situation and subsequent developments. It was hampered in reporting before the conclusion of proceedings and the finalisation of the IPCA report by the fact that some key parties could not, in their opinion, engage effectively with the Commission while the court proceedings were underway. The Commission also saw itself as constrained in the same way as the IPCA by the ongoing court proceedings.²

The Commission's Human Rights Analysis reflects the law as it was in October 2007. Since then, new search and surveillance legislation has been introduced. Among other things, the new legislation requires that investigations and prosecutions of offences are carried out consistent with human rights values. The new Search and Surveillance Act will address much of the behaviour complained of in connection with Operation Eight. It also had an impact on the IPCA report, which states (at paragraph 321) that the introduction of the Search and Surveillance Act 2012 has:

"... had a significant bearing on the recommendations the Authority is making arising from its investigation into Operation Eight. In the normal course of events the Authority would have made recommendations in relation to issues of detention and searching of people given the findings made. Such recommendations are no longer appropriate in light of the changes to law and policy recently introduced."

The Commission's Human Rights Analysis complements the IPCA Report, designed to reflect the experiences of New Zealanders, who had not broken any laws but who were caught up in, and affected by Police or media conduct. In the media furore and other actions following the revelation that terrorism legislation had been invoked, innocent people were frequently overlooked even though they were affected by Operation Eight.

This fact was acknowledged in November 2007 by the then Police Commissioner, Howard Broad, who although stopping short of a formal apology, conceded that:

“... [the Police] ... are deeply concerned at the impact the operation has had on the people ... who are connected to Tūhoe. We clearly appreciate that people were caught up in the termination of the operation that were innocent. We regret the hurt and stress caused to the community of Ruatoki and we will seek an appropriate way to repair the damage done to Police-Māori relations”.

The IPCA report quoted at paragraph 343:

“... On 24 May 2012, the Commissioner of Police acknowledged that innocent individuals, families and a community were frightened and inconvenienced when search warrants were executed in October 2007. He publicly stated that he very much regretted the fear experienced by innocent people in the Ruatoki Valley, especially the children, and apologised to those people.”

On the release of the IPCA Report, Police Commissioner Peter Marshall further stated:

“I apologise to those people who were caught up in the investigation and who were not otherwise involved in it. Caught up, whether through the roadblocks or through the searches of houses. To those who were frightened, inconvenienced or distressed, I again say that I am sorry.”

The reaction of many Tūhoe to Operation Eight and the inherent assumption by some New Zealanders that Tūhoe were difficult and likely to defy authority must be viewed in the context of their unique history – a history marked by 160 years of injustice and unfairness on the part of the Crown. This history has been formally acknowledged by the Crown.³

Tūhoe did not sign the Treaty of Waitangi and at least initially, did not rebel against the Crown. However, Tūhoe land was confiscated in the 1860s and later returned to other Māori as part of a Compensation Court process. This had the effect of evicting Tūhoe from land it had traditionally occupied and cultivated. Over succeeding decades, further injustices exacerbated the hardship for Tūhoe, culminating in the apprehension and arrest of the prophet Rua Kenana at Maungapohatu in 1916. By the 1920s, Tūhoe were left with only 16 per cent of their land which could not support their increasing population. The result is that today 85 per cent of Tūhoe no longer live in the area, and those that do struggle to scrape a living from the land, suffering severe socio-economic deprivation as a result.

The Te Urewera-Tūhoe Bill, introduced recently to give effect to the final settlement of Tūhoe claims under the Treaty of Waitangi, records the Crown’s acknowledgement of the history of past wrongs and the intention to establish the foundation for a constructive future relationship with Tūhoe. As part of rebuilding the relationship, Police consulted with Tūhoe leaders to provide operational support during the Ngāi Tūhoe Settlement signing in Wellington. Police managed traffic safety and provided staff liaisons to assist the proceedings, which were attended by over 1500 Tūhoe.

One of the Commission’s aims in publishing this analysis is to promote good relationships between Tūhoe and Police, and to help ensure that people are treated fairly by having their rights respected. Another aim is that Police will ensure the impact of operations on innocent people is minimised and is in accordance with relevant standards. The Commission’s work on this Human Rights Analysis has also reinforced for the Commission the importance of distinguishing activities involving the use of violence or threats of violence from non-violent political dissent, non-violent civil disobedience or non-violent assertions of Māori sovereignty. The work has also stressed the importance of building relationships between

communities and the media and Police; integrating human rights in Police policy and practice; ensuring the wellbeing of children and young people at all times; the need to never forget the hurt done to the innocent while the justice process deals with people accused of crimes; and the importance of doing everything possible, as soon as possible, to heal harm done to innocent people.

None of the Human Rights Commissioners who are members of the Human Rights Commission today were members of the Commission in October 2007, or when the Commission decided in December 2007 to provide a Human Rights Analysis. However, the Commission has continued to take the view that it could not publish its Human Rights Analysis until court proceedings were completed, the IPCA had reported and the Commission had considered the implications of the IPCA report.

The Commission was involved with Tūhoe in the months immediately following Operation Eight. A Tūhoe liaison person was assigned by the Tūhoe Tribal Committee to engage with the Commission in late October 2007, and the Commission offered to meet with people affected by the operation. The Commission attended three community hui in late 2007 and early 2008. However, whether the Commission should have done more to support innocent people impacted by Operation Eight is a question for reflection by the Commission. The Commission acknowledges that many of those people had immediate and may well have on-going rehabilitation needs to mitigate consequences of the Police action. These were people that the then Police Commissioner had acknowledged by November 2007 to be innocent people who had suffered hurt and stress.

The Chief Commissioner at the time of Operation Eight and the current Chief Commissioner agree that an independent agency – perhaps the Commission – should have sent staff to Ruatoki as soon as the events there became

known, to record experiences of people who were affected by Police conduct but not subject to any charges, while their experiences were still fresh. Those accounts could have raised human rights issues arising for innocent affected people, such as issues related to the human right to health and in particular mental health. This could have led to an earlier understanding of the impact on those innocently caught up in the operation and possibly enabled greater rehabilitation support for the innocent affected people.

Over the intervening years since Operation Eight, the Commission has met, and will meet again, with Tūhoe leaders and the Police. It is encouraging to see that both parties have embarked upon a process of restoring their relationship. The Commission has extended an invitation to assist in facilitating this process, if required. The Commission has also met with Police and is satisfied that the review of the Police Manual policy on planning for children and vulnerable people when executing search warrants has been completed. This ensures that Police carry out a thorough community impact assessment before a search is executed, including assessing the needs of vulnerable people and communities.

The Human Rights Commission's conclusions

Based on the factual findings of the IPCA that aspects of Police action in Operation Eight were unreasonable, unjustified and unlawful, the Human Rights Commission concludes the following:

- 1 Through the unreasonable, unjustified and unlawful actions of Police, the human rights of innocent affected people caught up in Operation Eight were negatively impacted, and those people were exposed to unnecessary trauma.
- 2 No comprehensive assessment of the impact of the Police actions on innocent affected people was carried out in the immediate aftermath of Operation Eight.

