Law Council
OF AUSTRALIA

# Financing Terrorism Offences

## Independent National Security Legislation Monitor

**2 August 2013**

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# Executive Summary

1. The Law Council has a number of concerns with the financing terrorism offences under the *Criminal Code Act 1995* (Cth) (Criminal Code) and the *Charter of the United Nations Act 1945* (Cth) (UN Charter Act).

2. As well as particular concerns with the offence provisions, the Law Council's concerns relate to definitions which are used in the Criminal Code such as those relating to terrorist acts and terrorist organisations. The Law Council also has concerns about the process for proscription of terrorist organisations; the grounds for proscription and the processes for review of proscription. The Law Council makes a number of recommendations in relation to narrowing the scope of the definition of a terrorist act and for improving accountability, fairness and transparency in relation to the proscription of terrorist organisations under the Criminal Code.

3. The Law Council is concerned about the broad scope of the offences relating to receiving funds from, making funds available to or collecting funds on behalf of terrorist organisations. The Law Council makes recommendations for narrowing the scope of these offences and for facilitating the ability of legal practitioners to rely on a relevant exemption from committing an offence if they provide legal assistance to people charged with terrorist organisation offences or seeking assistance to comply with relevant laws.

4. The Law Council is also concerned with the complexity and broad scope of the offences of providing support to a terrorist organisation and makes recommendations to clarify and narrow the scope of these offences.

5. In relation to the UN Charter Act, the Law Council is concerned with the lack of a definition of terrorism in the Act and regulations made pursuant to it. The Law Council is also concerned about the broad scope of executive discretion in relation to proscribing persons, entities and assets under that legislation and the limited scope of the discretion to revoke such proscriptions.

6. The Law Council is also concerned about inappropriate fault elements in offences under the UN Charter Act and the scope of these offences. It is also concerned about provisions applying to bodies corporate. It makes recommendations for reform of these provisions.

# Introduction

7. The Law Council provides this submission to the inquiry by the Independent National Security Legislation Monitor (the Monitor) into financing terrorism legislation. The Law Council notes that the Monitor conducted public hearings as part of this inquiry on 22 and 24 April 2013. Dr David Neal SC, a member of the Law Council's National Criminal Law Liaison Committee gave evidence at the hearing on 22 April 2013 on behalf of the Law Council.[1] Another member of that committee, Mr Phillip Boulten SC also gave evidence in his capacity as one of the counsel involved in *R v Vinayagamoorthy & Ors,* a case which involved financing terrorism offences.[2]

8. This submission outlines the financing terrorism provisions in the Criminal Code) and the UN Charter Act. It details the Law Council's previous advocacy regarding these and related provisions. It also seeks to respond to questions relating to the financing terrorism legislation raised by the Monitor in his 2011 Annual Report and questions raised during the hearing on 22 April 2013.

9. These questions include:

    (a) Is there practical consensus internationally on the definition of terrorism?

    (b) Should terrorist acts or threats of them be defined always to involve dangers to life and limb as opposed only to property or infrastructure damage?

    (c) What is the effect of the requirement under the Inter-Governmental Agreement for consultation between the Commonwealth, the States and the Territories in relation to the listing of terrorist organisations?

    (d) Is the requirement that regulations under the UN Charter Act for listing decisions in relation to freezing assets etc merely relate to terrorism too loose?

    (e) Should the Minister be required rather than empowered to revoke a listing when satisfied it is no longer necessary?

    (f) Does the once yearly obligation for the Minister to consider a listing revocation application give too much discretion or create undesirable inflexibility?

    (g) Should there be wider judicial review of listing decisions including revocation applications?

# Background

10. A number of legislative measures were introduced in 2002 in an effort to bring Australia's laws relating to financing criminal activity into line with Australia's international obligations to criminalise the financing of terrorist activity.

11. One such measure was the introduction of the *Suppression of the Financing of Terrorism Act 2002* (Cth) (the SFT Act) which was enacted to implement Australia's international legal obligations under the *International Convention on the Suppression*

[1] See Transcript of Proceedings, Independent National Security Legislation Monitor, Public Hearing, 22 April 2013, available at http://www.dpmc.gov.au/inslm/docs/inslm-public-hearing-2013-04-22.pdf
[2] [2010] VSC 148

*of the Financing of Terrorism* (Financing Terrorism Convention) and United Nations (UN) Security Council resolutions 1267 and 1373.[3] It also responded to the international Financial Action Task Force recommendations on terrorist financing.[4]

12. The SFT Act amended a number of existing statutes including the UN Charter Act. It also created a new offence in section 103.1 of the Criminal Code in relation to financing terrorist acts. In 2005 a further offence was introduced in section 103.2 of the Criminal Code relating to financing persons to facilitate or engage in terrorist acts.[5]

13. The *Security Legislation Amendment (Terrorism) Act 2002* (Cth) (SLAT Act) was also passed in 2002 and introduced a definition of 'terrorist act'; created a regime for proscribing terrorist organisations; and criminalised a wide range of conduct relating to terrorist organisations including funding related activities.

Financing terrorism offences in the Criminal Code

14. There are a number of offences in the Criminal Code that relate to financing terrorism. These include:

- Receiving funds from, making funds available to, or collecting funds for or on behalf of a terrorist organisation, knowing that the organisation is a terrorist organisation (penalty – 25 years imprisonment);[6]
- Receiving funds from, or making funds available to a terrorist organisation, or collecting funds for or on behalf of a terrorist organisation, being reckless as to whether that organisation is a terrorist organisation (penalty – 15 years imprisonment);[7]
- Intentionally providing support or resources to a terrorist organisation knowing it is such an organisation (penalty 25 years imprisonment);[8]
- Intentionally providing support or resources to a terrorist organisation being reckless as to whether it is such an organisation (penalty 15 years imprisonment);[9]
- Providing or collecting funds being reckless as to whether the funds will be used to facilitate or engage in a terrorist act (penalty – life imprisonment);[10]
- Intentionally making funds available to another person or collecting funds for another person, whether directly or indirectly, being reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act (penalty – life imprisonment).[11]

[3] See the International Convention on the Suppression of the Financing of Terrorism at http://www.un.org/law/cod/finterr.htm; UN Security Council Resolution 1267 at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3b00f2298; UN Security Council Resolution 1373 at http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=3c4e94552a
[4] See http://www.fatf-gafi.org/
[5] *Anti-Terrorism Act (No 2) 2005* (Cth)
[6] *Criminal Code Act 1995*, s.102.6(1)
[7] *Criminal Code Act 1995*, s.102.6(2)
[8] *Criminal Code Act 1995,* s 102.7 (1)
[9] *Criminal Code Act 1995,* s 102.7 (2)
[10] *Criminal Code Act 1995* (Cth) s103.1(1).
[11] *Criminal Code Act 1995* (Cth) s103.2.

15. A person will commit one of the latter two offences even if:[12]

    (a) a terrorist act does not occur; or

    (b) the funds will not be used to facilitate or engage in a specific terrorist act; or

    (c) the funds will be used to facilitate or engage in more than one terrorist act.

