



GUIDELINES ON THE OBLIGATIONS OF THE COUNTERING TERRORISM AND PROLIFERATION OF WEAPONS OF MASS DESTRUCTION ACT 2004

The Countering Terrorism and the Proliferation of Weapons of Mass Destruction Act 2004¹ (CTPA 2004) establishes a legal framework for countering terrorism and the proliferation of weapons of mass destruction in the Cook Islands. It is one of the mechanisms by which the Cook Islands gives effect to the United Nations Security Council (UNSC) resolutions which require UN member states² to take certain steps to address terrorism and proliferation.

Terrorism

The CTPA 2004 sets out offences that relate to terrorism and the provision of support and financing for terrorism.

Section 4 of the Act defines a terrorist act as including the following elements:

- An act that comes within the scope of a Counter Terrorism Convention;
- An act that is intended to:
 - intimidate the public or a section of the public;
 - compel a government or other international organisation to do or refrain from doing any act; and
 - involve serious injury or death to a person, serious damage to property, serious risk to the health or safety of the public (or a section of the public), serious disruption to any systems or provision of services for essential infrastructure, whether in the Cook Islands or not. .

Part 3 of the CTPA set out offences relating to terrorism. They include:

- committing terrorist acts;
- participating in a terrorist group;
- recruiting people to participate in a terrorist group;
- providing weapons to terrorists and harbouring terrorists; and
- financing terrorism.

Terrorist financing under sections 11 to 13 involves any conduct that:

- Collects funds intended to be used for a terrorist act or intended for an entity known to carry out terrorist acts,

¹ The Countering Terrorism and the Proliferation of Weapons of Mass Destruction Act was formerly titled the Terrorism Suppression Act 2004. This was amended in June 2017 to reflect new provisions around the proliferation of weapons of mass destruction.

² The Cook Islands is not a member of the UN and therefore UNSC resolutions are not binding on the Cook Islands. As part of its commitment to being a good international citizen the Cook Islands is committed to meeting UNSC resolutions

- Knowingly deals with any property owned or controlled by a designated terrorist entity, or
- Makes financial services available to a designated terrorist entity.

The penalties under the CTPA 2004 for offences are a maximum of up to 20 years imprisonment for individuals and a fine of up to \$1,000,000 in any other case.

Proliferation

In June 2017 provisions for offences relating to proliferation of weapons of mass destruction were added to the CTPA 2004. Proliferation is defined as the transfer or export of weapons of mass destruction. Weapons of mass destruction include:

- nuclear, chemical and biological weapons;
- any other explosive or radioactive device capable of causing widespread harm, death and destruction;
- any source material specially designed or prepared for the production of fissionable material;
- any material or technology that materially contributes to the design, manufacture or delivery of weapons of mass destruction.

Offences relating to proliferation are set in Part 5A of the CTPA 2004. They include:

- transporting or facilitating the transport of weapons of mass destruction;
- use of a weapon of mass destruction on or against a ship, aircraft or fixed platform in a manner likely to cause widespread harm and destruction;
- discharge of a weapon of mass destruction from a ship, aircraft or fixed platform in a manner likely to cause widespread harm and destruction;
- threat to carry out any of the acts referred to above with intent to intimidate a population, or to compel a government or international organisation to do or refrain from doing an act;
- attempting, assisting, conspiring or facilitating any of the acts referred to above;
- financing proliferation including providing property or services to an entity involved in proliferation or dealing with the property of an entity involved in proliferation.

The penalties under the CTPA 2004 for offences are a maximum of up to 20 years imprisonment for individuals and a fine of up to \$1,000,000 in any other case.

Responsibilities under the CTPA 2004

As noted above, a designation by the UN or the Cook Islands under the CTPA 2004 makes it a criminal offence to participate in or support the activities of the designated terrorist or proliferation entity. This includes in particular, dealing with the property of the designated terrorist or proliferation entity or making property or financial services (including related services) available to the entity.

The CTPA 2004 encapsulates '**deal with**' broadly to include using or dealing with the property, in any way and by any means (for example, to acquire possession of, or a legal or an equitable interest in, transfer, pay for, sell, assign, or dispose of (including by way of gift) the property; and allowing the property to be used or dealt with, or facilitating the use of it or dealing with it directly or indirectly.

Property includes:

- assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible; and
- legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including but not limited to bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.

A clear consequence of these provisions is that there is an automatic prohibition against any reporting institution (or any other person) to deal with property owned or controlled by a designated terrorist or proliferation entity, or to make financial services (including related services) or property available to a designated terrorist or proliferation entity (if in possession or control of such), effectively freezing any property in order to comply with the law.

The Attorney General has the power to authorise certain transactions or activity that would otherwise be prohibited under the CTPA 2004. While no specific factors are set out in the CTPA 2004, the discretion shall be exercised in accordance with the criteria set out by the relevant UN Sanctions Committee or UNSC Resolution for UN designated entities.

Reporting obligations under the Financial Transaction Reporting Act 2017

If a reporting institution has reasonable grounds to suspect it may be dealing with a designated terrorist and proliferation entity it must:

- Without delay freeze any funds, property or assets in its possession or control linked to the designated entity; and
- Submit a suspicious activity report (SAR) to the Financial Intelligence Unit.

Any funds, property or assets frozen by a reporting institution must remain frozen until the property is dealt with by a Court Order under the CTPA 2004, or the entity's designation is revoked.

A reporting institution must have procedures in place to deal with false positive matches. It is recommended the reporting institution deal with the FIU to clarify any false positive matches.

