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Article · January 2016

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THE MAKING OF NEW ZEALAND'S FOREIGN FIGHTER LEGISLATION: TIMELY RESPONSE OR UNDUE HASTE?

John Ip*

This paper discusses New Zealand's Countering Terrorist Fighters Legislation Bill, which was enacted over a period of some two weeks in late 2014. More specifically, the paper assesses the government's justifications for expediting the passage of this legislation through the use of urgency. It contends that these justifications — that the government's hand was forced by a United Nations Security Council Resolution on the issue of foreign fighters, that the legislation makes minimal changes, particularly when compared to its Australian and British equivalents, and that there is provision for a sunset clause and post-enactment review — are all problematic and ultimately unconvincing. The paper finishes by considering what the enactment of this legislation reveals about the separation of powers and constitutionalism in New Zealand.

INTRODUCTION

In this paper I consider the enactment of the Countering Terrorist Fighters Legislation Bill (CTFL Bill). This legislation is New Zealand's response to the "foreign fighter" phenomenon, which has seen large numbers of people travel to fight in the Syrian civil war. Of those from Western countries, a significant number have joined certain radical Islamist groups fighting on the rebel side, the most notable being Islamic State in Iraq and the Levant (ISIL).[1] The primary concern of Western governments is the prospect of foreign fighters returning home radicalised, acculturated into terrorist networks, and hardened with combat training and experience.[2] At the international level, this concern led to United Nations Security Council Resolution 2178 (UNSCR 2178), which requires states to ensure that their laws are capable of dealing with the threat of "foreign terrorist fighters".[3] At the domestic level, the legal response has involved various states — Australia, the United Kingdom and New Zealand among them — implementing security measures that aim to disrupt the ease of travel to and from a jurisdiction.

The CTFL Bill was passed under urgency in late 2014. The hurried nature of its enactment was widely criticised. The aim of this paper is to assess this critique. I begin by discussing the enactment of the CTFL Bill with reference to the literature on enacting counterterrorism legislation in an emergency context and the literature on the use of urgency in New Zealand. In the heart of the paper, I evaluate the government's justifications for truncating the legislative process through urgency. I suggest that these justifications — that UNSCR 2178 forced the government's hand, that the CTFL Bill makes minimal changes to the law, particularly when compared to its Australian and

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[1] Daniel Byman and Jeremy Shapiro, *Be afraid. Be a Little Afraid* (Policy Paper No 34, Brookings Institution, November 2014), 14 <http://www.brookings.edu/~/media/research/files/papers/2014/11/western-foreign-fighters-in-syria-and-iraq-byman-shapiro/be-afraid--web.pdf>.

[2] Treasa Dunworth, "International Law" [2015] *New Zealand Law Review* 285 at 311.

[3] SC Res 2178, UN SCOR, 7272th mtg, UN Doc S/RES/2178 (24 September 2014) ("*UNSCR 2178*").

British equivalents, and that there is provision for a sunset clause and post-enactment review — are all problematic and fail to justify the government's actions. In the final part of the paper, I consider what the enactment of the CTFL Bill reveals about the separation of powers and constitutionalism in New Zealand.

BACKGROUND

On 24 September 2014, the United Nations Security Council adopted UNSCR 2178, which requires, among other things, that states take various measures to disrupt and prosecute "foreign terrorist fighters" (FTFs) — persons who travel or attempt to travel to another state for the purposes of engaging in terrorist activity or providing or receiving terrorist training.[4]

On 5 November, New Zealand's Prime Minister, the Rt Hon John Key, stated in a speech that ISIL had successfully recruited New Zealanders, and that the government had a "watch list of between 30 and 40 people of concern in the foreign fighter context".[5] Some of those persons had already travelled to Syria to fight, while others had been prevented from doing so by cancelling their passports. The Prime Minister also noted that there were 30 to 40 additional persons requiring further investigation, and that the government had recently seen fit to raise the national threat level from "Very low" to "Low".[6] The Prime Minister then outlined the government's response. After the general election (20 September), he had established an internal review,[7] the terms of which were approved in mid-October.[8] This review considered the legal powers available to "investigate and monitor suspected and returning foreign terrorist fighters and other violent extremists", the powers available to disrupt the ability of FTFs to travel, and whether criminal offences in relation to FTFs were required.[9] Following the review, Cabinet signed off on several law changes that formed the basis of the CTFL Bill.[10]

These changes were threefold. First, the legislation allows the New Zealand Security Intelligence Service (NZSIS) and police to access information contained in customs databases for the purpose of preventing terrorism.[11] Second, the legislation grants new surveillance authority to the NZSIS, allowing it to conduct visual surveillance of private activity on private premises.[12] Controversially, the legislation also permits the

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[4] *UNSCR 2178*, UN Doc S/RES/2178 at [6]. The terms "foreign terrorist fighter" and "foreign fighter" tend to be used interchangeably in the discourse, although this tends to conflate two distinct phenomena (fighting in foreign conflicts and terrorism).

[5] John Key, "Facing a changing security environment" (2015) 40(1) *New Zealand International Review* 2 at 2.

[6] Key, n 5 at 3.

[7] Key, n 5 at 3.

[8] (9 December 2014) 702 NZPD 1255.

[9] Rajesh Channa, *Regulatory Impact Statement: Foreign Fighters - Targeted review of relevant legislation* (12 November 2014) Department of the Prime Minister and Cabinet, [6] <http://www.dpmc.govt.nz/sites/all/files/publications/ris-foreign-terrorist-fighters_0.pdf>. See also Countering Terrorist Fighters Legislation Bill 2014 (1-1) (explanatory note) at 2 ("*CTFL Bill explanatory note*")

[10] Key, n 5 at 3.

[11] See *CTFL Bill explanatory note*, n 9 at 5; *Customs and Excise Amendment Act 2014* (NZ).

[12] See *CTFL Bill explanatory note*, n 9 at 3-4; *New Zealand Security Intelligence Service Amendment Act 2014* (NZ), s 4IB.

NZSIS in an emergency to conduct surveillance without warrant for up to 24 hours.[13] Third, the legislation allows the Minister of Internal Affairs to cancel or refuse to issue a passport and then deny a passport for up to three years on the grounds that the affected person poses a threat to the security of New Zealand or another country.[14] The legislation also adds an ancillary power to suspend passports to allow the cancellation process to take place.[15]

EVALUATING THE CRITIQUE OF THE CTFL BILL'S ENACTMENT

The CTFL Bill's text was leaked on 23 November 2014.[16] The Bill itself was introduced on 25 November; it received royal assent on 11 December, and was in force on 12 December. This was made possible by urgency. The government's resort to urgency was widely criticised by opposition MPs[17] and by virtually all those who made submissions on the Bill.[18]

In order to evaluate this critique about how the CTFL Bill was enacted, I first add some context by discussing the particular pathologies of enacting counterterrorism legislation, and by outlining the use of urgency in New Zealand more generally. I then clarify the specific steps that were taken to expedite the enactment of the CTFL Bill, before turning to consider the government's justifications for employing urgency.

Hasty legislating in the counterterrorism context

Enacting counterterrorism legislation, of which the CTFL Bill is an example, can be problematic, particularly where it occurs in the aftermath of a terrorist attack,[19] a situation characterised by "panic, fear and an overwhelming sense of urgency."[20] After an attack, the imperative of reassuring a fearful public demands that something be done,

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[13] *New Zealand Security Intelligence Service Amendment Act 2014* (NZ), s 4ID. This aspect of the CTFL Bill attracted the most submissions during the select committee process: see Department of the Prime Minister and Cabinet, *Departmental Report for the Foreign Affairs, Defence and Trade Committee: Countering Terrorist Fighters Legislation Bill* (December 2014), [149] <http://www.parliament.nz/resource/mi-nz/51SCFDT_ADV_00DBHOH_BILL60721_1_A414768/55d0f6a1e0a48a2cd48c8c72d5f24d0173e5d196>.