Cases involving financing terrorism offences under the Criminal Code

*R v Thomas*[13]

16. In November 2004, Joseph Thomas was arrested and charged with a number of offences under the Criminal Code. These included:

    (a) Intentionally receiving funds from a terrorist organisation (Al Qaida) (section 102.6(1), Criminal Code);

    (b) Two counts of intentionally providing support to a terrorist organisation (section 102.7(1), Criminal Code); and

    (c) Possessing a false passport (section 9A(1)(e), *Passports Act 1938* (Cth))

17. It was alleged that Mr Thomas had received $3,500, a plane ticket and a false passport from an Al Qaida member before returning to Australia, following his participation in arms training in Pakistan and Afghanistan.

18. Mr Thomas was found guilty of receiving funds from a terrorist organisation and possessing a falsified passport. He was acquitted of the other charges.

19. The Victorian Court of Criminal Appeal upheld an appeal by Mr Thomas regarding the inadmissibility of admissions made by him during an interview with the Australian Federal Police (AFP) in March 2003, and quashed the convictions on 18 August 2006.

20. A retrial was ordered partly on the basis that evidence which emerged as a result of an interview by Mr Thomas with the Australian Broadcasting Corporation's Four Corners television program in February 2006 was not known and could not have been known by the prosecution at the time of the trial. The Court of Criminal Appeal exercised its discretion to order a retrial.

21. Mr Thomas sought special leave to appeal against this decision in the High Court, which was refused. Mr Thomas' retrial commenced in October 2008. On 23 October 2008 the jury acquitted Mr Thomas of the charge of receiving money from a terrorist organisation, but found him guilty of the charge of possessing a falsified passport. Mr Thomas was sentenced to nine months imprisonment but was released on a recognisance order.

22. The *Thomas* case illustrates the broad scope of the section 102.6 offences relating to receiving funds from, making funds available to or collecting funds for or on behalf of a terrorist organisation. As Dr Neal noted at the hearing on 22 April 2013, Mr Thomas stated that he received the funds from Al Quaida and intended to use them to exit the organisation and returning to Australia. As Dr Neal also noted, section 102.6 is

[12] *Criminal Code Act 1995* (Cth) s103.2 (2).
[13] (2006) 14 VR 475: 288, see also *R v Thomas* (No 3) (2006) 14 VR 512: 288

currently drafted so broadly that the mere receipt of funds is criminalised even if it is not intended to benefit the organisation.

*R v Benbrika and others*[14]

23. This case involved 12 men who had formed a terrorist group in Melbourne. The members of the group were all charged with different terrorist organisation offences, and pleaded not guilty.

24. In September 2008, Aimen Joud, Ahmed Raad and Ezzit Raad were found guilty of attempting to make funds available to a terrorist organisation (sections 102.6(1) and 11.1, Criminal Code). The men had devised a scheme that saw them strip stolen cars and sell the leftover parts to raise money to finance their terrorism plans.

25. In addition to this, Abdul Nacer Benbrika, Aimen Joud, Fadal Sayadi, Abdullah Merhi, Ahmed Raad, Amer Haddara and Ezzit Raad, were all found guilty of being members of a terrorist organisation, knowing that the organisation was a terrorist organisation (section 102.3(1), Criminal Code).

26. Aimen Joud, Fadal Sayadi and Ahmed Raad were also found guilty of intentionally providing resources (themselves) to a terrorist organisation (section 102.7(1), Criminal Code);

27. Abdul Nacer Benbrika was found guilty of intentionally directing the activities of a terrorist organisation (section 102.2(1), Criminal Code).

28. Four other members of the group were acquitted of all the charges against them. Those found guilty were sentenced on 3 February 2009 to periods of between six and fifteen years imprisonment.[15] Some of these sentences were reduced on appeal.[16]

29. Shane Kent was originally indicted with the other men on similar counts to those above. However, the jury was unable to reach a verdict in relation to Mr Kent and the jury was discharged. Mr Kent was remanded for re-trial and pleaded guilty on 28 July 2009 to being a member of a terrorist organisation under s102.3 of the Criminal Code and to making a document connected with preparation for a terrorist act, and being reckless as to that connection under s101.5(2) of the Criminal Code.

30. Mr Kent was sentenced to 5 years imprisonment for being a member of a terrorist organisation. He was sentenced to 2 ½ years for making a document in connection with a terrorist act, being reckless to as to that connection. A non-parole period of 3 years and 9 months was set.[17]

31. The *Benbrika* case involved a number of rulings by the Supreme Court of Victoria, including rulings related to the definition of a 'terrorist act';[18] the requirements for proof relating to whether the relevant organisation was a 'terrorist organisation;[19] and the admissibility of evidence relating to making funds available for a terrorist

[14] (2009) 222 FLR 433
[15] *R v Benbrika* [2009] VSC 21
[16] *Benbrika v R* [2010] VSCA 281
[17] *R v Kent* [2009] VSC 375
[18] *R v Benbrika and Ors (Ruling No 2)* [2007] VSC 261;
[19] *R v Benbrika (Ruling No 7)* [2007] VSC 425; *R v Benbrika (Ruling No 8)* [2007]VSC 404; *R v Benbrika (Ruling No 21)* [2008] VSC 114; *R v Benbrika (Ruling No 23)* [2008] VSC 137; *R v Benbrika (Ruling No 30)* [2008] VSC 477; *R v Benbrika (Ruling No 31)* 2008 [VSC] 484; *R v Benbrika (Rulings no 35.01-35.11)* [2009] VSC 142

organisation.[20] These rulings demonstrate some of the issues which arise in relation to: the definition of a 'terrorist act and the broad scope of the concept of a 'terrorist organisation'. These issues are discussed below.

## Division 102 of the Criminal Code

The definition of a 'terrorist organisation'

32. The definition of a 'terrorist organisation' is the basis for a number of offences which are contained in Division 102 of the Criminal Code.[21]

33. A 'terrorist organisation' is defined in subsection 102.1(1) of the Criminal Code as:

    (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or

    (b) an organisation that is specified by the regulations for the purposes of this paragraph

34. This means that there are two ways for an organisation to be identified as a 'terrorist organisation'. Either an organisation may be found to be such an organisation by a court as part of the prosecution for a terrorist offence, or it may be proscribed in regulations, known as 'listing'.

35. The Law Council has particular concerns with the process of proscription by regulation.

*Proscription or listing by regulation*

36. According to subsection 102.1(2), before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition above, the Attorney-General must be satisfied on reasonable grounds that the organisation:

    (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or

    (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

37. An organisation 'advocates' the doing of a terrorist act if it:

    (a) directly or indirectly counsels or urges the doing of a terrorist act; or

    (b) directly or indirectly provides instructions on the doing of a terrorist act; or

    (c) directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person

[20] *R v Benbrika(Ruling No 18)* [2008 VSC 6

[21] Division 102 of the *Criminal Code* was introduced by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth). It was subsequently amended in 2003 and 2004 by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth) and the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

(regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act.