- 3 No early intervention, joined-up wraparound support response was put in place to respond to the social recovery and support needs of innocent affected people.
 - 4 To ensure this kind of action does not happen again, Police have made changes to policy and practice relating to use of roadblocks and community impact assessments, and have completed a review of the Police Manual policy on planning for children and vulnerable people when executing search warrants.
 - 5 Despite the impact of Operation Eight on innocent affected Tūhoe people, Tūhoe and the Crown have found ways to work together to progress Tūhoe's Treaty settlement. That Tūhoe and the Crown have been able to work together in this way is positive.
 - 6 Through a process of re-engagement, Tūhoe leadership and Police have been working positively together to rebuild their relationship following the impact of actions by Police in Operation Eight.
- 3 In the absence of this impact assessment being undertaken at the time, the Human Rights Commission should have called for the independent monitoring of the human rights of innocent affected people to take place. The Commission would have been usefully placed to provide advice and support on recording and measuring human rights impacts in the immediate aftermath.
 - 4 A joined-up, early intervention wraparound support response by social sector government and non-government agencies, in association with the independent agency monitoring human rights impacts, should have been established to rapidly respond to the immediate and on-going social recovery and support needs of innocent affected people.
 - 5 Relevant government agencies should develop contingency plans to ensure rapid response capability for undertaking impact assessments and delivering early intervention wraparound support response, to guard against similar situations in the future.

Human Rights Commission's recommendations

In relation to the above conclusions, and with the benefit of hindsight, the Human Rights Commission is of the view that:

- 1 An independent agency could have usefully been tasked with monitoring the human rights of innocent affected people in the immediate aftermath of Operation Eight, to record and measure the impact on human rights and to identify social recovery and support needs.
- 2 Undertaking such an impact assessment in the immediate aftermath of Operation Eight would likely have had the benefit of ensuring the impacts were accurately captured and understood, and led to early intervention providing social recovery and support services, and therefore better short and long-term outcomes.

Notes

- 1 Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary*, LexisNexis (2006) at 15.4.1, refer to the common law right to pass and repass along the public highway: *Mc Manus v Gordon* [1959] NZLR 587.
- 2 On April 13 2013, the Supreme Court dismissed the applications for leave to appeal by the four people facing criminal charges as a result of Operation Eight.
- 3 Te Uruwera-Tūhoe Bill, <http://www.legislation.govt.nz/bill/government/2013/0146/latest/DLM5481230.html?s-rc=q5>.

Purpose of this paper

- 1 This is the final Human Rights Analysis by the Human Rights Commission (the Commission) of the human rights issues involved in the Police operation known as Operation Eight. It reflects feedback received on a draft human rights analysis that was circulated on 9 March 2009 to Police, the Independent Police Conduct Authority (IPCA) and to people who had complained to the Commission with regard to Operation Eight.
- 2 Operation Eight was the result of an investigation by Police of a group of people engaged in military style activities (which included the use of firearms) in Te Urewera. The investigation lasted 18 months and led the Police Commissioner to believe that the threat to public safety justified bringing charges under the Terrorism Suppression Act 2002.
- 3 Although no prosecutions were authorised under the Terrorism Suppression Act, charges were laid under the Crimes Act and the Firearms Act. The charges led to protracted court proceedings that were only resolved in April this year when the Supreme Court dismissed the applications by the last two applicants for leave to appeal their convictions and sentence.
- 4 Within days of the termination of Operation Eight by the Police on 15 October 2007, the Commission received more than 31 enquiries and complaints, only one of which could be dealt with as unlawful discrimination.¹ People complained about:
 - ◆ the roadblock at Ruatoki which limited access to those who lived there and provided the Police with an opportunity to search a large number of cars and photograph the occupants
 - ◆ Police reluctance to provide identification when requested
 - ◆ children confined to their homes for several hours, in some cases without food
 - ◆ removal of computers, cameras and photographic equipment which were only returned after a considerable period
 - ◆ the suspicion and mistreatment that some people (including children and young people) were subjected to because of the political beliefs of their relatives
 - ◆ Māori and Pākehā communities being treated differently
 - ◆ the use of the search warrants and how they were obtained
 - ◆ the implications of using the Terrorism Suppression Act.
- 5 The Commission can deal with complaints of alleged unlawful discrimination as part of its mediation process and breaches of human rights standards sit more generally under the powers in section 5 of the Human Rights Act 1993. Given the cases that were before the Court and the IPCA investigation, it was considered inappropriate for the Commission to carry out an investigation or undertake a formal inquiry.
- 6 The purpose of this paper is to:
 - ◆ respond to the issues raised with the Commission and provide basic information about the extent of Police powers at the date of the operation
 - ◆ identify the human rights issues that need to be considered in such an investigation
 - ◆ provide complainants to the Commission with a human rights analysis of the issues they raised.²
- 7 This paper focuses on the human rights of the people caught up in Operation Eight who were not arrested or charged.
- 8 The Human Rights Commission has two primary functions:

- ◆ to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society; and
 - ◆ to encourage the maintenance and development of harmonious relations between individuals and among the diverse groups in New Zealand society.
- 9 Much of the debate relating to Operation Eight raises matters that had implications for both respect for human rights and for harmonious relations.
- 10 The public debate that followed Operation Eight reflected widespread abhorrence at the possibility of the use of violence, and anxiety at the perceived proliferation of unlicensed and illegal weapons. There was concern at the display of force in response to the perceived threat. There was alarm at the implications of invoking the Terrorism Suppression Act (whether or not it could be justified legally) and the way in which the media emphasised this in its coverage of Operation Eight. There was also recognition that the Police Commissioner had responsibility for the safety of his officers where a possibility of violence existed.
- 11 Human rights are vitally important for everyone. They are the key to personal security, equal opportunity and fair treatment. Public examination of human rights in a situation where State power is deployed is therefore crucial to promoting widespread understanding of peoples' rights and responsibilities. If people are not aware of, and cannot exercise their rights, this can undermine the functioning of a democracy.
- 12 In deciding how to approach the complaints and enquiries it received, the Commission took into account its mandate to advocate for and protect human rights and harmonious relations; the importance of identifying and communicating effectively the human rights issues involved; and its responsibilities to the Courts and the IPCA. On 10 December 2007 it resolved:
- That the Commission:*
- a** *make contact* with those who have complained about Operation Eight, including the complaints of race discrimination to:
 - **explore** more fully their complaints and expectations of the Commission's complaints process,
 - **inform** them of the proposed Independent Police Complaints Authority inquiry and of the Commission's decision to publish an analysis of the human rights issues involved in the use of the Terrorism Suppression Act and Operation Eight;
 - b** *agree to undertake and publish* an analysis of the human rights issues involved in the use of the Terrorism Suppression Act and Operation Eight;
 - c** *advise* Police Commissioner Howard Broad and the Independent Police Complaints Authority of the Commission's proposed activities;
 - d** *request* the Independent Police Complaints Authority to conduct an inquiry with the widest possible terms of reference; and
 - e** *contribute* to the Law Commission's review of the Terrorism Suppression legislation.
- 13 To assess the extent to which human rights were respected in Operation Eight the Commission identified the following issues:
- ◆ the appropriateness of using the Terrorism Suppression Act including:
 - whether there were alternative means to monitor and prevent possible organised threats to public safety and security, and
 - its impact, if any, on the rights to freedom of expression, peaceful assembly and association

- ◆ the reasonableness of any search or seizure
 - ◆ whether people detained during the operation were treated with humanity and respect for the inherent dignity of the person
 - ◆ whether the Ruatoki road block – and related activities in that community – amounted to discriminatory treatment on the basis of race or political opinion
 - ◆ whether children and young people caught up in the operation:
 - received appropriate care; or
 - were treated inappropriately, or discriminated against, by reason of their parents' or legal guardians' race or political opinion.
- 14 The analysis has reinforced for the Commission the importance of:
- ◆ rejecting the use of violence or threats of violence for political or any other ends
 - ◆ distinguishing activities that involve the use of violence or threats of violence from political dissent, civil disobedience and assertions of Māori sovereignty or any form of activism
 - ◆ better community understanding of Indigenous rights as human rights
 - ◆ building communities' relationship with Police
 - ◆ comprehensively integrating human rights in Police policy and practices
 - ◆ ensuring the wellbeing of children and young people at all times.