[14] See *CTFL Bill explanatory note*, n 9 at 5-6; *Passports Amendment Act 2014* (NZ), schedule, cls 1-2.

[15] *Passports Amendment Act 2014* (NZ), sch, cl 7.

[16] Andrea Vance, "Alarm at 'draconian' leaked spy law" *Stuff.co.nz* (online), 23 November 2014 <http://www.stuff.co.nz/national/politics/63451448/Alarm-at-draconian-leaked-spy-law>.

[17] See, for example, (9 December 2014) 702 NZPD 1209. See also the Labour Party's minority view on the Select Committee Report: Countering Terrorist Fighters Legislation Bill 2014 (1-2) (select committee report) at 6-7 ("*FADT Committee Report*").

[18] Department of the Prime Minister and Cabinet, n 13 at [9]. See, for example, Human Rights Commission, "Human Rights Commission Submission to the Foreign Affairs, Defence and Trade Committee" (27 November 2014) at [1.4.2]; Amnesty International New Zealand, "Submission on the Countering Terrorist Fighters Legislation Bill" (28 November 2014) at [11]; New Zealand Law Society, "Countering Foreign Fighters Legislation Bill" (27 November 2014) at [30].

[19] Laura K Donohue, *The Cost of Counterterrorism* (Cambridge University Press, Cambridge, 2008) pp 11-12.

[20] John E Finn, "Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation" (2010) 48 *Columbia Journal of Transnational Law* 442 at 443.

and be done swiftly.[21] It is therefore unsurprising that counterterrorism legislation is often rushed through an acquiescent legislature at the executive's demand.[22] As a matter of substance, these laws almost invariably introduce additional security measures, often with significant implications for civil liberties and human rights.[23] This is a simple reflection of political incentives — avoiding the risk of ever being perceived as responsible for failing to prevent a terrorist attack is paramount.[24]

There are many instances of counterterrorism legislation being enacted in these circumstances, particularly in the United Kingdom.[25] Perhaps the most famous example is the Prevention of Terrorism (Temporary Provisions) Act 1974, which was passed in 3 days after the Birmingham pub bombings.[26] More recently, the Anti-Terrorism Crime and Security Act 2001, which was introduced shortly after the 9/11 terrorist attacks, became law in just over one month.[27]

There is an important clarification to be made here: the claim, accurately stated, is not that these laws were drawn up at the last minute on the back of the proverbial napkin. Rather, the concern about hasty or panicked legislating centres on the lack of time for meaningful legislative consideration and scrutiny. As Walker observes, counterterrorism legislation is often "revealed and passed in emergency circumstances, but it has almost certainly been drafted in non-emergency circumstances".[28] Once drawn up, these proposals sit on the legislative shelf, ready to be drawn upon in case of emergency.[29] The above-mentioned Prevention of Terrorism (Temporary Provisions) Act 1974 resulted from earlier Home Office plans that drew upon existing terrorism legislation in force in Northern Ireland.[30] The same point can be made about more recent counterterrorism legislation, such as the Anti-Terrorism Crime and Security Act[31] and the USA PATRIOT

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[21] Conor Gearty, "Political Violence and Civil Liberties" in Christopher McCrudden and Gerald Chambers (eds), *Individual Rights and the Law in Britain* (Clarendon Press, Oxford, 1994) p 164; David Cole, "No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint" (2008) 75 *University of Chicago Law Review* 1329 at 1343; David Bonner, "Responding to crisis: legislating against terrorism" (2006) 122 *Law Quarterly Review* 602 at 623.

[22] Andrew W Neal, "Terrorism, Lawmaking, and Democratic Politics: Legislators as Security Actors" (2012) 24 *Terrorism and Political Violence* 357 at 358. See also John Ip, "Sunset Clauses and Counterterrorism Legislation" [2013] *Public Law* 74 at 83.

[23] Alan Greene, "Questioning executive supremacy in an economic state of emergency" (2015) 35 *Legal Studies* 594 at 613.

[24] Cole, n 21 at 1345 ; Donohue, n 19, p 12.

[25] See House of Lords Select Committee on the Constitution, *Fast-track legislation: Constitutional Implications and Safeguards*, House of Lords Paper No 116-I, Session 2008-09 (2009) [65]-[82]; Philip A Thomas, "September 11th and Good Governance" (2002) 53 *Northern Ireland Legal Quarterly* 366 at 369.

[26] House of Lords Select Committee on the Constitution, *Fast-track legislation: Constitutional Implications and Safeguards*, House of Lords Paper No 116-II, Session 2008-09 (2009) 178 (Memorandum by Clive Walker).

[27] Adam Tomkins, "Legislating against terror: the Anti-terrorism, Crime and Security Act 2001" [2002] *Public Law* 205 at 205.

[28] House of Lords Select Committee on the Constitution, n 26 at 178.

[29] See also Fionnuala Ni Aoláin and Oren Gross, "A Skeptical View of Deference to the Executive in Times of Crisis" (2008) 41 *Israel Law Review* 545 at 551.

[30] House of Lords Select Committee on the Constitution, n 26 at 178-179. See also Bonner, n 21 at 604-605.

[31] Conor Gearty, "11 September 2001, Counter-terrorism, and the Human Rights Act" (2005) 32 *Journal of Law and Society* 18 at 23.

Act,[32] which even included provisions based on proposals that had previously been rebuffed in Congress.[33]

Urgency in New Zealand

Urgency is a device that extends the hours that the House sits and allows the government to control what goes on during that time.[34] Its use by New Zealand governments to hasten the passage of legislation has been a recurring concern over many years.[35]

The invocation of urgency can have two further consequences depending on the specifics of the urgency motion. First, if the motion applies to multiple stages of the legislative process, the ordinarily-mandated stand-down periods between those stages will not apply.[36] With the removal of these stand-down periods, which exist to slow down the passage of legislation and to allow MPs and members of the public time to pause and reflect,[37] a bill can be pushed through all the stages of the legislative process in the same sitting day.[38] Second, if urgency is accorded to the first and second readings, this will result in the bypassing of the select committee stage.[39] Because this stage is the primary site of public participation, scrutiny and revision,[40] this kind of urgency motion is the most problematic.[41] Even where the select committee stage is not bypassed, the effectiveness of a select committee can be curtailed by reducing the time available to the committee through the inclusion of special instructions in the motion referring a bill to select committee.[42] This device has commonly been used to shorten the default six-month timeframe for a select committee to report back.[43]

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[32] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub L No 107-56, 115 Stat 272.

[33] Donohue, n 19, pp 12-13.

[34] Claudia Geiringer, Polly Higbee and Elizabeth M McLeay, *What's the Hurry?: Urgency in the New Zealand Legislative Process 1987-2010* (Victoria University Press, Wellington, 2011) p 1.

[35] See, for example, J F Burrows and P A Joseph, "Parliamentary Law Making" [1990] *New Zealand Law Journal* 306; Jeremy Waldron, "Compared to What? Judicial Activism and the New Zealand Parliament" [2005] *New Zealand Law Journal* 441; Geiringer, Higbee and McLeay, n 34; Sascha Mueller, "Where's the Fire: The Use and Abuse of Urgency in the Legislative Process" (2011) 17 *Canterbury Law Review* 316; Geoffrey Palmer, "The Bill of Rights after Twenty-One Years: The New Zealand Constitutional Caravan Moves on" (2013) 11 *New Zealand Journal of Public and International Law* 257.

[36] Geiringer, Higbee and McLeay, n 34, p 30.