38. There were 18 organisations officially listed as 'terrorist organisations' as at 11 July 2013.[22]

39. The listing of an organisation ceases to have effect three years after the making of the relevant regulation, or if the Minister ceases to be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in, fostering or advocating the doing of a terrorist act, whichever occurs first.[23]

*Review of listings*

40. There are three main avenues of review relating to a listed organisation.

41. Once listed an entity may apply to the Attorney-General for delisting, 'on the grounds that there is no basis for the Minister to be satisfied that the listed organisation is directly or indirectly engaged in, preparing, planning, assisting in, fostering or advocating the doing of a terrorist act.' [24]

42. If de-listing is denied by the Minister, the entity has the opportunity, under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act), to have this decision reviewed.[25]

43. Each regulation may also be reviewed by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) within 15 sitting days of the regulation being laid before Parliament. The PJCIS may make recommend disallowance.[26]

44. Review of listed organisations by the PJCIS has occurred numerous times, providing an important form of external scrutiny of the decision to list an organisation.

45. Although the PJCIS has never recommended that Parliament disallow a regulation listing or re-listing an organisation, it has questioned the process undertaken by the key agencies involved in the process. [27]

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[22] For an up-to-date list of listed terrorist organisations, including when the organisations were listed and re-listed as terrorist organisations and for details as to their key objectives and activities, see the Australian Government's National Security website at (http://www.ag.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument).

[23] *Criminal Code Act 1995* ss102.1(3), 102.1(4).The listing period was originally 2 years. However, s. 102.1(3) was amended by *the National Security Legislation Amendment Act* (Cth) in 2010 to increase the period from 2 to 3 years

[24] *Criminal Code Act 1995* s102.1(4).

[25] ASIO has also advised the PJCIS that 'the making of the regulation is also subject to judicial review under section 75(v) of the Australian Constitution, and section 39B of the *Judiciary Act 1903*. ' However, this is not an avenue for merits review. See Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJCAAD'), *Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004*, (16 June 2004). p. 9.

[26] Section 102.1A of the *Criminal Code*. As part of its review the PJCIS may seek submissions from Australian members of the relevant organisation and from other interested parties. The PJCIS is also permitted access to all material (including classified material) upon which the Minister's decision was based. See for example PJCAAD, *Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004*, Tabled 16 June 2004.

[27] The most critical review conducted by the PJCIS related to the listing of the Kurdistan Workers' Party (PKK) in 2006. During this review, the majority of the Committee recommended that the Government keep the matter under 'active consideration'. This Review also contained a minority report prepared by the Hon Duncan Kerr SC MP and Senator John Faulkner which recommended that the Government reassess the listing of the PKK.

## Law Council concerns with the process of listing terrorist organisations

46. The Law Council's concerns with the proscription regime have been raised in a number of forums[28] and are detailed below.

Broad executive discretion to proscribe terrorist organisations

47. Pursuant to subsection 102.1(2) the Minister enjoys a broad power to proscribe an organisation and expose to criminal liability those individuals associated with the organisation, including those who may receive funds from, make funds available to or collect funds for or on behalf of the organisation.

48. On the basis of the broad definition contained in subsection 102.1(1), a considerable number of organisations are potentially eligible for proscription. Nonetheless, only 18 organisations have been listed as at 11 July 2013.[29] The rationale behind how and why those organisations have been chosen as opposed to other organisations is difficult to discern. Likewise, information is not publicly available about organisations which are currently under consideration for listing.

49. The Law Council considers that conferring a broad executive discretion to proscribe a particular organisation is unacceptable in circumstances where the consequences of proscribing it are to expose people to serious criminal sanctions for a broad range of activities related to the organisation.

Absence of clear criteria for listing an organisation as a terrorist organisation

50. The absence of clear criteria for the listing of organisations exacerbates the lack of transparency and accountability flowing from the broad exercise of executive discretion described above.

51. When reviewing the listing of terrorist organisations, the PJCIS has repeatedly called for the Australian Security Intelligence Organisation (ASIO) and the Attorney-General's

See PJCIS *Review of the listing of the Kurdistan Workers' Party (PKK)* (26 April 2006). Furthermore in a June 2009 review, the PJCIS stressed the need for new information to be provided when considering whether or not to re-list a terrorist organisation, see PJCIS, *Review of the Re-listing of Hizballah's External Security Organisation under the Criminal Code Act 1995'*, June 2009, p6-7. In their August 2011 report, the PJCIS acknowledged the importance of reviewing the listings of organisations in accordance with the most current information available about those organisations. See PJCIS Review *of the Listing of Al-Qa'ida in the Arab Peninsula (AQAP) and the re-listing of 6 Terrorist* Organisations, 22 August 2011, p. 10. Available from http://www.aph.gov.au/house/committee/pjcis/AQAP_6%20terrorist%20orgs/report.htm

[28] For example see Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills* (April 2002); Law Council of Australia Submission to the Attorney-General, House of Representatives, *Criminal Code Amendment (Terrorist Organisation) Bill* (3 March 2004); Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (10 May 2010)

[29] For an up-to-date list of listed terrorist organisations see the Australian Government's National Security website at http://www.ag.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument.

Department (AGD) to provide a statement of the criteria it applies to the listing process, and to adhere to those criteria when listing (or re-listing) organisations.[30]

52. During its 2005 review of the listing of six terrorist organisations[31] the then Parliamentary Joint Committee on ASIO, the Australian Security Intelligence Service and the Defence Signals Directorate (PJCAAD), which later became the PJCIS, received from the Director-General of ASIO a summary of ASIO's evaluation process in selecting entities for proscription. Factors included:[32]

    (a) engagement in terrorism;

    (b) ideology and links to other terrorist groups/networks;

    (c) links to Australia;

    (d) threat to Australian interests;

    (e) proscription by the UN or like-minded countries; and

    (f) engagement in peace/mediation processes.

53. The PJCAAD recommended that ASIO and the Attorney-General specifically address each of the six criteria in all future statements of reasons, particularly for new listings.[33]

54. However, when reviewing the listing of the Kurdistan Workers' Party (PKK) the PJCIS was subsequently informed that 'the criteria are a guide only and that they are applied flexibly, and that not all elements of the criteria are necessary before a decision might be taken to list an organisation'. [34]

55. For that reason, where the criteria have been departed from in the past, ASIO and the AGD have not considered it necessary to advance evidence of special overriding circumstances which justified the listing of the organisation, notwithstanding the fact that the criteria were not met.[35] The result is that while both the AGD and ASIO have acknowledged that it is neither possible nor desirable to list every organisation which meets the broad definition of a 'terrorist organisation', neither agency has been willing to promulgate binding criteria for listing.

56. The absence of transparent binding criteria has inevitably made it difficult to allay public fears that the proscription power might be utilised for ends other than law enforcement imperatives.