Human rights and Operation Eight

Human rights limit State power and establish the minimum standards of behaviour that can be expected of State agencies. The legitimacy, stability and security of a State depend on the extent to which it respects, protects and fulfils the human rights of its people. Respect for human rights is also essential for promoting harmonious relations between individuals and the diverse groups in a society.

- 15 This paper uses as its foundation the rights and responsibilities set out in the Universal Declaration of Human Rights (the Declaration) and codified in international human rights law through covenants and conventions.³ The Declaration places an obligation on States to respect, promote and protect human rights, and on individuals to exercise their rights responsibly and to respect the rights of others. It also stipulates that everyone has duties to the community.
- 16 Threats to people's security may come from external sources such as terrorist acts, internally from the State and its agents, or from individuals threatening the physical integrity of others. Whether the source of the threat is terrorism, criminal activity or domestic violence, security of the person is primarily a responsibility of the Police. Operation Eight involved the execution of search and arrest warrants in relation to people who, according to Police "were known to have and use firearms and other weapons."⁴
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While civil disobedience may be legitimate in a democratic society, Police have the authority to intervene where there is a threat to individual or community security. The authority must be exercised in a manner that respects people's dignity and humanity.

- 17 Those arrested and charged had the opportunity to challenge charges made against them in Court. However, the Commission was also told that people (including children) who were caught up in Operation Eight simply because they lived in a particular community, or worked with, or were related to, a person of interest to the Police, were upset and frightened by Police actions.
- 18 Against this must be balanced the Police Commissioner's responsibility as an employer, to take all reasonable measures to ensure the safety of individual Police officers – given the possibility of armed retaliation – and to provide adequate protection in carrying out an operation involving seizure of weapons.

The role of the Human Rights Commission

- 19 The Commission has the statutory responsibility to advocate and promote respect for human rights in New Zealand, to encourage the maintenance and development of harmonious relations among the diverse groups in New Zealand and to deal with enquiries and complaints of unlawful discrimination. The Commission is also specifically empowered to make public statements in relation to any matter affecting human rights, to receive and invite representations from members of the public, and to inquire into and to report on any matter that may involve the infringement of human rights.
- 20 Following the events of 15 October 2007, the Commission received a number of complaints and enquiries about Operation Eight and how it was carried out. In considering how best to deal with them, the Commission was mindful that those arrested would be brought before the Courts where they would be able to contest the evidence against them and how it was obtained. Those affected by the operation

also had the option of complaining about the Police actions to the IPCA, while people who had concerns about media coverage could complain to the Broadcasting Standards Authority and the Press Council.

- 21 In cases like this, the function of the Commission is not to act as a substitute for the Courts or other accountability mechanisms. However, it can assist those bodies by identifying relevant human rights issues. In the case of Operation Eight, the Commission urged the IPCA to conduct an inquiry with the widest possible terms of reference. It also decided to provide an analysis identifying the human rights issues arising from Operation Eight and the use of the Terrorism Suppression Act in response to the issues that had been raised with the Commission.

Scope of the analysis

- 22 The Commission's Human Rights Analysis addresses the use of Police powers and human rights in their broadest sense. It raises the right of children and young people to special care and assistance and protection from discrimination or punishment on the basis of the status, activities, opinions or beliefs of the child's parents, legal guardians, or family members⁵ and summarises the legal provisions (as they were at the time) that related to powers to search people's homes; consent to enter; detention during search; establishment of road blocks; requests to photograph people and take DNA samples; and seizure of property. It also considers how and why the Terrorism Suppression Act was used and the role the news media played in the public debate that followed.
- 23 In undertaking this analysis the Commission has drawn on:
- ◆ the enquiries, complaints and expressions of concern received, and accounts given to former Chief Commissioner Rosslyn Noonan

and Commission staff in meetings with some of those affected

- ◆ material in the public domain
- ◆ commissioned legal research
- ◆ discussions with the New Zealand Police, the Independent Police Conduct Authority and other interested parties.

Summary of events

- 24 Operation Eight was the result of a Police investigation into the activities of a group of people in Te Urewera. The investigation lasted more than 18 months. In the course of the investigation the Police had applied to the Court for a number of warrants under section 198 of the Summary Proceedings Act 1957 which allowed them to access text messages exchanged by those under observation. Information obtained as a result led the Police to believe that the group's activities posed a real threat to public safety.
- 25 Interception warrants were subsequently granted under section 312CA of the Crimes Act 1961 on the ground that serious violent crimes may be committed. Between May and October 2007, interception warrants were granted on the basis that the offence of participating in a terrorist group had been, was or may be, about to be committed.
- 26 On 8 November 2007, the Solicitor-General concluded there was insufficient evidence for him to authorise prosecution under the Terrorism Suppression Act 2002 but that the use of the Act to obtain the interception warrants had been justified.
- 27 The Solicitor-General's decision not to prosecute under the terrorism legislation meant that the conversations recorded by the Police under the interception warrants were inadmissible at the trial of those facing charges under the Arms Act.
- 28 The Government, on the advice of the Solicitor-General, asked the Law Commission to consider and report on the effectiveness of the Terrorism Suppression Act in preventing organised threats to public safety and security.⁶
- 29 On 14 November 2007, the *Dominion Post* published extracts of the affidavit presented to the Manukau District Court to obtain the search warrants. The 156-page affidavit contained details obtained during the surveillance operation.
- 30 In December 2007, a complaint was submitted on behalf of Ngāi Tūhoe to the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous People, Rodolfo Stavenhagen. The complaint alleged breaches of privacy, freedom from discrimination and personal liberty arising out of the operation.
- 31 Just before Christmas 2007, the Government was contacted by the Special Rapporteur, the United Nations Special Rapporteur on Counter-Terrorism and the Secretary-General's Special Representative on Human Rights Defenders seeking an explanation for the raids and urging the Government "to take all necessary measures to guarantee that the rights and freedoms of the concerned persons are respected and that the accountability of any officials guilty of violations of the law or international human rights standards is ensured."⁷
- 32 The Government's response on 30 January 2008 highlighted the mechanisms of redress available to complainants and indicated that the consistency of the Police actions with human rights standards would be considered in these contexts.
- 33 In February 2008, three more people from the Bay of Plenty were charged with firearms offences relating to Operation Eight.

- 34 On 14 April 2008, the Solicitor-General filed contempt proceedings against the owner and editor of the *Dominion Post* for publishing conversations recorded by the Police during the surveillance exercise on the grounds that the publication of the material had the potential to compromise the defendants' right to a fair trial.
- 35 In September, the High Court dismissed the Solicitor-General's application against Fairfax while still finding that Fairfax's conduct was in breach of suppression orders and unlawful. The Court noted that it was not convinced that jurors might be prejudicially affected by the publication of the articles given that the trial would be at least two years later.⁸
- 36 A month-long depositions hearing took place against those charged in relation to Operation Eight in September 2008. All but one of the defendants were committed for trial on firearms charges. Following the depositions hearing, the Police issued a further indictment charging five of the accused with participation in a criminal gang.
- 37 There were a number of court hearings about the admissibility of evidence obtained by the Police, and in 2011 the Supreme Court issued a decision⁹ in which the majority found that the evidence was only admissible against those charged with the possession of firearms and being part of an organised criminal group.
- 38 Those who were tried were found guilty of possessing firearms and a restricted weapon but the jury was unable to reach a verdict on participating in an organised criminal group and the Crown subsequently sought a stay of proceedings relating to the charge.