[37] Geiringer, Higbee and McLeay, n 34, p 142; David McGee, "Concerning Legislative Process" (2007) 11 *Otago Law Review* 417 at 422.

[38] MB Rodriguez Ferrere, "Standing orders in the New Zealand House of Representatives" (2014) 34 *Parliaments, Estates and Representation* 228 at 234.

[39] Standing Orders of the House of Representatives 2014, SO 288 ("*Standing Orders*"). See also Geiringer, Higbee and McLeay, n 34, p 31.

[40] Palmer, n 35 at 263.

[41] Geiringer, Higbee and McLeay, n 34, p 146. This is discussed further in the final section below.

[42] *Standing Orders*, n 39, SO 287(1)(b).

[43] Geiringer, Higbee and McLeay, n 34, p 136. The 2013 Constitution Advisory Panel also identified this device as being problematic: see Constitutional Advisory Panel, *New Zealand's Constitution: A Report on a Conversation* (November 2013), 72 <http://www.ourconstitution.org.nz/store/doc/FR_Full_Report.pdf>.

Urgency and the enactment of the CTFL Bill

The CTFL Bill was a response to concerns about a particular kind of terrorist threat, something that is reflected in the surrounding rhetoric. The Bill's proposals were announced in the Prime Minister's November 5 speech, which repeatedly referenced security, public safety, and the looming threat of ISIL and returning foreign fighters — perhaps tapping into visceral revulsion towards ISIL's barbaric practices and post-9/11 anxieties about home-grown terrorism.[44] The legislative debate is littered with similar references, with the most pointed perhaps being the Minister in charge of the NZSIS, the Hon Christopher Finlayson, referencing the IRA's ominous warning of terrorists "only [having] to be lucky once".[45] Moreover, although the CTFL Bill was not enacted in the aftermath of a terrorist attack, here too we see a government presenting a set of proposals to the legislature, and then using particular procedural devices to limit the time available for the legislature to scrutinise and modify those proposals.

On 25 November, urgency was accorded to the introduction and first reading of the CTFL Bill. The motion was agreed to by a margin of 96 to 25, with the opposition Labour party joining the National government and its coalition partners.[46] This motion removed the usual stand-down period between introduction and first reading,[47] giving opposition MPs and the public less opportunity to consider the Bill before its first reading.[48]

As noted above,[49] the proposals in the CTFL Bill arose out of the internal government review that began in mid-October.[50] Given that Cabinet had signed off by 5 November, it is reasonable to infer that those proposals must have been close to fully-formed by early November. It appears that the proposals then sat on the shelf until shortly before 25 November, when several organisations such as the New Zealand Law Society and Legislation Advisory Committee were provided with advance copies of the Bill.[51] The Minister in charge of the NZSIS also stated that other political parties were briefed about the review and the legislation,[52] although in the case of two opposition parties, the Greens and New Zealand First, this did not extend to the providing of advance copies of the Bill.[53] Unless they had seen the leaked copy of the Bill, it is possible that members of those parties were not privy to the Bill's specifics up until the urgency motion on 25 November.

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44 Key, n 5 at 3. Perceptions of threat are of course open to manipulation. One example (postdating the CTFL Bill) is the December 2015 briefing given by the NZSIS Director to the Intelligence and Security Committee, in which the spectre of Kiwi "jihadi brides" was raised. It subsequently emerged that these women had departed from Australia rather than New Zealand (as had been implied). See Claire Trevett, "SIS head Rebecca Kitteridge denies scaremongering with Jihadi brides", *New Zealand Herald* (online), 18 May 2016 <http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=11640711>. Notably, there is nothing in the CTFL Bill that impedes these women from returning to New Zealand.

45 (25 November 2014) 702 NZPD 781.

46 (25 November 2014) 702 NZPD 780.

47 *Standing Orders*, n 39, SO 285(1).

48 See generally Geiringer, Higbee and McLeay, n 34, p 142.

49 See text above at nn 7 to 10.

50 (9 December 2014) 702 NZPD 1255.

51 (25 November 2014) 702 NZPD 781.

52 (25 November 2014) 702 NZPD 781.

53 (25 November 2014) 702 NZPD 790.

Because the urgency motion applied only to the introduction and first reading, the select committee stage was not bypassed: the Bill was referred to the Foreign Affairs, Defence and Trade Committee (the FADT Committee).[54] However, as had been signalled by the Minister in charge of the NZSIS, the referral to select committee included an instruction that the FADT Committee was to report back to the House on 2 December.[55] Because this entailed a reporting back period of less than four months, the motion was debated.[56] The Labour party's attempt to amend the date to 10 February 2015 was defeated 59 to 62, and the original motion was agreed to by a margin of 62 to 59.[57] Consequently, interested persons only had a narrow window in which to make a submission to the FADT Committee: the closing date for submissions was 27 November.[58] Despite most submitters having a mere two days' notice, the FADT Committee received 588 written submissions, with 63 submissions being heard.[59]

The FADT Committee recommended several changes to the CTFL Bill that were eventually adopted. These included moving the expiry date in the sunset clause forward to 1 April 2017,[60] restricting the NZSIS's authority to engage in visual surveillance to the detection, investigation or prevention of terrorist acts,[61] and limiting the period of emergency warrantless surveillance to 24 hours.[62] While these changes are all improvements on the original CTFL Bill, they may ultimately flatter to deceive. The moving forward of the date in the sunset clause and the reduction in the time period of warrantless surveillance are little more than marginal changes to peripheral details of the legislation. The tying of the NZSIS's new surveillance powers to countering terrorist acts rather than ensuring security, a concept broadly defined in the NZSIS's governing legislation,[63] is one of the more significant changes. But it has the air of a calibrated concession following an audacious opening bid.

On 9 December, a further motion accorded urgency to the remaining stages of the CTFL Bill and any bills into which it might be divided,[64] thereby removing the stand-down periods between the post-second reading stages of the legislative process.[65] The motion was agreed to by a margin of 62 to 59, with the majority consisting of MPs from the National Party and two of its coalition partners.[66] Debate at the committee of the whole House stage was ended with a motion for closure, which carried by 64 to 57, with

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[54] (25 November 2014) 702 NZPD 802.

[55] (25 November 2014) 702 NZPD 781. This is required by Standing Orders: see *Standing Orders*, n 39, SO 287(1), 290(1).

[56] *Standing Orders*, n 39, SO 290(2).

[57] (25 November 2014) 702 NZPD 812.

[58] *FADT Committee Report*, n 17 at 11.

[59] Department of the Prime Minister and Cabinet, n 13 at [4].

[60] *FADT Committee Report*, n 17 at 3.

[61] *FADT Committee Report*, n 17 at 4.

[62] *FADT Committee Report*, n 17 at 5.

[63] *New Zealand Security Intelligence Service Act 1969* (NZ), s 2.

[64] (9 December 2014) 702 NZPD 1206. The CTFL Bill was later divided at the committee of whole House stage.

[65] *Standing Orders*, n 39, SO 296, 299, 310.

[66] (9 December 2014) 702 NZPD 1207.

the majority consisting of MPs from the National Party and all three of its coalition partners.[67]

Despite the political division over the process of enactment, at each key juncture of the legislative process, the substance of the CTFL Bill (later the Passport Amendment Bill, Customs and Excise Amendment Bill and the New Zealand Security Intelligence Service Amendment Bill) secured clear majorities, including support from the two major political parties, National and Labour.[68]

The government's case for expediting the passage of the CTFL Bill

Under Standing Order 57, the Minister moving the motion to accord urgency must "inform the House with some particularity of the circumstances that warrant the claim for urgency".[69] When urgency was first moved on 25 November, the Hon Simon Bridges, stated: "Urgency is required because of the urgency of the proposals contained in the bill".[70] The proposals were described as augmenting the government's capacity to respond to threats and increasing the security of the country.[71] Similarly, when the second urgency motion was moved on 9 December, the Hon Gerry Brownlee spoke of strengthening the "Government's ability to deal with evolving threats" and measures "that add to the safety and security of New Zealand in the short term".[72]

These ritualistic incantations about security and safety reveal little, and are consistent with the general lack of genuine observance with Standing Order 57.[73] However, from Hansard, three primary justifications for using urgency in relation to the CTFL Bill can be discerned. These are considered below.