57. In its response to recommendations made by the PJCIS regarding the listing process, the Government indicated that it supported the recommendation that ASIO and the AGD 'develop an unclassified protocol which outlines the key indicators which are taken into consideration when determining whether an organisation meets the

[30] For example see PJCIS, *Review of the re-listing of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations under the Criminal Code Act 1995* (16 October 2006); PJCAAD, *Review of the listing of six terrorist organisations*, (5 September 2005) at [2.36].
[31] ibid
[32] ibid
[33] PJCAAD *Review of the listing of six terrorist organisations* (5 September 2005, Recommendation 2.
[34] PJCIS, *Review of the listing of the Kurdistan Workers' Party (PKK)* (26 April 2006) [2.3].
[35] Minority Report of PJCIS, *Review of the listing of the Kurdistan Workers' Party (PKK)* (26 April 2006) at p. 36.

statutory test for proscription'.[36] At present, the criteria that the PJCIS uses in order to review listings are those that were enunciated during the PJCAAD's 2005 review.[37]

*58.* While these criteria have now been included in a *Protocol for Listing terrorist organisations under the Criminal Code*, which is published on a Government website,[38] this protocol notes that in providing advice to the Attorney-General, ASIO *may* have regard to these criteria but that a lack of information about one or more of these criteria will not preclude an organisation from being considered for listing.

*59.* While these criteria also appear to be addressed in the unclassified Statement of Reasons generally included in the relevant regulation,[39] the protocol also notes that where there is insufficient unclassified information, ASIO may provide a classified briefing to the Attorney-General which is not available to the public.

*60.* Although there is additional public information accompanying the relevant regulations in the form of a statement of compatibility with human rights pursuant to the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), this is insufficient to allay concerns about the lack of binding, transparent criteria applicable to the listing process.

Listing organisations on the basis of 'advocacy' alone

61. Following amendments to the Criminal Code in 2005, an organisation can be listed as a terrorist organisation on the basis that it "advocates" the doing of a terrorist act.

62. Subsection 102.1(1A) of the Criminal Code provides that an organisation "advocates" the doing of a terrorist act if it:

    (a) directly or indirectly counsels or urges the doing of a terrorist act; or

    (b) directly or indirectly provides instruction on the doing of a terrorist act; or

    (c) directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act.

63. The Law Council has previously submitted that the power to proscribe an organisation on the basis of advocacy alone is unnecessary and that paragraphs 102.1(2)(b) and 102.1(1A) should be repealed.

64. The Law Council is not opposed to laws which criminalise incitement to violence or other criminal acts. However, the Law Council considers that paragraphs 102.1(2)(b) and s102.1(1A) extend well beyond criminalising incitement.

[36] See Australian Government response to PJCIS Inquiry into the proscription of terrorist organisations under the Australian Criminal Code - December 2008 available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoPJCISInquiryintotheproscriptionofterroristorganisationsundertheAustralianCriminalCode-December2008 .
[37] PJCAAD *Review of the listing of six terrorist organisations* (5 September 2005)
[38] See http://www.nationalsecurity.gov.au/agd/WWW/rwpattach.nsf/VAP/%289A5D88DBA63D32A661E6369859739356%29~LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf/$file/LISTING+PROTOCOL+SEPTEMBER+2011+%282%29.pdf
[39] For example, *see Criminal Code (Terrorist Organisation – Al'Qaida in the Lands of the Islamic Mahgreb Regulation 2013* at http://www.comlaw.gov.au/Details/F2013L01354/Explanatory%20Statement/Text

65. Without paragraph 102.1(2)(b), it is possible to proscribe any organisation which is directly *or indirectly* engaged in, preparing, planning, assisting in or *fostering* the doing of a terrorist act (emphasis added).

66. In the Law Council's view, if it can not be demonstrated that an organisation's activities fall under this very broad umbrella then the organisation should not be proscribed.

67. The *National Security Legislation Amendment Act 2010* (Cth) amended subsection 102.1(1A) so that an organisation can only be listed as a terrorist organisation if it directly praises the doing of a terrorist act in circumstances where there is a *substantial* risk that it might have the effect of leading a person (regardless of his or her age or any mental impairment that he or she might suffer) to engage in a terrorist act (emphasis added).

68. Whilst the Law Council supported this amendment,[40] it considers that it is insufficient to remedy the broad scope of behavior which may be covered by subsection 102.1(1A).

69. Similarly problematic terms in subsection 102.1 (1) include 'indirectly fostering' the doing of a terrorist act by an organisation. Indirectly fostering the doing of a terrorist act becomes even more uncertain if the terrorist act is a 'threat of action'. This definition lacks legal certainty and introduces unclear terminology that may encompass a very wide spectrum of acts or representations.[41]

Denial of natural justice in the listing process

70. The current process of proscribing terrorist organisations does not afford affected parties the opportunity to be heard *prior* to an organisation being listed or to effectively challenge the listing of an organisation after the fact.

71. The PJCIS has repeatedly requested that key government agencies engage in public consultation *before* listing organisations. For example, in its review of the listing of the al-Zarqawi network in 2005 the then PJCAAD suggested that it would be most beneficial if community consultation occurred prior to the listing.[42]

72. In 2007, the PJCIS recommended that the Government consider reverting to the initial legislative approach of postponing commencement of a listing until after the disallowance period for the regulation had expired. [43] In its 2008 response to the PJCIS, the Government accepted this recommendation but indicated that flexibility would need to be maintained for circumstances where the listing should commence immediately.[44]

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[40] Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, *National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010* (10 May 2010), p.9

[41] Dina Yehia, NSW Public Defender, *Anti Terror Legislation Consideration of Areas of Legal And Practical Difficulties,* Presentation at Federal Criminal Law Conference, Sydney, 5 September 2008 p. 12-13.

[42] PJCAAD *Review of the listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a Terrorist Organisation* (25 May 2005) Recommendation 1

[43] See PJCIS Report*, Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code 1995* at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/proscription/report.htm, Recommendation 4.

[44] See Australian Government response to PJCIS Inquiry into the proscription of terrorist organisations under the Australian Criminal Code - December 2008 available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoPJCISInquiryintotheproscriptionofterroristorganisationsundertheAustralianCriminalCode-December2008 (accessed 3 August 2009).

73. The Government appears to have adopted this recommendation in its approach to the listings of at least two terrorist organisations since the 2007 PJCIS report.[45]

74. The Law Council recognises that there are also avenues for review after an organisation has been listed, however it considers that the available forms of post facto review provide inadequate protection for the rights of persons who might be affected by the proscription process. These avenues of review are discussed below.

*Review of listings by the PJCIS*

75. Section 102.1A of the Criminal Code stipulates that the PJCIS may review a regulation proscribing an organisation within 15 sitting days of the regulation being laid before Parliament.[46]

76. Although the Parliament is likely to rely upon the judgment of the PJCIS in deciding whether to disallow the proscribing regulation, particularly where classified material is involved, the primary problem with PJCIS review is that it is not mandatory and it takes place after a decision to proscribe an organisation has been made and often after it comes into effect.

*Consultation with States and Territories regarding listings*

77. Consultation with States and Territories in relation to listings is required under the *Inter-Governmental Agreement on Counter-Terrorism Laws* (IGA) established in June 2004.[47]

78. The IGA outlines a number of procedures for consultation and agreement between the Commonwealth and the States and Territories, including in relation to the initial listing of terrorist organisations.[48]

79. Clause 3.4 of the IGA provides:

    (a) Before making a regulation specifying a terrorist organisation for the purposes of Part 5.3 of the Commonwealth Criminal Code, the Commonwealth will consult the other parties about it.