Approaches to the Commission

- 39 Following the raids, the Commission received a number of complaints, enquiries and expressions of concern. In January 2008, the Chief Commissioner and a senior Commission employee met some of the complainants and others affected in Whakatāne.
- 40 At that meeting, concern was expressed that the exclusion by the Police of iwi liaison officers or kaitakawaenga from the planning and execution of Operation Eight undermined the future capability of Police to work effectively with Māori. Some wondered whether the outcome would have been different if the iwi liaison officers had been involved.¹⁰
- 41 Those caught up in the operation raised a range of issues about their treatment. They spoke of not knowing what Police could or could not do and of being unsure what their rights were in such a situation. This uncertainty was reflected in the comments and questions about the search warrants, what the Police could require of them and what they could challenge; concern at being stopped at the road block and photographed – in some cases without their consent; at police officers not displaying identification and unwilling to produce any when asked; and the ability of Police to stop people coming and going in the community and their homes. Concerns were also raised with the Commission about how long Police were holding computers and other equipment that was vital to peoples' business and what responsibility Police had to return property taken safely.
- 42 Concerns were expressed by many people (including young people themselves) about the impact of the exercise on the children and young people in Ruatoki. The Commission heard that children were confined to their homes for significant periods and closely

monitored by armed Police. Counselling was sought for the children who witnessed the events.

- 43 A separate group of complaints related to comments by a Whakatāne District Councillor alleging that they excited racial disharmony and hostility. The comments first published on a website, and then picked up by television and the *Whakatāne Beacon*. The Commission was told that these comments compounded the sense of hurt, resentment and anger that law-abiding people in the community felt at being branded as criminals if not terrorists.
- 44 Both those directly affected, and those who complained about events they had learned of from family or friends who had been involved or through the media, raised a number of wider issues. These can be summarised as the perceived targeting of Tūhoe people and members of the Ruatoki community; the targeting of people related to Tame Iti; and the apparent different treatment of Māori and Pākehā. They objected to people being branded as terrorists and what they saw as the inappropriate use of the Terrorism Suppression Act and its consequences, regardless of whether or not charges were brought under it.
- 45 The Commission was told that Operation Eight had caused serious damage to Police relations with Tūhoe and it was likely that there would be long term consequences for Māori-Pākehā relations and for harmonious race relations generally.

Operation Eight and the law

- 46 This section summarises the law covering Police actions on and leading up to 15 October 2007. It focuses specifically on those aspects of the law that are relevant to the enquiries, complaints, representations and expressions of concern received by the Human Rights Commission.

Surveillance

- 47 Operation Eight was the result of visual surveillance and the interception of private communications by Police. Visual surveillance can be carried out without a warrant but to intercept phone calls and other private communications, Police have to apply for interception warrants.
- 48 Warrants were obtained under sections 312CC and 312CD of the Crimes Act 1961. Sections 312CC and 312CD set out the conditions under which the Police can apply to the High Court for a warrant to intercept private communications relating to terrorist offences.¹¹ To obtain a warrant a Judge had to be satisfied that it was in the best interests of the administration of justice and the extent to which the privacy of any person or persons would be interfered with.¹² There must also have been reasonable grounds for believing a terrorist offence was about to be committed and whether the use of the interception device was likely to prevent the commission of such an offence. Other criteria included whether other ways had been employed and proved unsuccessful, or were too dangerous or that the case was so urgent that it would have been impractical for the Police to have used other means of carrying out the investigation.¹³
- 49 Use of the Terrorism Suppression Act 2002 was one of the most publicly questioned aspects of Operation Eight. Without the threat of suspected terrorist offences, it is unlikely that Police would have been able to obtain the interception warrants.¹⁴

Freedom of expression and the right to peaceful assembly and association are fundamental human rights and essential to the functioning of a democratic society. For this reason the State's power to intrude on those freedoms, including through surveillance of its citizens and interception of their conversations and other communications, is necessarily constrained. While these rights are not absolute, a high threshold is necessary to justify any restriction. Protecting citizens from harm is a permissible limitation.¹⁵

- 50 The use of the Terrorism Suppression Act in relation to purely domestic activities, and the gap in New Zealand criminal law at that time brought into sharp focus questions about the desirability of extending State powers of surveillance to activities which may amount to neither terrorism nor criminality, but civil disobedience, dissent or protest.
- 51 After reviewing all the evidence, including "hundreds of pages of intercepted communications, a large number of photographs taken by the Police during their surveillance operations, as well as video footage of events observed by the Police", the Solicitor-General concluded that Police had "a sufficient and proper basis" for investigating the activities that led up to Operation Eight under the provisions of the Terrorism Act.¹⁶
- 52 The fact that the Solicitor-General elected not to authorise prosecutions under the Terrorism Suppression Act 2002¹⁷ does not necessarily invalidate its use to investigate the activities in question. However, it remains a moot point whether the extent of the surveillance in this instance intruded unnecessarily into the right to freedom of association.

Search and seizure

- 53 As a result of the information intercepted, Police obtained warrants under the Summary Proceedings Act to search people's homes and businesses. In Auckland, Hamilton, Whakatāne, Ruatoki, Gisborne, Wellington and Christchurch, houses and offices were searched, a number of people were arrested and in some cases, computers, cameras and papers were removed.

Right to search¹⁸

- 54 Police require a warrant to search people's homes and places of business. A search warrant is written authorisation from a judicial officer allowing Police to search for and seize specified items from a particular place.¹⁹ In such cases a Police officer must "believe on reasonable grounds"²⁰ that the search is necessary.
- 55 Police activity that amounts to a search (or seizure) must also be reasonable.²¹ The fact that a search is legal does not necessarily mean it is reasonable.²² In most cases, a search that is not legally justified will be unreasonable for the purposes of section 21,²³ but legally justified searches may also be unreasonable. If Police exceed the particulars of a warrant in relation to the "place to be searched, the items to be seized, or the crime to be investigated",²⁴ this will be unlawful.
- 56 When Police execute a search warrant they have a duty to have the warrant with them and produce it if required.²⁵ They do not, however, have to produce the affidavit in support which contains the details of why the warrant was issued unless requested. While it is lawful for Police to produce only the warrants, most people would be unaware that much of the detail on which a warrant is based is found in the accompanying affidavit and that they can ask to see this.

Consent to search

- 57 Police may lawfully enter and search houses, vehicles and other premises without a warrant if valid consent has been given.²⁶
- 58 Although consent must be freely and voluntarily given, there is no requirement that Police must inform people of their right to refuse consent²⁷ and many people are unaware of their right to refuse to consent to a search.²⁸

Detention during searches

- 59 A number of people claimed they were detained while Police searched their homes even though they were not arrested. A person may be considered to be detained where there is no formal arrest but where, as a result of Police (or other official) conduct, they hold a reasonable belief that they are not free to leave.²⁹
- 60 The authority provided by a search warrant includes the right to exercise some control over people who are present in the place to be searched,³⁰ but in most cases does not provide an express power to detain while a search is being carried out.³¹ It is common practice for Police to detain people at a place to be searched either during the search or until their connection to any wrongdoing has been clarified.³²

When a person is detained they have the right to be treated with humanity and dignity. Section 23(5) of the New Zealand Bill of Rights Act 1990 imposes a “positive duty” to ensure treatment “as befits a human being with compassion”.³³