(a) The UN Security Council made us do it

The legislative debate is replete with references to the need to respond to UNSCR 2178.[74] The Minister of Justice, the Hon Amy Adams, stated this imperative most clearly: "one of the critical reasons for passing this legislation, and for doing so quickly, is to give full effect to our obligations under Security Council Resolution 2178".[75] The claim is effectively that the government was merely obeying Security Council diktat: it was UNSCR 2178 that compelled immediate changes to the law. This is unconvincing for three reasons.

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[67] (9 December 2014) 702 NZPD 1252-1253. On closure, see David G McGee, *Parliamentary Practice in New Zealand* (Dunmore Publishing, Wellington, 3rd ed, 2005) pp 199-201.

[68] The final tallies were: 107-14 (first reading), 94-27 (second reading), and 94-27 (third reading). See (25 November 2014) 702 NZPD 802; (9 December 2014) 702 NZPD 1226, 1273-1274.

[69] *Standing Orders*, n 39, SO 57(3).

[70] (25 November 2014) 702 NZPD 780.

[71] (25 November 2014) 702 NZPD 780.

[72] (9 December 2014) 702 NZPD 1206.

[73] Geiringer, Higbee and McLeay, n 34, pp 46-47.

[74] See, for example, (25 November 2014) 702 NZPD 781, 782.

[75] (25 November 2014) 702 NZPD 785.

First, although UNSCR 2178 required New Zealand (and other member states of the United Nations) to act,[76] it is not clear that it mandated the use of urgency. In a submission to the Joint Committee on Human rights concerning the equivalent British legislation, Walker noted that, while UNSCR 2178 might be claimed as the impetus for decisive action, the Resolution also "urges respect for human rights and due consideration".[77] Dunworth makes a similar point in relation to UNSCR 2178 and the CTFL Bill: "the Resolution itself does not require normal democratic processes to be abandoned".[78]

Second, the government's position assumes that the existing law fell so short of the requirements of UNSCR 2178 that urgent legislative reform was required. But this is doubtful. The Resolution requires states to take a variety of measures to combat FTFs.[79] These include preventing "the movement of terrorists through effective border controls and controls on issuance of identity papers and travel documents",[80] preventing and suppressing "the recruiting, organizing, transporting or equipping" of FTFs,[81] and ensuring that "any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice".[82] States are also specifically directed to "ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize" FTFs and those who financially aid, organise or otherwise facilitate the activities of FTFs.[83]

Fletcher Tabuteau, a New Zealand First member of the FADT Committee, inquired about New Zealand's compliance with UNSCR 2178, and was "told repeatedly" (presumably by government officials) that the existing law satisfied the Resolution's requirements.[84] New Zealand's passport legislation was already able to deny putative terrorist travellers access to passports.[85] And, given that the CTFL Bill did not contain any new criminal offences, this indicates that the government considered the existing law, and the Terrorism Suppression Act 2002 in particular, sufficient in this respect. Indeed, the government's internal review, which occurred after UNSCR 2178, did not recommend any changes, as "[t]he general criminal law and terrorism offences address the most serious forms of offending in relation to FTFs [foreign terrorist fighters]", and the development of more specifically tailored offences was not considered urgent.[86] If the government considered the existing law to already meet the requirements of UNSCR

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[76] The notable precedent for the use of the Security Council's Chapter VII powers in this way is SC Res 1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001). See generally Kim Lane Scheppele, 'Global security law and the challenge to constitutionalism after 9/11' [2011] *Public Law* 353.

[77] Clive Walker, *Counter terrorism and Security Bill 2014-2015: Submission to the Joint Committee of Human Rights* (5 December 2014) UK Parliament, [1] <http://www.parliament.uk/documents/joint-committees/human-rights/Prof_Clive_Walker_Submission.pdf>.

[78] Dunworth, n 2 at 315.

[79] *UNSCR 2178*, UN Doc S/RES/2178.

[80] *UNSCR 2178*, UN Doc S/RES/2178 at [2].

[81] *UNSCR 2178*, UN Doc S/RES/2178 at [5].

[82] *UNSCR 2178*, UN Doc S/RES/2178 at [6].

[83] *UNSCR 2178*, UN Doc S/RES/2178 at [6].

[84] (9 December 2014) 702 NZPD 1233.

[85] For further discussion, see text below at nn 108 to 114.

[86] *CTFL Bill explanatory note*, n 9 at 2.

2178,[87] then the CTFL Bill could not have been thought necessary to ensure compliance. If so, the Resolution cannot plausibly be relied on to justify the urgent passage of the Bill.

Third, the claim that UNSCR 2178 compelled the government to make urgent reforms to the law is unconvincing as a chronological matter. The Minister in charge of the NZSIS suggested that the timing of the CTFL Bill was forced upon the government. The general election had taken place on 20 September, four days prior to UNSCR 2178;[88] the parameters of the internal review were settled in mid-October, and a draft of the bill was "released as soon as it was ready".[89] Mark Mitchell, the chair of the FADT Committee, also suggested that the urgent passage of the legislation was the product of circumstance, but that the government had "tried to run the best, most robust process" possible in the circumstances.[90]

However, the phenomenon of people traveling to fight in the Syrian conflict with the likes of ISIL was well known prior to late 2014. The Prime Minister was apprised of the matter by at least February 2014, when he confirmed that a handful of New Zealanders were fighting in Syria and that others had had their passports cancelled to prevent their departure.[91] UNSCR 2178 did not suddenly bring the issue to the government's attention.

In any case, by the time the CTFL Bill became public in late November, some two months had elapsed since UNSCR 2178.[92] The Minister's justification for this (namely that the timing was delayed by the general election and the subsequent internal review) is also open to question. David Shearer, a Labour member of the FADT Committee, contended that the internal review could have occurred earlier — if necessary, even prior to the election.[93] Moreover, as the Leader of the Opposition Andrew Little observed, there had been a delay of some three weeks between the Prime Minister's speech on 5 November, in which it was stated that Cabinet had signed off on the changes, and the introduction of the Bill on 25 November.[94] The proximate cause of this delay was a motion concerning the House's sitting programme moved by the government on 6 November. Under this motion, the House was to adjourn until 25 November, and then adjourn again on 10 December until 10 February 2015. This motion was carried (with only the New Zealand First party objecting).[95] It just so happened that the CTFL Bill progressed through all of the stages of the legislative process in the House between 25 November and 9 December.

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[87] Whether this is actually the case is open to dispute: see Jessica Burniske, Dustin A Lewis and Naz K Modirzadeh, *Suppressing Foreign Terrorist Fighters and Supporting Principled Humanitarian Action: A Provisional Framework for Analyzing State Practice* (Research Briefing + Appendix, Harvard Law School Program on International Law and Armed Conflict, October 2015), 77 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2673502>.

[88] (9 December 2014) 702 NZPD 1255.

[89] (9 December 2014) 702 NZPD 1255.

[90] (9 December 2014) 702 NZPD 1259.

[91] Claire Trevett, "We'll watch returning fighters, says Key", *New Zealand Herald* (online), 11 September 2014 <http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&objectid=11199633>.

[92] Dunworth, n 2 at 315.