    (b) If a majority of the other parties object to the making of a regulation specifying a terrorist organisation within a time frame nominated by the Commonwealth

[45] Al Shabaab was listed on 26 October 2009 with the relevant regulation taking effect the day after registration 'for security reasons'. The PJCIS in its review of the listing stated that it was comfortable with this approach, see http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/al%20shabaab/report.htm. The listing of Al Quaida in the Arabian Peninusla came into effect after the disallowance period for the relevant regulation, see the PJCIS report on the review of the listing at http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/aqap_6%20terrorist%20orgs/report.htm

[46] The PJCIS has noted that 'since Parliament is able to disallow a regulation, the Parliament should have the clearest and most comprehensive information upon which to make any decision on the matter.' Accordingly, as part of its review the PJCIS may seek submissions from Australian members of the relevant organisation and from other interested parties. The PJCIS is also permitted access to all material (including classified material) upon which the Minister's decision was based. See PJCAAD, *Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the Criminal Code Amendment Act 2004*, (16 June 2004).

[47] See http://archive.coag.gov.au/coag_meeting_outcomes/2004-06-25/docs/iga_counter_terrorism.cfm.

[48] Clause 3.3, *Agreement on Counter-Terrorism Laws*, 25 June 2004. Available from http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/Australiascounterterrorismlaws.aspx

and provide reasons for their objections, the Commonwealth will not make the regulation at that time.

(c) The Commonwealth will provide the other parties with the text of the proposed regulation and will use its best endeavours to give the other parties a reasonable time to consider and to comment on the proposed regulation.

(d) The Commonwealth will also provide the other parties with a written brief on the terrorist-related activities of the organisation to be specified by the regulation and offer the other parties an oral briefing by the Director-General of Security.

(e) The other parties will use their best endeavours to respond within a time frame nominated by the Commonwealth.

(f) Approval for regulations specifying terrorist organisations must be sought, and responses from other parties must be provided, through the Prime Minister and Premiers and Chief Ministers.

80. Clause 3.4 of the IGA does not apply to the Government's decision to re-list terrorist organisations.[49]

81. Despite the Government's commitment to consulting with the States and Territories prior to listing terrorist organisations, this process appears to have provided only limited accountability. Indeed, as has been noted by some commentators:

"The Intergovernmental Agreement on Counter-Terrorism Laws provides that the Attorney-General will not make a regulation if a majority of the States and Territories object. However, a frequent complaint made by the leaders of the States and Territories is that they are given insufficient time by the Attorney-General to fully reflect upon the impact of a regulation, and therefore a considered objection to the making of a regulation is practically impossible."[50]

82. The PJCIS and its predecessor, the PJCAAD have also commented on the short periods of time that have been provided for consultation with States and Territories in relation to listing decisions. For example, in its 2005 report on the 'Review of the listing of six terrorist organisations', the PJCAAD described the period of consultation as "so short that it rendered it impossible for the States and Territories to make any response, let alone object to a listing, as is their right."[51]

83. The PJCIS made a similar observation in its 2007 report of its inquiry into the proscription of 'terrorist organisations' under the Criminal Code, finding that:

"In fifty per cent of cases the parties have been given five days or less in which to consider and comment on a proposed listing. The large majority of cases involve re-listings, and consultation has in practice become a form of notification. However, in the case of a new listing, for example, the listing of the PKK, the period was also

[49] See http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2005-02-17/0192/hansard_frag.pdf;fileType=application%2Fpdf

[50] See A. Lynch, N. McGarrity and G. Williams, (2009). 'The Proscription of Terrorist Organisations in Australia,' *Federal Law Review,* Vol. 37, p.7.

[51] See PJCAAD, *Review of the listing of six terrorist organisations*, March 2005, para. 3.52. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcaad/terrorist_listingsa/report.htm

extremely short with only three working days provided for the Premiers to take advice and respond."[52]

84. In the case of the PKK listing, although the matter was under consideration for over a year, State and Territory leaders were advised of the proposed listing just six days before the relevant regulation was made and were provided only with the three and half page unclassified statement of reasons in support of the listing. It is difficult to accept that consultation of this type acts as an effective safeguard.

85. Therefore in response to the issue raised by the Monitor at the hearing on 22 April 2013 relating to the Law Council's consideration of the IGA in the context of the proscription process, the Law Council notes that it may not provide an effective review process in the absence of adequate time frames for consultation.

International criticism of listing or proscription schemes

86. Listing or proscription regimes relating to terrorist organisations have also been developed by international organisations and other countries. However, as noted by the Monitor, many of these schemes (including that of the UN) have been the subject of criticism by a number of commentators.[53]

87. This criticism has largely related to the lack of due process afforded to entities that are proscribed or listed; the absence of transparency; the broad discretion that is provided to the executive; and the absence of effective safeguards (such as judicial review) of listing decisions.[54] Indeed, as noted by the report of the International Commission of Jurists' (ICJ) Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, the decision to list an organisation or individual is usually carried out in an arbitrary way by the executive, "either alone, or in conjunction with the legislature, but with no judicial involvement." [55]

88. A similar observation has been made in relation to the Australian process for listing and de-listing terrorist organisations insofar as the process carries "an unnecessarily high potential for the generation of arbitrary and overly-politicised decisions."[56]

89. The proscription regime in the United Kingdom (UK) has also been criticised by some commentators due to its potential to "severely restrict the rights of speech, association and assembly in respect of any group against which the power is used."[57]

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[52] PJCIS*, Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, para. 6.12. Available from http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcis/proscription/report.htm

[53] See Independent National Security Legislation Monitor, Bret Walker SC, *Annual Report 2011*, 16 December 2011, pp.38-39, available from http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20111216.pdf

[54] See A. Lynch, N. McGarrity and G. Williams, (2009). 'The Proscription of Terrorist Organisations in Australia,' *Federal Law Review,* Vol. 37, p.3. See also M. Pieth, (2006). 'Criminalizing the Financing of Terrorism,' *Journal of International Criminal Justice*, Vol. 4, p.1086; and International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, 2009, p.115, available from http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Report-of-the-Eminent-Jurists-Panel-on-terrorism-couter-terrorism-Annual-Report-2009.pdf

[55] International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, 2009, p.114, available from http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/Report-of-the-Eminent-Jurists-Panel-on-terrorism-couter-terrorism-Annual-Report-2009.pdf

[56] See A. Lynch, N. McGarrity and G. Williams, (2009). 'The Proscription of Terrorist Organisations in Australia,' *Federal Law Review,* Vol. 37, p.12.