Seizure of computer equipment

- 61 Search warrants obtained under section 198 of the Summary Proceedings Act 1957 allowed Police to seize property such as computers. However, the statutory search regime had been developed before computer searches became common and the legislative framework was unclear about whether such powers extend to information stored on the computers.³⁴ In some cases the Courts have interpreted section 198 as extending to accessing computer data³⁵ and some recent legislative provisions also contemplate warrants issued under section 198 allowing computer data to be accessed.
- 62 When property is seized as part of an ongoing investigation there is an expectation that it will be returned in good condition.³⁶

Road blocks

- 63 At the time Operation Eight occurred, the power to set up road blocks was found in the Crimes Act 1961 (section 317B). This has subsequently been repealed and replaced by section 121 of the Search and Surveillance Act 2012. Section 121 allows an enforcement officer to stop a vehicle to search it with or without a warrant. An officer exercising this power must identify himself or herself to the driver, state the law under which the search is taking place and the reason, and (if not in uniform) produce evidence for the search.
- 64 The Commission understands that the roadblocks undertaken by Police in Operation Eight were pursuant to the Local Government Act 1974, specifically section 342A, which allowed for the temporary closure of roads in certain situations (section 342A has also been repealed and replaced by a similar provision in the Policing Act 2008). The IPCA found that the use of the Local Government Act was inappropriate

and rendered the Police actions in setting up the road blocks unlawful, unreasonable and unjustified.³⁷

Requests to photograph people

- 65 A person is entitled to refuse consent to a Police request to be photographed unless he or she is arrested and in custody. It is not illegal for the Police (or anyone else) to photograph people without their agreement in a public place.

Requests for DNA

- 66 Police may ask for DNA samples if they are investigating a reasonably serious (indictable) offence and the investigating officer has reasonable grounds for believing that analysis of the sample would confirm or disprove the person's involvement in the offence.³⁸ While a suspect can consent to provide a DNA sample, strict procedural requirements have to be complied with.³⁹
- 67 The right to freedom of association, along with the right to freedom of assembly, freedom of movement and freedom of expression, have been described as "important building blocks of a free and democratic state".⁴⁰ Although the right to freedom of association can be limited, it raises human rights concerns when a person can be treated in a way that restricts the right because he or she belongs to a particular group – in other words when the action leads to "guilt by association".⁴¹ People detained during an exercise such as Operation Eight can expect to be treated with humanity and dignity, consistent with section 23(5) of the New Zealand Bill of Rights Act 1990.

Rights of children and young people

- 68 Concerns were expressed by many people (including young people themselves) about the impact of the exercise on the children and young people in Ruatoki. The Commission heard that children were confined for significant periods and closely monitored by armed Police. Counselling was subsequently requested for the children who witnessed the events.
- 69 Some of the situations described to the Commission raise questions about whether children and young people caught up in the exercise were treated consistently with the standards in the United Nations Convention on the Rights of the Child (the Convention).
- 70 The Convention is designed to protect the rights of children and young people, and states that children and young people are entitled to special care and assistance because of their inherent vulnerability. New Zealand ratified the Convention in 1993, thereby committing itself to complying with the standards in the Convention.
- 71 The Convention makes it clear that the rights of the child should always be paramount unless there are reasons (such as national security and public order) not to do so, and that children and young people must be protected against discrimination by reason of (among other things) their parents' or legal guardians' race or political opinion⁴² and "all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians, or family members".⁴³ The Convention explicitly requires States to ensure children are provided with the care and protection necessary for their wellbeing, and outlines the rights and duties of parents, guardians or others who are legally responsible for them.⁴⁴ States party to the Convention are required to recognise the right

of the child to the enjoyment of the “highest attainable standard of health and to facilities for ... rehabilitation.”⁴⁵

- 72 The vulnerability of children means that the protection and promotion of their human rights warrants particular attention, as they are often dependent on others such as parents and guardians to give effect to those rights. While parents and guardians have a responsibility to ensure their children are safe and cared for, they also have a right to be reassured that in situations such as this where they cannot control what is happening, their children will be well treated and looked after.

Discrimination

- 73 The issue of discrimination was frequently raised in the representations made to the Commission. The claims related primarily to the treatment of people in Ruatoki and the perception that a Pākehā community would not have been treated in the same way.⁴⁶ Possible political and family status discrimination were also suggested, with claims that Ruatoki was targeted because some members of the community supported Māori sovereignty and that some individuals were under Police suspicion or were treated more harshly because of their relationship to Tame Iti.
- 74 Under the Human Rights Act 1993 it is unlawful to discriminate against people on certain grounds.⁴⁷ The grounds are sex, marital status, religious and ethical belief, race, colour, ethnic or national origin, disability, age, political opinion, employment status, family status and sexual orientation. Family status, (or presumed family status⁴⁸), includes “being a relative of a particular person”.⁴⁹ Although the meaning of “particular person” is untested in New Zealand,⁵⁰ Canadian case law suggests that a claim of discrimination based on a person’s

particular identity (not merely because they belong to a specific group) is possible.⁵¹

- 75 An action will amount to discrimination if an individual or group of people are treated differently by reason of one of these grounds and disadvantaged as a result. Where the discrimination is the result of an action by a person or agency carrying out a public function (such as Police), it falls within Part 1A of the Human Rights Act and is judged against the standards in the New Zealand Bill of Rights Act. The discrimination may therefore be justified if it amounts to a reasonable limitation that can “Be demonstrably justified in a free and democratic society.”⁵² It is up to the person complaining to establish the discriminatory treatment and the alleged perpetrator to justify it.⁵³

Use of the Terrorism Suppression Act 2002

- 76 The use of the Terrorism Suppression Act 2002 was one of the most contentious issues relating to Operation Eight.
- 77 The definition of “terrorist act” is central to the Terrorism Suppression Act 2002. An act may qualify as a terrorist act in one of three ways. First, a terrorist act covers acts that are contrary to various international conventions on terrorism listed in a schedule to the Terrorism Suppression Act.⁵⁴ Second, a terrorist act may be “a terrorist act in armed conflict” as defined by the Terrorism Suppression Act.⁵⁵ Neither was applicable in relation to Operation Eight. Rather, it was the third definition that was relevant.⁵⁶ The definition⁵⁷ has a number of separate components. The act must be:
- ◆ intended to cause in one or more countries, one or more specified outcomes, generally involving some sort of danger to life⁵⁸
 - ◆ carried out for the purpose of “advancing an ideological, political, or religious cause” and

- ◆ with the intention to either “induce terror in a civilian population” or “unduly” compel or force a government or an international organisation to do or abstain from doing any act.⁵⁹
- 78 The specified outcomes are set out in section 5(3) of the Terrorism Suppression Act and are:
- a the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act)
 - b a serious risk to the health or safety of a population
 - c destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d)
 - d serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life
 - e introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.
- 79 The definition is very broad. Even if it does accurately capture the essence of acts that should be described as terrorism, it may also capture activity that amounts to no more than acts of civil disobedience, dissent or protest. To protect against this, an avoidance of doubt provision was inserted into the Act to protect those engaged in strikes, protest or in dissent.⁶⁰ The precise boundaries of this provision, like many of the terms that form the Terrorism Suppression Act’s primary definition of “terrorist act” – “ideological”, “to unduly compel”, “serious risk”, “serious interference” – are still open to interpretation with the result that the Act has the potential to be applied very broadly by law enforcement and intelligence officials.
- 80 The nebulous terminology in the Terrorism Suppression Act increases the possibility that it could be misused.