In addition to UN or Cook Islands designated entities list, there are other sanction designation lists such as the United States Treasury Office of Foreign Assets Control (OFAC) which registers all other entities suspected of having links to terrorism:

<http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>

Designations and the CTPA 2004

As noted above, the CTPA 2004 is the mechanism by which the Cook Islands gives effect to UNSC resolutions requiring UN member states to take certain steps to address terrorism and proliferation. Under the CTPA 2004, any designations will affect the way the property of these entities can be dealt with.

There are three broad categories of entities that are affected by the CTPA:

1. Entities listed by the UNSC as terrorist entities under UNSC resolutions 1267/1989/2253 (2015) and 1988 (2011) (entities or individuals linked to ISIL (Daesh) and al-Qaida or the Taliban);
 - Entities designated by the UNSC Committees under these UNSC resolutions are automatically deemed terrorist organisations in the Cook Islands. Cook Islands residents and businesses operating in the Cook Islands are specifically obliged to take action against these terrorist entities.
2. Entities listed by the UNSC as relating to proliferation of weapons of mass destruction under UNSC resolutions such as 1718(2006).
3. Non-UN listed entities designated under the CTPA.
 - UNSC resolution 1373 obliges the Cook Islands to, amongst other things, outlaw the financing of, participation in, and recruitment to, terrorist entities. The resolution does not specifically identify those entities but leaves it to Member States to identify the entities against which they should act. The Attorney General under the CTPA has the power to designate individuals or groups as terrorist (or associated) entities under section 5.

The Attorney General is obliged to have an up to date list of all entities designated by the UN and the Cook Islands publicly available. This is facilitated through the Cook Islands Financial Intelligence Unit (FIU).

The FIU is responsible for disseminating notifications when the United Nations (UN) updates its list of entities that are designated as terrorist entities by the UNSC 1267(1999) /1989(2011) /2253(2015) and 1988(2011) Committees. The FIU will also disseminate notifications on designations under UNSC 1373 that the Cook Islands has chosen to proscribe as a terrorist entity.

There are currently no designations under UNSC 1373 for the Cook Islands. Any future designations will be made available on the FSC/FIU website.

Designation Process for Cook Islands Specified Entities (UNSC 1373)

The Attorney-General has the power under the CTPA 2004 to designate individuals or groups as terrorist entities. Section 5 (as amended in 2017) provides that the Attorney-General may designate an entity as a terrorist entity if he or she is satisfied on reasonable grounds that the entity has knowingly carried out, assisted, conspired or threatened to carry out, or has knowingly participated in the carrying out of one or more terrorist acts, or is owned or controlled by a terrorist group (Cook Islands specified entity under the CTPA 2004).

Further, in considering whether to make a designation, the Attorney-General may take into account any relevant information, including classified security information (s 34B CTPA 2004).

It does not follow, however, that every entity that meets the legal test in section 5 must be designated. Section 5 confers a discretion on the Attorney-General (“the Attorney-General may ...declare an entity”) as to whether to designate an entity that meets the legal test for designation. No specific factors are identified for the Attorney-General’s consideration when exercising this discretion. However, it would be reasonable to suggest that both the CTPA’s purpose (as stated in section 2 of the CTPA 2004) and the matrix of obligations in UNSCR 1373 that the CTPA 2004 was enacted, in part, to implement, point to the guiding consideration being whether designation of the relevant entity would effectively assist the suppression of terrorism.

The process for advancing the designation of non-UN listed terrorist entities is managed by the Cook Islands National Intelligence Taskforce (CINIT), chaired by Cook Islands Police. It includes officials from other law enforcement agencies including the Financial Intelligence Unit, Customs, Immigration and the Crown Law Office. It is a mandate of CINIT to share information and intelligence amongst its members regarding serious criminal activity, including threats of terrorist activity and financing of terrorism. It is intended that a Counter Terrorist Working Group consisting of the Police, FIU, Crown Law Office and Ministry of Foreign Affairs and Immigration will be established in late 2017 to streamline the designation process under the CTPA 2004.

If the Attorney-General considers that the entity meets the legal criteria for designation as a terrorist entity, the Attorney-General may then exercise his or her discretion under section 5 as to whether to designate, bearing in mind the Cook Island’s commitment to be a good international citizen through the acceptance and application of obligations under UNSCR 1373 and the guiding consideration of whether designation would effectively assist the suppression of terrorism.

The CTPA 2004 requires that the designation be publicly notified in the Gazette and also that a notice indicating the designation has been made is given with all reasonable speed to the designated entity (Cook Islands specified entity) if practicable and where the entity or a representative of it is in Cook Islands.

Delisting for Cook Islands Specified Entities and UN Specified Entities

Cook Islands Specified Entities

A Cook Islands Specified entity can apply in writing to the Attorney-General for the designation to be revoked on the grounds that the entity does not satisfy the section 5 “test” or that the entity is no longer involved in any way in acts of the kind that made, or that would make, the entity eligible for designation. Judicial review proceedings are also possible in respect of a designation under the CTPA 2004. Periodic reviews of any designation must also be undertaken by the Attorney-General.

UN Specified Entities

Any individual or group listed by the United Nations may apply to remove their name from the list. A Cook Islands resident or citizen or any group whose members have Cook Islands

citizenship or residency may submit a request for delisting through the Ministry of Foreign Affairs and Immigration Cook Islands or directly to the Office of the Ombudsperson.

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For further information regarding an application for delisting please visit the website of the Office of the Ombudsperson of the Security Council's 1267 and 1988 Committee.