[93] (9 December 2014) 702 NZPD 1257-1258.

[94] (25 November 2014) 702 NZPD 784.

[95] New Zealand House of Representatives, *Journals of the House of Representatives of New Zealand (for the period 4 November – 6 November 2014)* (18 December 2014), 44 <http://www.parliament.nz/resource/en-nz/00HOHJournals201411041/587162322354c84d4409d0dffe135105bc98cd5d>.

To take the most charitable view, it could have been the case that the proposals, despite being signed off by Cabinet by 5 November, needed further work and were not in a state to be introduced to the House before late November. However, even if the CTFL Bill could not have been introduced earlier, this still does not explain why the legislative process could not have been extended. Even if the government was not willing to extend the process into the New Year, the House could have sat beyond 10 December.[96] Consequently, claims that the timing of the CTFL Bill was forced on the government, and that the process was as good as it could be given the circumstances, must be viewed with some scepticism. The timetable for the passage of legislation is not controlled by some mysterious, exogenous force. The compressed timeframe for the passage of the CTFL Bill, I suggest, was due as much to choice as circumstance.

(b) The legislation is minimal, particularly compared to other jurisdictions

The Minister in charge of the NZSIS stated that the CTFL Bill was only making "a narrowly focused set of changes" to address the FTF threat,[97] and, in response to the opposition's claim that Australia and the United Kingdom were enacting equivalent legislation in a more measured manner,[98] that the CTFL Bill was not comparable to its more expansive Australian and British counterparts.[99]

The Australian legislation referred to was the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, which received its first reading on 24 September 2014, passed both Houses on 30 October, and received royal assent on 3 November. The changes made by this legislation are extensive: it amends 22 other Acts, augments the existing control order regime, and creates new offences of advocating terrorism and of traveling to or remaining in a declared area.[100] The British legislation, the Counter-Terrorism and Security Bill, received its first reading in the House of Commons on 26 November 2014. Amendments between the House of Commons and House of Lords were resolved on 10 February 2015, and the bill received royal assent on 12 February 2015. Again, the changes made by this legislation are considerable, and include measures that oblige public bodies to prevent radicalisation, enhance the existing regime under the Terrorism Prevention and Investigation Measures Act 2011, grant powers to seize passports, and impose conditions for returning citizen foreign fighters via Temporary Exclusion Orders.[101]

The government's argument is that, because the CTFL Bill made only modest changes to the law when compared to its equivalents in Australia and the United Kingdom, the shorter time for the legislative process is justifiable. But, as Phil Goff, a Labour member of the FADT Committee, pointed out, Australia and the United Kingdom were responding to higher threat levels.[102] One recent report estimates that

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96 "On being adopted by the House, the sitting programme operates subject to any decision by the House to the contrary." See *Standing Orders*, n 39, SO 81(4). See also McGee, n 67, p 158.

97 (25 November 2014) 702 NZPD 781.

98 (25 November 2014) 702 NZPD 788-789, 798, 804, 809.

99 (9 December 2014) 702 NZPD 1255. See also Department of the Prime Minister and Cabinet, n 13 at [12].

100 See *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth).

101 See *Counter-Terrorism and Security Act 2015* (UK) c 6.

102 (25 November 2014) 702 NZPD 810.

there are 500–600 foreign fighters from the United Kingdom and 100–250 foreign fighters from Australia involved in the Syrian conflict. This compares with 6 from New Zealand.[103] The United Kingdom, in particular, faces a greater threat on account of its geographical proximity and the relative ease of travel to and from the conflict zone — any European Union passport holder can travel freely to Turkey, which shares a 900 kilometre border with Syria.[104] It is also noteworthy that the expediting of the legislative process in relation to the Australian and British legislation, which in any event still took more than two months in both cases, has been criticised for undermining parliamentary scrutiny.[105]

Quite apart from this, can the changes made by the CTFL Bill properly be described as minimal and narrowly focused? To assess this claim, we must first understand what the status quo was. As noted earlier, the government did not consider enacting criminal offences specific to FTFs to necessary. Of the changes contained in the CTFL Bill, only the provisions relating to passports pertain specifically to stopping persons traveling to commit terrorist acts. The question, then, is what the pre-CTFL Bill law on passports provided for. Sections 4A and 8A of the Passports Act 1992, added in 2005, already allowed the Minister to refuse to issue or cancel a passport in the case of someone reasonably believed to be a danger to the security of New Zealand because that person intended to engage in, or facilitate, among other things, a terrorist act.[106]

The CTFL Bill makes two modifications. One is to clarify that the powers to refuse to issue and cancel also apply when the Minister reasonably believes that a person is a danger to the security of a country other than New Zealand because the person intends to engage in, or facilitate a terrorist act.[107] The other is to increase the period of time that a person who has their passport denied or cancelled can be prevented from holding a passport. The existing law specified a default period of 12 months, which government officials considered insufficient because some individuals "[remained] motivated to travel" beyond that period.[108] But the existing law also permitted the Minister to apply to a High Court judge for a further extension of up to 12 months. Post-CTFL Bill, the law provides for the same default period of 12 months, but includes the possibility of the Minister specifying a period of up to 36 months "if the Minister is satisfied that the person would continue to pose a danger to New Zealand or any other country".[109] The possibility of applying to a High Court judge for a further 12-month extension remains.[110]

Therefore, the travel plans of an aspiring Kiwi ISIL recruit could have been disrupted under the law prior to the CTFL Bill. Indeed, there have been 9 passport

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[103] Peter R Neumann, *Foreign fighter total in Syria/Iraq now exceeds 20,000; surpasses Afghanistan conflict in the 1980s* (26 January 2015) International Centre for the Study of Radicalisation and Political Violence <http://icsr.info/2015/01/foreign-fighter-total-syriairaq-now-exceeds-20000-surpasses-afghanistan-conflict-1980s/>.

[104] Byman and Shapiro, n 1 at 10.

[105] Walker, n 77 at [1]; Gabrielle Appleby, "The 2014 Counter-Terrorism Reforms in Review" (2015) 26 *Public Law Review* 4 at 10.

[106] The term "terrorist act" is defined in s 5 of the *Terrorism Suppression Act 2002* (NZ).

[107] *Passports Amendment Act 2014* (NZ), sch, cls 1 and 2. See also (9 December 2014) 702 NZPD 1227.

[108] (9 December 2014) 702 NZPD 1246.

[109] *Passports Amendment Act 2014* (NZ), sch, cls 1(4)(b), 1(6), 2(4)(b) and 2(6).

[110] *Passports Amendment Act 2014* (NZ), sch, cls 1(8) and 2(8).

cancellations since 2010,[111] and it is reasonable to infer that among that number are the would-be ISIL recruits referred to in the Prime Minister's November 5 speech as having had their passports cancelled.[112] Plainly, and in my view plausibly, officials interpreted the extant passport legislation as permitting cancellation in such circumstances — that is, that such persons could pose a danger to New Zealand's security because they intended to travel overseas to engage in terrorist activity.

While it is true that the law now gives the government greater administrative convenience with the possibility of denying a potential terrorist traveller a passport for up to three years, such a person would previously have been denied a passport for a minimum of 12 months, with the possibility of further extension. At the time the CTFL Bill was enacted, there were no cases of persons who had been denied passports taking court action to recover them,[113] and there had not yet been any cases where the government had sought to extend the denial period beyond 12 months.[114]

This suggests that the CTFL Bill did not make dramatic changes to the law applicable to persons traveling overseas to commit terrorist acts. Perhaps, then, the government's claim of minimalism ought to be accepted. However, if we expand our perspective to include other aspects of the CTFL Bill, notably its grant of power to the NZSIS to engage in visual surveillance of private premises, the picture becomes more complex. Although this power is superficially similar to an existing power available to police,[115] the threshold for invoking it (the surveillance must be necessary for the detection, investigation or prevention of terrorist acts), as well as the NZSIS's functions, are quite different. Arguably then, this power, which is available to counter terrorism and not only the threat of FTFs, is more than a minimal change.