Role of the media

- 81 The tension between the right of the news media to report events and freedom of expression and the rights of individuals and groups to their privacy was clearly evident in coverage of Operation Eight. The Operation was inherently newsworthy and the media treated it as an elite news item for complex and inter-related reasons including:
- ◆ the style and nature of Police resourcing, with large numbers of armed Police dressed in black and wearing balaclavas at road blocks and elsewhere
 - ◆ general public anxiety about terrorism
 - ◆ editorial commitment to the public’s right to know
 - ◆ commercial competitiveness amongst news media outlets.
- 82 This section examines the complaints to the Human Rights Commission about comments made by a Whakatāne District Councillor and published on the internet, on television and in the *Whakatāne Beacon*.

Complaints to the Commission

- 83 The Human Rights Commission received 35 complaints about comments by a Whakatāne District Councillor which were reported on Campbell Live. The comments were later repeated in an article in the *Whakatāne Beacon* in which the Whakatāne Mayor distanced himself and his Council from the remarks. Although the Commission did not pursue the complaints (for the reasons given below) the then Chief Commissioner Rosslyn Noonan met the Councillor (who subsequently agreed to meet with the

complainants) as well as some of the complainants when she visited Whakatāne.

- 84 Section 61 of the Human Rights Act makes it unlawful to publish material or comment publicly if the material or comment is likely to excite hostility against, or bring into contempt, people on the ground of their colour, race or ethnic or national origin. It is the effect of the comment that counts, not whether people found the remarks offensive. The right to freedom of expression is also relevant. As the right applies to everyone – including those who express ideas that others find objectionable – it follows that the Councillor’s comments, while disagreeable and offensive to some, attract the same protection as, for example, derogatory or offensive comments about Police.
- 85 Any decision about whether section 61 is engaged must therefore meet a high threshold to avoid infringing the right to freedom of expression.⁶¹ It also has to take into account how the material is likely to impact on those who hear or read it. In the case of the Councillor’s comments the threshold was, in the Commission’s assessment, not met.
- 86 *The Whakatāne Beacon* had a legitimate interest in publishing the Councillor’s remarks given both the news media’s role in reporting news of the day and the right to freedom of expression (which includes the right to express opinions and the right to receive the opinions of others). It reported the remarks without hyperbole or comment, thus bringing it within the exception in section 61(2) which allows the media to report material if the report accurately conveys the intention of the person who used the words.

Observations

- 87 Human rights are vitally important for everyone. They are the key to personal security, equality of opportunity and fair treatment. Public examination of human rights in the context of an event or operation where state power is vigorously displayed is therefore crucial to asserting the primacy of human rights in all situations and building community-wide understanding and appreciation of peoples’ rights and responsibilities.
- 88 This analysis has reinforced for the Commission the importance of:
- ◆ condemning the use of violence or threats of violence for political or any other ends
 - ◆ distinguishing activities that involve the use of violence or threats of violence from political dissent, civil disobedience and assertions of Māori sovereignty or any form of activism
 - ◆ building communities’ relationship with Police
 - ◆ comprehensively integrating human rights in Police policy and practices, and
 - ◆ ensuring the wellbeing of children and young people at all times.
- 89 To assess the extent to which human rights were respected in Operation Eight and ensure such a situation does not happen again, the following issues were relevant:
- ◆ the appropriateness of using the Terrorism Suppression Act 2002 including:
 - whether there were alternative means to monitor and prevent possible organised threats to public safety and security, and
 - its impact, if any, on the rights to freedom of expression, peaceful assembly and association

- ◆ the reasonableness of any search or seizure
- ◆ whether people detained during the operation were treated with humanity and respect for the inherent dignity of the person
- ◆ whether the Ruatoki road block – and related activities in that community – amounted to discriminatory treatment on the basis of race or political opinion
- ◆ whether children and young people caught up in the operation:
 - received appropriate care; or
 - were treated inappropriately, or discriminated against, by reason of their parents' or legal guardians' race or political opinion.

Appendix 1

The Terrorism Suppression Act 2002

Origins of the Act

The Bill that became the Terrorism Suppression Act 2002 began as the Terrorism (Bombings and Finance) Bill. It was designed to allow New Zealand to implement two international treaties on terrorism. Later, the original Bill was changed to incorporate the obligations imposed by United Nations Security Council Resolution 1373. This resolution, which was adopted in the aftermath of 9/11, obliged states to alter their laws by enacting various anti-terrorism measures. At the time, the original Bill was well into the legislative process. However, given the exceptional situation, additional parts were added to the Bill, causing it to double in size.⁶² The Terrorism Suppression Act became law in October 2002.

The justifications for distinct counter-terrorism laws

As noted above, significant parts of the Terrorism Suppression Act 2002 exist to implement international legal obligations that New Zealand has assumed by signing various international treaties on terrorism, as well as to implement the changes required by United Nations Security Council Resolution 1373.

The existence of distinct counterterrorism laws can be justified for two reasons.⁶³ First, terrorist acts are different from ordinary criminal acts as they are much more dangerous. For example, a terrorist who wants to bomb a public square is a much greater threat to society than an "ordinary" murderer. Second, because terrorist acts are so dangerous to the public, they need to be stopped before they can be carried out. The criminal law is primarily retrospective in its outlook and thus not ideally suited to counterterrorism. Special laws, framed in ways that respect fundamental rights, are therefore needed to fill this gap.

Overview of the Act

The heart of the Terrorism Suppression Act 2002 is the definition of the term "terrorist act".⁶⁴ Most of the offences created by the Act, such as financing terrorism,⁶⁵ recruiting members of terrorist groups,⁶⁶ harbouring or concealing terrorists,⁶⁷ and participating in a terrorist group,⁶⁸ depend at least in part on this definition. A number of offences also relate to support for, or activities related to, "designated terrorist entities", a concept that is also related to a "terrorist act".

The Act creates a designation process whereby organisations, associations or persons may be designated as terrorist entities.⁶⁹ A decision about whether a group is designated a terrorist entity is made by the Prime Minister. After consulting with the Attorney General and the Minister of Foreign Affairs and Trade, the Prime Minister may make an interim designation where he or she has "good cause to suspect that the entity has knowingly carried out, or has knowingly participated in the carrying out of, one or more terrorist acts."⁷⁰ The designation must be publicly notified, and expires after 30 days.⁷¹ However, after consulting with the Attorney-General, the Prime Minister may make a final designation, which lasts for three years unless renewed,⁷² if he or she "believes on reasonable grounds that the entity has knowingly carried out, or has knowingly participated in the carrying out of, one or more terrorist acts."⁷³

Once a group is designated as a terrorist entity, certain consequences follow. These include the triggering of certain offences under the Act, such as dealing with property that is owned or controlled by a designated terrorist entity,⁷⁴ and making property or financial or other related services available to a designated terrorist entity.⁷⁵ The offences of recruiting members of terrorist groups and participating in terrorist groups may also be based on the activities of a designated terrorist entity.⁷⁶ Additionally, the Attorney-General may apply to have property forfeited to the Crown if that property is owned or controlled directly or indirectly by a designated terrorist entity.⁷⁷

Significant Amendments to the Act since 2002

The Act has been amended several times since its enactment. The most significant aspects of these amendments were:

- ◆ **Terrorism Suppression Amendment Act 2003** – implemented two further international treaties relating to the protection of nuclear material and the making of plastic explosives.⁷⁸
- ◆ **Terrorism Suppression Amendment Act 2005** – amended the offence of financing terrorism.⁷⁹ In addition to it being an offence to give money intending or knowing that the money is to be used to carry out acts that would amount to terrorist acts if carried out, the amendment made it an offence to give money intending or knowing that the money is to benefit an entity that carries out or is involved in carrying out terrorist acts.⁸⁰
- ◆ **Terrorism Suppression Amendment Act 2007** – this amendment was in the legislative process at the time of Operation Eight. It created a new offence and modified existing offences concerning nuclear material to implement obligations New Zealand had assumed in an international terrorism convention⁸¹ as well as an offence of engaging in a terrorist act, which is punishable by up to life imprisonment.⁸² The Act also changes the designation process in two ways. First, groups designated as terrorist entities by the United Nations are now automatically designated as terrorist groups.⁸³ Second, designations made by the Prime Minister expire after three years, but may now be renewed by order of the Prime Minister, rather than the High Court.⁸⁴