90. In his 2012 report, the UK's Independent Reviewer of Terrorism Legislation, David Anderson QC, considered the UK's proscription regime in detail and made a number of recommendations for improvement, such as making all proscription decisions expire after a period of two years.[58]

91. The UN's listing, or sanctions regime, commenced in 1999 with the UN Security Council's passage of Resolution 1267.[59] This resolution established a UN Sanctions Committee (the UN Committee) and also imposed obligations on States to take certain actions in relation to any individual or entity that is designated by the UN Committee as being associated with Al-Qaida. For example, States must freeze the funds and other financial assets or economic resources of designated individuals and entities; prevent designated individuals from entering into or passing through their territories; and prevent the direct or indirect supply, sale and transfer of arms and military equipment to any designated individual or entity.[60]

92. The UN Committee maintains a list of designated individuals and entities known as the 'Al-Qaida Sanctions List'.[61] It adds individuals and entities to this list at the request of States. It also considers requests from States to remove people/entities from the list, as well as petitions that are provided to the Office of the Ombudsperson which was established following the passage of Resolution 1904.[62]

93. The UN Commissioner for Human Rights has also expressed concern about the listing of entities and the freezing of assets under the UN regime. Indeed, she has suggested that institutional changes to the sanctions regime have become necessary.[63]

94. Another criticism of the UN's sanctions regime is the fact that the responsibility to designate individuals and entities lies with the UN Committee, as opposed to an independent adjudicator.[64] To address this criticism, a number of reforms were introduced in 2009 and 2010, including the appointment of an Ombudsperson to handle requests from individuals and entities seeking to be removed from the list;[65] and the introduction of the requirement for the UN Committee to provide reasons for rejecting de-listing requests.

95. Despite these reforms, in 2010, the former UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (UN Special Rapporteur), Martin Scheinin expressed concern about the procedures for

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[57] See S. Marques da Silva and C. Murphy, Proscription of Organisations in UK Counter-Terrorism Law (October 8, 2012). *Legal Aspects of EU Sanctions*, Cameron, ed, Intersentia, 2012, p.1. Available from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2064048

[58] David Anderson QC, Independent Reviewer of Terrorism Legislation, *The Terrorism Acts in 2011,* June 2012, pp.56-57. Available from https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2013/04/report-terrorism-acts-2011.pdf.

[59] See UN Security Council, *Resolution 1267 adopted by the Security Council at its 4051st meeting on 15 October 1999*, 15 October 199, S/RES/1267, available from http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1267%281999%29.

[60] Ibid.

[61] A copy of this list is available from http://www.un.org/sc/committees/1267/pdf/AQList.pdf.

[62] UN Security Council, *Resolution 1904 adopted by the Security Council at its 6247th meeting on 17 December 2009*, 17 December 2009, S/RES/1904, available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/656/62/PDF/N0965662.pdf?OpenElement

[63] Office of the UN Commissioner for Human Rights, *Report on the protection of human rights and fundamental freedoms while countering terrorism*, 2 September 2009, A/HRC/12/22, para 40, available from http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A.HRC.12.22.pdf

[64] See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson QC, *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, 26 September 2012, A/67/396. Available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/522/54/PDF/N1252254.pdf?OpenElement

[65] See http://www.un.org/News/Press/docs/2010/sc9947.doc.htm

de-listing, asserting that they failed to "meet the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law."[66]

96. Further reforms were introduced in 2011 to increase the Ombudsperson's powers. These included Resolution 1989,[67] which provided the Ombudsperson with the mandate to make consequential recommendations in relation to delisting requests, and removed the requirement that the UN Committee must reach a consensus for an entity to be delisted.[68] An Ombudsperson's de-listing recommendation now takes effect 60 days after the UN Committee has finished considering it unless the Committee decides otherwise by consensus.[69]

97. The current UN Special Rapporteur, Ben Emmerson QC, has also commented on the UN listing regime, stating that despite the significant improvements made by resolution 1989, "the mandate of the Ombudsperson still does not meet the structural due process requirement of objective independence from the Committee."[70] He made recommendations to improve the due process standards, which include:[71]

    - The mandate of the Office of the Ombudsperson should be amended to authorize it to receive and determine petitions from designated individuals or entities (a) for their removal from the list; (b) for the authorization of humanitarian exemptions; and (c) to make a determination that is accepted as final by the Committee and the Security Council;

    - The Office of the Ombudsperson should be required to recommend delisting, unless satisfied on the information available that (a) it is more likely than not that the designated individual or entity is associated with Al-Qaida; and (b) the imposition of sanctions constitutes a proportionate interference with the rights of the designated person or entity; and

    - The Security Council should reconsider the introduction of a "sunset clause" imposing a time limit on the duration of all designations.

98. The Law Council considers that these observations and recommendations at the international level reinforce the need for consideration of reforms to improve due process, transparency and accountability in the listing process in Australia.

[66] See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, 6 August 2010, A/65/258, p.18. Available from http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A.65.258_en_UNcompliance.pdf
[67] Un Security Council, *Resolution 1989, adopted by the Security Council at its 6557th meeting on 17 June 2011*, 17 June 2011, S/RES/1989. Available from http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1989%20%282011%29
[68] See UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson QC, *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, 26 September 2012, A/67/396, para. 29. Available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/522/54/PDF/N1252254.pdf?OpenElement
[69] Ibid
[70] Ibid, para. 35
[71] Ibid, para. 59

## Law Council recommendations regarding proscription of terrorist organisations

99. Due to the above concerns with the process and grounds for proscription or listing of terrorist organisations, the Law Council considers that there is a need for reform of the Criminal Code provisions to:

    (a) Repeal the current provisions for proscribing organisations as terrorist organisations by regulation;

    (b) Introduce a fairer and more transparent process for proscribing an organisation as a terrorist organisation. Such a process should have the following features:

    (i) a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected parties and a hearing in open court;

    (ii) clear and publicly stated criteria for proscription;

    (iii) detailed procedures for revocation, including the right for a proscribed organisation to apply for review of a decision not to revoke a listing; and

    (iv) broad publication of proscription of an organisation.

100. In the alternative, the Law Council recommends that paragraph 102.1(2)(b), relating to proscribing organisations which "advocate" the doing of terrorist acts and subsection 102.1(1A) relating to the definition of "advocates" should be repealed

101. Such reforms would result in a fairer process for the proscription of terrorist organisations and greater certainty in relation to the scope of the terrorist organisation offences, including those related to receiving funds from, making funds available to or collecting funds for or on behalf of such organisations.

## Terrorist organisation offences

102. As noted above, the purpose of proscribing terrorist organisations is to impose criminal liability on the members of those organisations, and the individuals who support, fund or associate with those organisations.

103. Division 102 of the Criminal Code, which was introduced by the SLAT Act and later amended in 2003[72] and 2004,[73] contains a number of 'terrorist organisation offences'.