If there is more substance lurking in this apparently narrow legislation than first appears, then this undermines the government's claim of minimalism. If, on the other hand, it is true that the changes made by the CTFL Bill are minimal because the government considered the existing law largely adequate, then this counts against the use of urgency. After all, if the changes were no more than tweaks and improvements at the margin, it is doubtful that their urgent enactment was needed to ensure the security of the country.

(c) There will be review and reconsideration of the legislation in the future

The government's final justification is that however problematic the CTFL Bill and the process of its enactment might be, it is mitigated by the fact that the legislation is a temporary placeholder that will be considered again in the future. This is because the CTFL Bill includes a sunset clause, which means that its provisions will lapse on 1 April 2017 absent further legislative action.[116] Additionally, the Minister in charge of the NZSIS noted that the CTFL Bill would be included in a "comprehensive review" of "all

[111] Department of the Prime Minister and Cabinet, n 13 at [95].

[112] Key, n 5 at 2-3.

[113] This was the response of officials to an inquiry from Phil Goff: see (9 December 2014) 702 NZPD 1230.

[114] (9 December 2014) 702 NZPD 1234.

[115] See *Search and Surveillance Act 2012* (NZ), ss 45, 46, 51.

[116] For ease of reference, I refer to the CTFL bill's sunset clause, although each of the three derivative Acts contains a sunset clause.

security legislation" that would begin no later than June 2015.[117] The existence of the sunset clause and the review was referred to throughout the legislative debate.[118]

The provision of a sunset clause and post-enactment review is in keeping with the recommendations of the House of Lords Select Committee on the Constitution regarding safeguards for emergency legislation.[119] But is a sunset clause and accompanying review an effective safeguard? To some extent, this depends on our metric for effectiveness.[120]

History suggests that sunset clauses in counterterrorism legislation are unlikely to be substantively effective. That is, they are unlikely to the lead to the expiry of the law or legal provisions to which they apply. Therefore, to the extent that the various references to the CTFL Bill being "temporary" are meant to imply that the provisions will actually expire,[121] they are misleading: counterterrorism legislation enacted as a temporary response to emergency has a tendency to persist, even when a sunset clause is included.[122] There are several related reasons for the stickiness of ostensibly temporary counterterrorism measures.[123] First, expiry assumes that the threat that gave rise to the perceived need for the measures no longer exists. But as Justice Binnie observed in a dissenting judgment concerning an investigative power conferred by Canadian counterterrorism legislation, this assumption is problematic in the post-9/11 era:[124]

> The challenge posed to our legal institutions by the current "war on terrorism" promises to be more enduring and difficult to manage than the more traditional wartime challenges to civil liberties previously experienced. The terrorist threat had no announced point of commencement and may have no end. … There may be no dramatic final battle in which victors and losers are made manifest. … Efforts to counteract terrorism are likely to become part of our everyday existence for perhaps generations to come. In these circumstances we can take limited comfort from the declared intention of the government that the Anti-terrorist Act is a temporary measure. While its continued existence will depend on Parliament's appreciation of developments in the "war on terrorism", such temporary measures may well slide into a state of de facto permanence.

In relation to the CTFL Bill, what factual milestone would signal that the powers contained within it were no longer needed? The Bill was sold as a set of security measures necessary to deal with the problem of people wanting to travel to fight in the Syrian conflict with groups like ISIL. Conceivably, the conflict in Syria will end at some

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[117] (9 December 2014) 702 NZPD 1209-1210.

[118] See, for example, (25 November 2014) 702 NZPD 781, 785-786, 790; (9 December 2014) 702 NZPD 1206, 1213, 1229, 1249, 1256, 1259, 1272.

[119] House of Lords Select Committee on the Constitution, n 25 at [191]-[209]. See also Ip, n 22 at 94-97.

[120] Ip, n 22 at 86-87. See also Finn, n 20.

[121] See, for example, Department of the Prime Minister and Cabinet, n 13 at [21]; (9 December 2014) 702 NZPD 1215, 1250.

[122] House of Lords Select Committee on the Constitution, n 26 at 178; Finn, n 20 at 495; Laura K. Donohue, "The Perilous Dialogue" (2009) 97 *California Law Review* 357 at 372.

[123] Ip, n 22 at 87-88.

[124] *In the Matter of an application under section 83.28 of the Criminal Code* [2004] 2 SCR 248 at [115].

future point in time; the foreign fighter phenomenon likely will not.[125] And if, as became clear during the legislative debate, the government's concern is not with foreign fighters per se, but rather with persons traveling overseas to engage in terrorist acts,[126] this is also likely to be a continuing risk. Moreover, the CTFL Bill's other provisions are not limited to foreign fighters or even to persons traveling to engage in terrorist acts. The surveillance powers granted to the NZSIS are tied to the detection, investigation or prevention of terrorist acts,[127] while the provision allowing the NZSIS and police to access information in customs databases is for "counter-terrorism investigation purposes".[128] It is difficult to envisage these powers being significantly rolled back so long as there is a risk of terrorist attack.

The second reason is related to the first. Security agencies, with their vested interest in the continuation of newly-granted powers, tend to be unwilling to relinquish them,[129] and often prove influential in persuading governments to their point of view. This is again explicable given the political and electoral incentives in play. As long as there is a terrorist threat, it would take a brave government to allow these powers to expire. Even if there have not been any terrorist attacks, this can be used to support claims about the effectiveness and utility of the powers — and, almost invariably, these factual claims are impervious to independent verification because of the shroud of operational secrecy.[130]

Finally, even if temporary counterterrorism measures do expire, they can re-emerge. This is because expired measures are not forgotten, but remain as templates or precedents in what Barak-Erez terms "the legal system's memory or reservoir."[131] Green MP Kennedy Graham alluded to this concern when he expressed scepticism about the sunset clause's efficacy because the CTFL Bill was "creating constitutional precedent".[132] On this account, even if the CTFL Bill itself expires, the measures themselves may nonetheless persist.

Even if the sunset clause in the CTFL Bill is unlikely to be effective in a substantive sense, might it be effective in a procedural sense? The Minister in charge of the NZSIS suggested as much when he stated that, if the CTFL Bill's provisions did not expire as per the sunset clause, they would be replaced by superseding legislation enacted with a full select committee process and in light of the findings of the independent review commencing in June 2015.[133] What the Minister envisages here is in keeping with the procedural rationale for sunset clauses, namely facilitating future legislative

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[125] See David Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts* (Oxford University Press, New York, 2013).

[126] (9 December 2014) 702 NZPD 1208, 1236-1237.

[127] *New Zealand Security Intelligence Service Amendment Act 2014* (NZ), s 4IB(3)(a) and s 4ID(1)(a).

[128] *Customs and Excise Amendment Act 2014* (NZ), s 4.

[129] Donohue, n 19, p 15.

[130] See Gearty, n 21, p 166.

[131] Daphne Barak-Erez, "Terrorism Law Between the Executive and Legislative Models" (2009) 57 *American Journal of Comparative Law* 877 at 894.

[132] (9 December 2014) 702 NZPD 1263.