Other laws providing for investigative powers in relation to terrorism offences

The Counterterrorism Bill 2003 prescribed certain investigative powers for combating terrorism. Originally, the Bill would have resulted in a distinct Act but it was eventually split into several sections and incorporated into other legislation.⁸⁵

Parts of the Bill amended the Terrorism Suppression Act, but not in ways that are relevant for present purposes.⁸⁶ Other parts of the Bill which were enacted as amendments to other laws did however expand surveillance powers, notably:

- ◆ amendments to the Crimes Act 1961 which allow Police to intercept private communications relating to “terrorist offences”⁸⁷ for the interception of telephone calls and other communications⁸⁸
- ◆ amendments to Summary Proceedings Act 1957 allow for the placing of tracking devices by Police and Customs.⁸⁹ The use of such devices is not limited to terrorism offences
- ◆ the definition of “security” in the New Zealand Security Intelligence Service Act 1969 was amended to include “the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act.”⁹⁰ Under the Act, a warrant “authorising a person to intercept or seize any communication, document, or thing” may be issued for “the detection of activities prejudicial to security” or for “the purpose of gathering foreign intelligence information essential to security”.⁹¹

Appendix 2

Avenues of complaint

In addition to the court proceedings, other agencies investigating aspects of Operation Eight included:

- ◆ **The Independent Police Conduct Authority** (the IPCA) operates under the Police Complaints Authority Act 1988 investigating complaints from individuals about Police misconduct where the person or group of people complaining are personally affected.⁹² The IPCA has a variety of options for dealing with complaints including investigation, conciliation or taking no action because another appropriate mechanism is available.⁹³
- ◆ **The Law Commission** was to investigate some of the legal issues arising as a result of Operation Eight (including but not limited to, the use of the terrorism legislation), ensuring an appropriate balance between the preservation of public safety and security and the maintenance of individual rights and freedoms. Search and surveillance legislation based on the Law Commission's report, *Search and Surveillance Powers*,⁹⁴ which address some of the matters raised by Operation Eight, has since been enacted as new legislation.
- ◆ **The Human Rights Commission** administers a disputes resolution service to address complaints about unlawful discrimination.⁹⁵ To access the complaints process, the matter complained of must fall within jurisdiction of the Human Rights Act. That is, there has to be some evidence that a person or group was treated differently and suffered some form of disadvantage because of one of the grounds on which it is unlawful to discriminate. Mere suspicion, or assertion of different treatment is not enough. The Commission can decline to take action where "in all the circumstances" there is another remedy or right of appeal which it would be reasonable for a complainant to exercise.⁹⁶ In this case, the Commission considered the IPCA was the most appropriate agency for complainants.
- ◆ **The United Nations Special Procedure Mechanism** address thematic matters and usually involve examining, monitoring, and advising and publicly reporting on human rights situations in specific countries. There is also an individual complaints mechanism which allows individuals and organisations to complain directly to the relevant UN Committee if all domestic avenues have been exhausted.
- ◆ In addition, individual lawyers considered the possibility of compensation for Police actions such as tortious actions including trespass to the person, wrongful imprisonment or breaches of the New Zealand Bill of Rights Act 1990.⁹⁷

Endnotes

- 1 There were also 35 complaints about comments of Whakatāne District Councillor, Russell Orr, in the *Whakatāne Beacon*. These are dealt with in the section of this *Human Rights Analysis* on The Role of the Media.
- 2 Once it was clear that the IPCA was carrying out an inquiry into Operation Eight, the Commission provided it with a draft of this paper containing the human rights analysis.
- 3 The Declaration covers civil and political, economic, cultural and social rights. The New Zealand Bill of Rights Act 1990 (NZBoRA) gives domestic effect to the civil and political rights that became international law through the International Covenant of Civil and Political rights (ICCPR). Particularly relevant to Operation Eight are the right to be treated with dignity and respect; the right to security of the person; to freedom of expression and association (and when they can be legitimately restricted in a democratic state); and the right to freedom from discrimination. While most are expressed in broad and apparently absolute language, they can be limited in certain circumstances but whether the limitation is justified will depend on both the right in question and the facts of the particular case.
- 4 New Zealand Police statement, accessed 23 October 2007 at www.infonews.co.nz/news.cfm?id=8295.
- 5 Article 2, United Nations Convention on the Rights of the Child.
- 6 The terms of reference for the Law Commission review were announced on 29 January 2008. The review was subsequently dropped from the Law Commission's work programme.
- 7 See for request and government's response: United Nations Human Rights Council, Ninth session A/HRC/9/9/Add.1, pp 64-67.
- 8 *The Solicitor General v Fairfax New Zealand Ltd* (10 October 2008, HC Well CIV 2008-485-00705) Randerson CJ and Gendall J.
- 9 *Hamed & Ors v R* (2011) NZSC 10: the Video Camera Surveillance (Temporary Measures) Act 2011 was introduced in response to legalise surveillance that would otherwise have been unlawful.
- 10 The Commission notes that the decision not to deploy iwi liaison officers during Operation Eight was that Police did not wish to compromise their position in the community or damage established and trusted relationships. *IPCA Operation Eight: Report of the Independent Police Conduct Authority* (2013) at [para 135].
- 11 Section 312A defines a terrorist offence as an offence against any of the sections 6A to 13E of the Terrorism Suppression Act 2002.
- 12 Section 312 CD (2) Crimes Act 1961.
- 13 Section 312CC(2)(e) Crimes Act 1961.
- 14 The only other way a warrant could have been obtained in this situation would have been if it had involved a serious violent offence under the Arms Act 1983. Section 54 of the Arms Act defines a serious violent offence as the use or attempted use of an imitation firearm, restricted weapon, ammunition or explosive to resist or prevent arrest or commit an offence. Police can also obtain warrants for the interception of communications in relation to organised crime, serious violent crime and certain types of drug offences: sections 312B, 312CA and Misuse of Drugs Amendment Act 1978.
- 15 A & P Butler *The New Zealand Bill of Rights Act: A Commentary* (Lexis Nexis 2005) at 13.8.5.
- 16 The decision to prosecute under section 67 Terrorism Suppression Act 2002 is exercised by the Solicitor-General. This is a reflection of historical practice and is now provided for in legislation. See section 9 Constitution Act 1986. See David Collins QC "Media Statement: Solicitor-General' 8/11/07 available at <http://www.crownlaw.govt.nz/uploads/sgstatement.pdf> at para 7.
- 17 *Ibid.*
- 18 This Human Rights Analysis states the law as it was at the time of Operation Eight.