104. These offences criminalise various forms of association with a 'terrorist organisation'. Under Division 102 it is an offence to:

    (a) direct the activities of a terrorist organisation (s 102.2)

    (b) be a member of a terrorist organisation (s 102.3)

[72] See *Criminal Code Amendment (Terrorism) Act 2003* (Cth).
[73] See *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

(c) recruit a person to join or participate in the activities of a terrorist organisation (s 102.4)

(d) receive or provide training to a terrorist organisation (s 102.5)

(e) receive funds from or make funds available to a terrorist organisation (s 102.6)

(f) provide support or resources that would help a terrorist organisation engage in, plan, assist or foster the doing of a terrorist act (s 102.7)

(g) on two or more occasions associate with a member of a terrorist organisation or a person who promotes or directs the activities of a terrorist organisation in circumstances where that association will provide support to the organisation and is intended to help the organisation expand or continue to exist. (s 102.8)

105. The Law Council's concerns with the terrorist organisation offences generally relate to a shift in the focus of criminal liability from a person's conduct to their associations.

## Law Council concerns with terrorist organisation financing offences

The fault element of recklessness

106. Under section 102.6 of the Criminal Code it is an offence to receive funds from, make funds available to or collect funds for or on behalf of a terrorist organisation. There are two offences under section 102.6. The first is based on the person knowing that the organisation is a terrorist organisation, which provides a penalty of up to 25 years imprisonment. The second offence is based on recklessness as to whether the organisation is a terrorist organisation and provides a penalty of up to 15 years imprisonment.

107. The Law Council is particularly concerned about subsection 102.6 (2) which merely requires that a person receiving funds from or making funds available to an organisation or collecting funds for or on behalf of an organisation is reckless as to whether it is a terrorist organisation. The Law Council considers that there should at least be a requirement of knowledge. While recklessness requires proof of consciousness of a substantial risk, it falls short of the requirement of knowledge.

The exception for legal representation or assistance

108. Under subsection 102.6(3) a person will not be guilty of a section 102.6 offence if he or she receives funds from the organisation solely for the purpose of providing:

(a) legal representation for a person in proceedings relating to Division 102; or

(b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.

109. The defendant bears a legal burden in relation to these exceptions.

110. This means that if a legal practitioner is charged with receiving funds from a terrorist organisation, he or she must establish on the balance of probabilities that the funds were received for the purpose of the providing legal assistance in relation to

proceedings under Division 102 or in relation to some other form of regulatory compliance.

111. Communications between a legal adviser and his or her client made for the purpose of obtaining or giving legal advice are generally subject to client legal privilege. To exonerate him or herself from a section 106.2 offence, the legal practitioner may have to gain his or her client's consent to waive professional privilege so that evidence can be adduced about the nature of the legal assistance rendered. If a legal adviser cannot prove that the services they provided to a terrorist organisation fall within the legal representation exception, he or she faces up to 25 years imprisonment.

112. The Law Council, like the 2006 Security Legislation Review Committee, considers these provisions, and in particular the exception in subsection 102.6 (3), to be unreasonably restrictive.[74]

The complexity and scope of the offence of "providing support"

113. The Clarke Inquiry into the case of Dr Mohammed Haneef considered the interpretation of the offence of providing support for a terrorist organisation in section 102.7 of the Criminal Code and noted that it was highly confusing.[75] Dr Haneef was an Indian doctor working in Australia, who was arrested and detained in July 2007 for 12 days without charge on suspicion of having been involved in a terrorist attack in London. He was then charged with providing support to a terrorist organisation but the charge was subsequently withdrawn. The Government subsequently commissioned the Clarke Inquiry into the case.

114. The Clarke Inquiry expressed particular concern at the difficulties which would be encountered when attempting to direct juries as to the correct physical and mental elements of the offence and recommended that section 102.7 of the Criminal Code be amended to remove these uncertainties.[76] This could be achieved by requiring knowledge rather than recklessness as to whether the organisation was a terrorist organisation.

115. The Government indicated that it supported the Clarke Inquiry's recommendation to review section 102.7 and in its 2009 National Security Legislation Discussion Paper proposed to narrow and clarify the scope of the provision by:

(a) inserting a requirement into s.102.7 that would mean the support provided must be material support; and

(b) inserting a requirement into s.102.7 that would mean a person must provide the relevant resources or support with the express intention of helping the organisation to directly or indirectly engage in, prepare for, plan, assist in or foster the doing of a terrorist act.

116. The Law Council supported these proposed amendments. However, they were not pursued in the *National Security Legislation Amendment Act 2010* (Cth).

[74] Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) p 120.
[75] The Inquiry was conducted by retired NSW Supreme Court judge, the Hon John Clarke QC from March to November 2008, see http://www.haneefcaseinquiry.gov.au/.
[76] Ibid.

## Law Council recommendations regarding terrorist organisation financing offences

117. The Law Council recommends the following reforms:

(a) amend the offence provisions in subsections 102.6 (2) and 102.7 (2) to require knowledge rather than recklessness as to whether the organisation is a terrorist organisation;

(b) amend the exception in subsection 102.6 (3) to facilitate the ability of legal practitioners to rely on the exception in the ordinary course of legal practice;

(c) amend the offences in section 102.6 so that the person receiving funds from, making funds available to or collecting funds for or on behalf of the terrorist organisation must do so with the intention to assist it to engage in a terrorist act;

(d) amend the providing support offences in section 102.7 so that:

(i) the support provided must be material support; and

(ii) a person must provide the resources or support with the express intention of helping the organisation to directly or indirectly engage in, prepare for, plan, assist in or foster the doing of a terrorist act.

## The definition of a 'terrorist act'

118. The definition of a 'terrorist act' arises in the context of the Division 102 offences discussed above. It also arises in the context of Division 103 offences. When the SFT Act was introduced the Law Council raised a number of concerns with the new offence provisions, including the financing a terrorist act offence in section 103.1.[77] The Law Council's key concerns were that the offences were broad and imprecise; and went further than required by the international instruments they were introduced to implement.

119. The Law Council is particularly concerned that the offence in section 103.1 is unacceptably imprecise for an offence which carries a penalty of life imprisonment. These concerns arise from problems with the definition of 'a terrorist act' and from the use of recklessness as the relevant fault element in the offence.

120. Subsection 100.1(1) of the Criminal Code provides that 'terrorist act' means 'an action or threat of action where':

(a) the action falls within subsection (2) and does not fall within subsection (3); and

(b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and

[77] See Submission by the Law Council of Australia to the Senate Legal and Constitutional Legislation Committee, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills* (April 2002).

(c) the action is done or the threat is made with the intention of:

(i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or

(ii) intimidating the public or a section of the public.

121. Subsection 100.1(2) provides that action falls within the definition if it:

(a) causes serious harm that is physical harm to a person; or

(b) causes serious damage to property; or

(c) causes a person's death; or

(d) endangers a person's life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) seriously interferes with, seriously disrupts, or destroys, an electronic system including:

(i) an information system; or

(ii) a telecommunications system; or

(iii) a financial system; or

(iv) a system used for the delivery of essential government services; or

(v) a system used for, or by, an essential public utility; or

(vi) a system used for, or by, a transport system.

122. Subsection 100.1(3) provides that action falls outside the definition if it:

(a) is advocacy, protest, dissent or industrial action; and

(b) is not intended:

(i) to cause serious harm that is physical harm to a person; or

(ii) to cause a person's death; or

(iii) to endanger the life of a person, other than the person taking the action; or

(iv) to create a serious risk to the health or safety of the public or a section of the public.