[133] (25 November 2014) 702 NZPD 781-782; (9 December 2014) 702 NZPD 1256.

reconsideration.[134] But in this regard too, the record of sunset clauses is mixed. The quality of subsequent legislative participation and debate often compares poorly to the original debate. The persistent nature of the terrorist threat also means that political incentives continue to weigh heavily on the side of renewing expiring counterterrorism measures.[135]

In the case of the CTFL Bill, the effect of the sunset clause is to require Parliament to enact fresh legislation if the powers are to extend beyond 1 April 2017. This should help ensure against low participation — many instances of poor participation in subsequent legislative debates involve sunset clauses that did not require the legislature to enact new legislation, and constrained the possible courses of action to renewing the provision as a whole, or allowing it to expire.[136] As noted, the CTFL Bill's sunset clause has also been complemented by a review, which I have suggested is a way of making sunset clauses more procedurally effective.[137] One would expect that the report resulting from the Review will be an important point of reference when Parliament again considers the measures contained in the CTFL Bill. But, as ever, the devil is in the details.

The main concern relates to the scope of the review. The review of the CTFL Bill was carried out as part of a wider review of New Zealand's intelligence and security legislation. The obligation to undertake this review was added in a 2013 amendment to the Intelligence and Security Committee Act 1996, which now requires that a review of the intelligence and security agencies, together with their associated legislation, commence before 30 June 2015, and then occur every five to seven years thereafter.[138] The fact that the review occurred under the auspices of the legislation concerned with the oversight of intelligence and security agencies was reflected in the review's terms of reference. In particular, the reviewers were tasked with considering the appropriateness of the legislation governing the intelligence and security agencies, as well as the adequacy of the provisions for oversight.[139] In the post-Edward Snowden era, these are plainly pressing issues deserving of careful consideration.[140] The point is that the obligation on the reviewers to consider "whether the legislative provisions arising from the Countering Foreign Terrorist Fighters legislation … should be extended or modified" was in addition to an already formidable task.[141] While some parts of the CFTL Bill grant

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[134] See Antonios Kouroutakis and Sofia Ranchordas, "Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies" (2016) 25 *Minnesota Journal of International Law* 29. For a skeptical view, see Emily Berman, "The Paradox of Counterterrorism Sunset Provisions" (2013) 81 *Fordham Law Review* 1777.

[135] Ip, n 22 at 90-91. See also Finn, n 20 at 501-502.

[136] Ip, n 22 at 92-94.

[137] Ip, n 22 at 95-97.

[138] *Intelligence and Security Committee Act 1996* (NZ), s 21.

[139] The terms of reference can be found at <www.justice.govt.nz/publications/global-publications/i/intelligence-and-security-agencies-review>.

[140] See, for example, David Anderson, *A Question of Trust* (June 2015) <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2015/06/IPR-Report-Print-Version.pdf>; President's Review Group on Intelligence and Communications Technologies, *Liberty and Security in a Changing World: Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies* (12 December 2013) <http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf>.

[141] Terms of reference, n 139. The report resulting from the Review was published after this paper was written. Ten of the report's approximately 150 pages concern the response to FTFs. See Michael Cullen and Patsy Reddy, *Intelligence and Security in a Free Society* (29 February 2016) <http://www.parliament.nz/en-

additional powers to intelligence agencies and could be said to fit within the focus of the review's terms of reference, other parts — including those relating specifically to disrupting the travel of persons traveling overseas to commit terrorist acts — were a less obvious fit. Indeed, consideration of the various legal and administrative measures that might be implemented to deal with FTFs is a sufficiently complex and distinct task to occupy a review in itself.

Was urgency justified?

Having outlined and critiqued the government's justifications for expediting the CTFL Bill, I turn to analyse the sufficiency of those justifications. I do so using the framework established by Geiringer, Higbee and McLeay, who classify the reasons governments use urgency into four categories: reasons specific to particular legislation, to free up the order paper, tactical reasons, and Budget day urgency.[142] The first three are possibilities here. The first category includes the need to respond to an unexpected event or emergency, correcting an error or oversight in existing legislation, or the need to have legislation in place to meet an external deadline. Reasons in this category can, under some circumstances, justify the use of urgency that applies to more than one stage of the legislative process.[143] The second category covers the use of urgency as a means of progressing the government's legislative agenda given the House's finite sitting hours. This category can justify urgency being taken in relation to one stage, which results in the House's sitting hours being extended, but not multiple stages, which results in the elimination of stand-down periods.[144] The third category describes a range of motivations, including signalling to the public that decisive action is being taken and shepherding controversial legislation through the legislative process.[145] Such reasons cannot justify the use of urgency.[146]

Because urgency was applied to multiple stages of the CTFL Bill's enactment, it can only be justified if one of the reasons in the first category applies. The CTFL Bill was not enacted in the wake of a terrorist attack. It would also be a stretch to say that the security threat posed by foreign fighters amounted to an emergency, or even that it was unexpected (since FTFs were on the government's radar by at least early 2014). Similarly, for the reasons discussed above, UNSCR 2178 cannot plausibly be said to an external driver that necessitated urgency.

This leaves the error/oversight correction rationale. As discussed, the changes in the CTFL Bill specific to FTFs are marginal tweaks to the existing law, suggesting that

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nz/pb/presented/papers/51DBHOH_PAP68536_1/report-of-the-first-independent-review-of-intelligence >.

[142] Geiringer, Higbee and McLeay, n 34, p 45-65.

[143] Geiringer, Higbee and McLeay, n 34, p 144.

[144] Geiringer, Higbee and McLeay, n 34, p 144-145. The government now also has the option of extending one sitting per week: *Standing Orders*, n 39, SO 56.

[145] Geiringer, Higbee and McLeay, n 34, p 57-61.

[146] Geiringer, Higbee and McLeay, n 34, p 145.

this rationale is inapplicable. The only possible candidate for an oversight is the NZSIS's previous lack of authority to conduct visual surveillance of private premises, which was said to be a "significant gap" in its capability to effectively investigate suspected and returning FTFs.[147] However, the CTFL Bill, as introduced, went much further than this, and linked the power to ensuring security. The opposition was alive to this being a "back door" method of expanding the NZSIS's powers,[148] and the scope of the power was pared back to the countering of terrorist acts. Even so, the legislation goes considerably further than simply remedying the claimed oversight.

If urgency was being used to usher through an expansion of the state's surveillance power under the pretext of countering the threat of FTFs, then it would certainly be illegitimate. If, on the other hand, urgency was being used to fix a perceived gap in surveillance authority, it would still be illegitimate given the circumstances,[149] in particular, the extent to which the legislative process was expedited, the lack of opportunity for public input, and the likely difficulty of securing future legislative reconsideration.

THE CTFL BILL AND CONSTITUTIONALISM IN NEW ZEALAND

In this final part of the paper, I argue that the process of enactment of the CTFL Bill undermined the separation of powers and, as a result, the resulting legislation lacks democratic legitimacy.

The separation of powers is a protean concept, but at a minimum it includes the idea that no single actor or institution ought to have unchecked power over a particular domain — here, the making of law through legislation.[150] The centrepiece of the formalistic account of legislating given to New Zealand law students is that Parliament is the supreme lawmaker according to the doctrine of parliamentary supremacy. However, as Tomkins reminds us, "it is not *Parliament* that enjoys sovereignty under this doctrine, but *Acts of Parliament.*"[151] Parliament's actual role in making law is limited, for it is cabinet that comes up with legislative initiatives; Parliament's role is one of scrutinising these proposals.[152] This is a function of the Westminster system's fusion of executive and legislative power — what Bagehot referred to as the "efficient secret" of the English constitution.[153] This fusion, and what it entails in practice for legislating, sits in tension with the notion of the separation of powers. Indeed, it was cabinet's effective dominance over the law-making power of Parliament that led Lord Halisham, writing more than a

147 Channa, n 9 at [14].

148 (9 December 2014) 702 NZPD 1213.