- 19 P Rishworth, G Huscroft, S Optican & R Mahoney *The New Zealand Bill of Rights* (OUP 2003) 472.
- 20 Section 22 Summary Proceedings Act 1957 (now repealed).
- 21 S Optican, "Criminal Procedure" in J Tolmie & W Brookbanks (eds), *Criminal Justice in New Zealand* (Lexisnexis 2007), 158. For a discussion of seizure see P Rishworth et al (n 19) 428-433.
- 22 "Reasonableness is a different and wider test than lawfulness ... The lawfulness or unlawfulness of the search will always be highly relevant but should not be determinative either way. A search may be legal but unreasonable. It may be also be illegal, but reasonable". *R v Jeffries* [1994] 1 NZLR 290, 304.
- 23 *R v Williams* (2007) 23 CRNZ 1 [para 21] The only possible illegal but reasonable search would be one involving a minor or technical breach of the law.
- 24 Rishworth et al (n 19) 483.
- 25 Section 198(8) Summary Proceedings Act 1957.
- 26 Whether this is so will be determined as a matter of fact in each case: Optican (n 21) at 164. Consent given to one police officer can constitute consent to the Police generally.
- 27 See L. Solan & P Tiersma *Speaking of Crime* (University of Chicago Press 2005) 35-48.
- 28 Optican (n 21) "Criminal Procedure" 164.
- 29 *R v M* [1995] 1 NZLR 242, 245 (HC) approved in part in *Everitt v Attorney-General* [2002] 1 NZLR 82(CA). Restricting the movements of the occupier of a property for which a search warrant has been obtained does not amount to detention for the purposes of the NZBoRA: *Police v Smith & Herewini* [1994] 2 NZLR at 306.
- 30 New Zealand Law Commission, *Search and Surveillance Powers* (June 1997, Report 97) para 6.104.
- 31 The one exception is section 168(3)(a) Customs and Excise Act 1996. The Law Commission has observed that such a limitation on individual freedom is unlikely to be viewed as unreasonable but has recommended that the power to temporarily detain people under these circumstances should be expressly provided for by statute: (n 30) at para 6.115.
- 32 Although the power is implied rather than express, the Law Commission considers that "... these limitations on individual freedom are not unreasonable and would accord with public expectations of enforcement agencies" *ibid.*, at 6.113.
- 33 *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (HC) para 275.
- 34 This was clarified with the enactment of the Search and Surveillance Act 2012 - see ssection130.
- 35 *Powerbeat International Ltd. v Attorney-General* (Judgment No.2) (1999) 16 CRNZ 562.
- 36 *Bliss v Attorney-General* HC Napier, CP 62/92, 6/6/00 at 39.
- 37 For discussion see Independent Police Conduct Authority, *Operation Eight: The Report of the Independent Police Conduct Authority*, (IPCA 2013), p.37-46.
- 38 Section 6 Criminal Investigations (Body Samples) Act 1995.
- 39 *Ibid.*, sections 9,10,16 & 54.
- 40 A & P Butler, (n 15) at 15.5.
- 41 Arguably, this should only be the case if the person affected is aware that the association is for an unlawful purpose. For a more in depth discussion see A & P Butler, (n 15) at 15.9.7 and following sections.
- 42 Article 2(1), UN Convention on the Rights of the Child.
- 43 *Ibid.*, Article 2(2).
- 44 *Ibid.*, Article 3(2). Parental responsibility is also referred to in Article 18.

- 45 Ibid., Article 24(1).
- 46 M. Jackson “Back in the mists of fear: a primer on the allegations of terrorism made during the week 15-19 October 2007” accessed 24 October 2007 at <http://www.scoop.co.nz>.
- 47 Section 21 Human Rights Act 1993.
- 48 Section 21(2)(a)(b) Human Rights Act 1993.
- 49 Section 21(1)(l)(iv) Human Rights Act 1993.
- 50 A. & P. Butler (n 15) at 18.8.20.
- 51 *B v Ontario (Human Rights Commission)* [2002] 3 S.C.R 403; 2002 SCC 66 at para 38.
- 52 Section 5 New Zealand Bill of Rights Act 1990.
- 53 A person does not need to be personally affected to complain to the Commission or the Human Rights Review Tribunal *Attorney-General v Human Rights Review Tribunal* (2006) 18 PRNZ 295, per Miller J.
- 54 Terrorism Suppression Act 2002, section 5(1)(b).
- 55 Ibid., section 5(1)(c).
- 56 This assessment is based on the provisions of the Terrorism Suppression Act highlighted by the then Solicitor-General. See David Collins QC, “Media Statement: Solicitor-General”, 8 November 2007, available at <http://www.crownlaw.govt.nz/uploads/sgstatement.pdf>.
- 57 Section 5(1)(a) Terrorism Suppression Act.
- 58 These outcomes are specified in section 5(3) of the Act. Section 5(3) provides:
- (3) The outcomes referred to in subsection (2) are –
- (a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act):
- (b) a serious risk to the health or safety of a population:
- (c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):
- (d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:
- (e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country
- 59 Ibid., section 5(2).
- 60 Section 5(5) provides:
- To avoid doubt, the fact that a person engages in a protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person –
- (a) is carrying out an act for a purpose, or with an intention, specified in s 5(2); or
- (b) intends to cause an outcome specified in s 5 (3).
- 61 For further comment on the need to employ a high threshold when considering infringement of the right to freedom of expression see the comments of Justice France in *Hopkinson v Police* [2004] 3 NZLR 704.
- 62 A Conte, *Counter-Terrorism and Human Rights in New Zealand* (New Zealand Law Foundation 2007), 95.
- 63 It should be noted that such arguments are not undisputed. See, for example, M Palmer “Counter-Terrorism Law” [2002] *New Zealand Law Journal* 456, 464. For further arguments about the need for special legislation, see C Walker, *Blackstone’s Guide to the Anti-Terrorism Legislation* (Oxford University Press 2002) 11-13.
- 64 Sections 4 and 5 Terrorism Suppression Act 2002.
- 65 Ibid., section 8.
- 66 Ibid., section 12.
- 67 Ibid., section 13A.

- 68 Ibid., section 13.
- 69 Ibid., sections 20-42.
- 70 Ibid., section 20.
- 71 Ibid., sections 21 and 26-29.
- 72 Ibid., section 35.
- 73 Ibid., section 22.
- 74 Ibid., section 9.
- 75 Ibid., section 10.
- 76 Ibid., section 12 and 13.
- 77 Ibid., section 55.
- 78 Conte supra (n 65) 96.
- 79 Section 8 Terrorism Suppression Act 2002.
- 80 Ibid., section 8(2A).
- 81 Ibid., sections 13C, 13D and 13E.
- 82 Ibid., section 6A.
- 83 Ibid., section 4: see amendment to meaning of “designated terrorist entity”.
- 84 Ibid., section 35.
- 85 Conte, (n 65) 114.
- 86 Terrorism Suppression Amendment Act 2003. See Conte *ibid.*, at 96.
- 87 Sections 312CC and 312CD Crimes Act 1961.
- 88 The only other way in which an interception warrant could have been obtained would be under the Crimes Act’s interception regime if an offence qualified as a “serious violent offence” under section 54 Arms Act 1983 which is the use or attempted use of imitation firearm, restricted weapon, ammunition, or explosive to resist or prevent arrest or commit an offence.
- 89 Sections 200A to 200O Summary Proceedings Act 1957.
- 90 Section 2 New Zealand Security Intelligence Service Act 1969.
- 91 Ibid., section 4A.
- 92 Section 12(1)(a) Police Complaints Authority Act 1988.
- 93 Ibid., section 17.
- 94 New Zealand Law Commission (n 30), 97.
- 95 Ibid., Part 3.
- 96 Ibid., section 80(3)(d).
- 97 The Court of Appeal in *Simpson v Attorney-General [Baigent’s Case]* [1994]3 NZLR 667(CA) held that the Crown can be directly liable for breach of the NZBoRA as a matter of public law. The Court read down the various immunities available to the Police, limiting them to actions taken in good faith [at para 718]. Whether compensation is available, however, will depend on a number of factors including “the nature of the right and of the particular infringement” and whether the breach could be vindicated by other means.