149 See Geiringer, Higbee and McLeay, n 34, p 144.

150 See generally Eric Barendt, "Separation of Powers and Constitutional Government" [1995] *Public Law* 599.

151 Adam Tomkins, *Public Law* (Oxford University Press, Oxford, 2003) p 93 (emphasis in original).

152 Vernon Bogdanor, *The New British Constitution* (Hart Publishing, Oxford, 2009) p 286. See also Jeremy Waldron, "Bicameralism and the Separation of Powers" (2012) 65 *Current Legal Problems* 31 at 44.

153 Walter Bagehot, *The English Constitution* (Chapman and Hall, London, 1867) p 12.

century after Bagehot, to characterise the Westminster system as an "elective dictatorship".[154]

For some time then, the reality has been that Parliament, while formally the branch that legislates, plays a reactive, scrutinising role: "today's Parliament is more accurately described as the institution through which the government legislates".[155] But Parliament's capacity to fulfil even this role, to extract some concessions from the government and at least exert a degree of control over the content of legislation, is undermined when, as was the case with the CTFL Bill, the legislation was pushed through Parliament in the space of two weeks.[156]

Bogdanor has suggested that the consequence of constitutional reform in the United Kingdom means that Lord Hailsham's "elective dictatorship" is no longer an apt description of modern British government.[157] Arguably though, in the case of New Zealand — a unitary state with a small,[158] unicameral legislature and no equivalent of the supra-national European ties of the United Kingdom — the label still fits.[159] In this context, the process that governs how New Zealand's legislature goes about making law takes on added importance. But, as noted earlier, the CTFL Bill is but one example of that process falling short. Indeed, New Zealand's legislative practices, including the frequent invocation of urgency, and constitutional framework are such that Jeremy Waldron, perhaps the most prominent critic of judicial review of legislation on account of its democratic illegitimacy, carves out an exception to his general opposition to the practice in the specific circumstances of his native country.[160] This is because Waldron's argument is conditional, with one condition being that a society's democratic institutions are in "reasonably good working order".[161] This requires that a society's constitutional framework, electoral processes and politics satisfy certain minimum requirements. Elements of what this entails at the level of legislative process include "robust committee scrutiny" and "multiple levels of consideration, debate and voting".[162] For Waldron, these aspects of legislative procedure represent "a sense of the need for care in making law",[163] which he considers one of the general principles of good legislating.

The use of urgency, however, undermines observance of this duty of care. The rationale for having successive rounds of voting following debate is lost since urgency removes the stand-down periods between the stages of the legislative process, sometimes

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154 Lord Hailsham, *The dilemma of democracy : diagnosis and prescription* (Collins, London, 1978) p 126.

155 Tomkins, n 151, p 95.

156 Party discipline and the political incentives surrounding counterterrorism legislation are other problems. See Fiona de Londras and Fergal F Davis, "Controlling the Executive in Times of Terrorism: Competing Perspectives on Effective Oversight Mechanisms" (2010) 30 *Oxford Journal of Legal Studies* 19 at 34.

157 Bogdanor, n 152, p 288.

158 On the small size of a legislature relative to the number of ministerial positions, see Waldron, n 152 at 46-47.

159 See generally Geiringer, Higbee and McLeay, n 34, p 5.

160 Waldron, n 152 at 49; Waldron, n 35.

161 Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 *Yale Law Journal* 1346 at 1360.

162 Waldron, n 161 at 1361.

163 Jeremy Waldron, "Principles of legislation" in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch* (Cambridge University Press, Cambridge, 2006) p 24.

resulting in legislation being enacted in a single sitting day.[164] While the use of urgency in relation to the CTFL Bill did not go this far, many of the stand-down periods were removed. The introduction and first reading stages occurred over one sitting day; the second reading, committee of the whole House, and the third reading stages also took place over one sitting day. The resulting speed of the CTFL Bill's passage meant that MPs were simply denied the time to consider and debate the specifics of the Bill's proposals.[165]

As for committee scrutiny, this occurs in New Zealand through the select committee process, which Waldron has identified as an important aspect of multi-layered deliberation.[166] Select committee is where bills are subject to detailed consideration, where recommendations for amendments are made, and where the public has the opportunity to provide input. For this reason, practices that hinder the work of select committees are particularly problematic.[167] Although the select committee process was not bypassed in the case of the CTFL Bill, the report back period was shortened to such an extent that similar concerns arise.[168] Even if the FADT Committee made the best of a bad situation, it would surely have been preferable to not put the Committee in that situation in the first place, particularly if, as I have argued, the case for doing so was weak.

Additionally, as noted by the House of Lords Select Committee on the Constitution, expedited legislative procedures mean that external stakeholders have less opportunity to deliberate, meaningfully participate, and possibly offer input that may improve a legislative proposal.[169] This point is starkly illustrated by the select committee process for the CTFL Bill, where members of the public had to make submissions within a two-day window, and, unless they were among those provided with advance copies of the Bill, they would have had no prior notice of the Bill's specifics. While the chair of the FADT Committee stated that every submitter who wanted to be heard in person was afforded the opportunity,[170] this obscures several infirmities. First, given the two-day period available to make submissions, it is likely that an unknown number of interested parties did not hear about the Bill in time or did not have time to make a submission. Second, there must be doubt about how meaningful these hearings before the FADT Committee could have been given that it would have had to have heard, digested, and reflected on the contents of 63 in-person submissions in a matter of days. Finally, there were more than 500 written submissions where the submitter did not appear in person, and according to Green MP Kennedy Graham, another member of the FADT Committee, these submissions were simply left unread due to lack of time.[171]

Because it successfully passed through the various stages of the legislative process, the CTFL Bill is, in a positivistic sense, valid law. But because of the specifics of how it proceeded through the legislative process, the CTFL Bill, on Waldron's account, lacks meaningful democratic legitimacy: if a citizen who disagreed with the legislation's

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[164] Waldron, n 35 at 442.

[165] See generally House of Lords Select Committee on the Constitution, n 25 at [33]-[35].

[166] Waldron, n 35 at 445.

[167] Burrows and Joseph, n 35 at 307; Geiringer, Higbee and McLeay, n 34, p 146.

[168] Geiringer, Higbee and McLeay, n 34, p 141.

[169] See House of Lords Select Committee on the Constitution, n 25 at [44]-[45]; House of Lords Select Committee on the Constitution, n 26 at 84 (Memorandum by Brice Dickson).

[170] (9 December 2014) 702 NZPD 1212.

[171] (9 December 2014) 702 NZPD 1215.

substance were to ask why she nonetheless ought to support it, the answer according to Waldron has to be in the fairness of the process of enactment[172] — that is, that the citizen's concerns were raised and carefully considered, even if, in the end, they did not carry the day.[173] But can this really be said to be the case with the enactment of the CTFL Bill? I suggest not. In sum, there is a depressing ring of truth to Green MP Catherine Delahunty's comment about the compressed select committee process that applies generally to the CTFL Bill's enactment: "It is a tiny, tiny, little tick-box attempt at democracy."[174]

CONCLUSION

In this paper, I set out to evaluate the critique about how the CTFL Bill was enacted. My conclusion is that the critique is valid. As I have argued above, the government's justifications for hastening the passage of the legislation via urgency do not stand up to scrutiny. The effect of expediting the legislative process to the degree that occurred in this case was to undermine Parliament's capacity to carry out its proper constitutional function. As a result, the product of that process, the CTFL Bill, lacks genuine democratic legitimacy. This is particularly troubling given the subject matter of the legislation, with its potentially significant impact on the rights and liberties of individuals, and also New Zealand's constitutional context, in which the enactments of a unicameral legislature are the supreme, unimpeachable law of the land.

[172] Waldron, n 163, p 18.

[173] Waldron, n 163, p 25.

[174] (25 November 2014) 702 NZPD 806.