## Law Council concerns with the definition of 'terrorist act'

123. Since its introduction, the Law Council has considered the definition of 'terrorist act' to be problematic. This view has been shared by a number of national and international review bodies.

The incorporation of international views on the definition of terrorist acts

124. There are a number of international conventions that have been developed by the UN to address terrorism.[78] Each of these conventions address particular activities associated with terrorism, including unlawful acts against the safety of civil aviation;[79] unlawful seizure of aircraft;[80] the taking of hostages;[81] the protection of nuclear material;[82] terrorist bombings;[83] financing of terrorism;[84] and nuclear terrorism.[85] There are 13 conventions that deal with terrorist related activities.[86] However, none of them contain a consistent definition of terrorism.

125. A number of resolutions have been passed by UN bodies in relation to terrorism including Resolution 1373[87] which was passed following the September 11 2001 terrorist attacks in the United States, and Security Council Resolution 1566[88] which was passed in 2004. However, none of these resolutions have included a consistent definition of terrorism.[89]

126. Resolution 1566 outlines a series of acts that constitute offences under the conventions dealing with terrorism, and calls upon all States "to prevent such acts and, if not prevented, to ensure that such acts are punished by penalties consistent with their grave nature."[90] The acts in question are described as follows:

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[78] See http://www.un.org/terrorism/instruments.shtml

[79] See United Nations, Convention for the suppression of unlawful acts against the safety of civil aviation, 23 September 1971, available from http://treaties.un.org/doc/db/Terrorism/Conv3-english.pdf

[80] See United Nations, Convention for the suppression of the unlawful seizure of aircraft, 16 December 1970, available from http://treaties.un.org/doc/db/Terrorism/Conv2-english.pdf.

[81] United Nations, International Convention against the taking of hostages, 17 December 1979, available from http://treaties.un.org/doc/db/Terrorism/english-18-5.pdf

[82] United Nations, Convention on the physical protection of nuclear material, 26 October 1979, available from http://treaties.un.org/doc/db/Terrorism/Conv6-english.pdf

[83] United Nations, International Convention for the suppression of terrorist bombings, A/52/49, available from http://treaties.un.org/doc/db/Terrorism/english-18-9.pdf

[84] United Nations, International Convention for the suppression of the financing of terrorism, 1999, available from http://treaties.un.org/doc/db/Terrorism/english-18-11.pdf

[85] United Nations, International Convention for the suppression of acts of nuclear terrorism, 2005, available from http://treaties.un.org/doc/db/Terrorism/english-18-15.pdf

[86] See http://www.un.org/terrorism/instruments.shtml. See also United Nations Office on Drugs and Crime, *Handbook on Criminal Justice Responses to Terrorism*, 2009, pp. 12-14. Available from http://www.unodc.org/documents/terrorism/Handbook_on_Criminal_Justice_Responses_to_Terrorism_en.pdf

[87] United Nations Security Council, Resolution 1373, Adopted by the Security Council at its 4385th meeting on 28 September 2001, S/RES/1373, available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement

[88] United Nations Security Council, Resolution 1566, Adopted by the Security Council at its 5053rd meeting, on 8 October 2004, S/RES/1566, available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/542/82/PDF/N0454282.pdf?OpenElement

[89] See K. Hardy and G. Williams, 'What is Terrorism? Assessing Domestic Legal Definitions,' *University of New South Wales Faculty of Law Research Series 2013,* February 2013, Working Paper 16. Available from http://law.bepress.com/unswwps-flrps13/16/

[90] Resolution 1566, adopted by the Security Council at its 5053rd meeting on 8 October 2004, S/RES/1566, para 3. Available from http://daccess-ods.un.org/TMP/4119834.89990234.html

"…criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism…"[91]

127. Resolution 1373 does not define terrorist acts but imposes a range of obligations on States to ensure they prevent and suppress the financing of such acts.

128. In response to the Monitor's question regarding whether there is practical consensus internationally on the definition of terrorism, the Law Council's view is that there is no such consensus. There appear to be a number of reasons why the international community has been unable to agree on a definition of terrorism. Central to these have been concerns by some States about the extent to which 'freedom fighters' in national liberation movements could be classified as terrorists; whether international rules on terrorism should be based on an enhanced understanding of the underlying causes of such behaviour;[92] a reluctance by some States to accept the guidance of international law; [93] and concerns that a universally accepted definition of terrorism would place limitations on sovereign power, which would result in States no longer being able to define terrorism according to their own rationale.[94]

129. The absence of a comprehensive UN definition of terrorism has resulted in several definitions being developed and implemented in legislation at the Member State level. A number of academics have analysed the definitions of terrorism around the world and have suggested that there is an established need for definitions of terrorism to be precise, not overly broad, and drafted consistently across comparable jurisdictions.[95]

The former UN Special Rapporteur, Martin Scheinin, has expressed concern that "the absence of a universal and comprehensive definition of the term may give rise to adverse consequences for human rights."[96] He has noted the importance of ensuring that "[i]n the absence of a universally agreed upon, comprehensive and concise definition of terrorism, counter-terrorism laws and policies must be limited to the countering of offences that correspond to the characteristics of conduct to be

[91] Resolution 1566, adopted by the Security Council at its 5053rd meeting on 8 October 2004, S/RES/1566, para 3. Available from http://daccess-ods.un.org/TMP/4119834.89990234.html
[92] A. Cassese, (2006). 'The Multifaceted Criminal Notion of Terrorism in International Law', *Journal of International Criminal Justice*, 4, p.935. DOI: 10.1093/jicj/mq1074
[93] See E. Herschinger, (2013). 'A Battlefield of Meanings: The Struggle for Identity in the UN Debates on a Definition of International Terrorism,' *Terrorism and Political Violence*, 25, p.186. DOI: 10.1080/09546553.2011.652318
[94] G. Fletcher, (2006). 'The Indefinable Concept of Terrorism', *Journal of International Criminal Justice*, 4, p.894.
[95] See for example, K. Hardy and G. Williams, 'What is Terrorism? Assessing Domestic Legal Definitions,' *University of New South Wales Faculty of Law Research Series 2013,* February 2013, Working Paper 16, p.80. Available from http://law.bepress.com/unswwps-flrps13/16/. See also, Martin Scheinin, *Report of the UN Special Rapporteur on the promotion an protection of human rights and fundamental freedoms while countering terrorism*, 28 December 2005, E/CN.4/2006/98, paras. 42 and 50. Available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/84/PDF/G0516884.pdf?OpenElement
[96] United Nations, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 28 December 2005, E/C.4/2006/98, p.8. Available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/84/PDF/G0516884.pdf?OpenElement

suppressed in the fight against international terrorism, as identified by the Security Council in its resolution 1566..."[97]

130. An issue with respect to the Australian definition of terrorist act that the Monitor has raised relates to the inclusion of "interference or destruction of electronic systems, systems to deliver essential Government services or used by essential public utilities, or transport systems."[98] The Law Council has previously raised this issue and the inclusion of property damage in its concerns with the definition.[99] This issue was also considered by the Monitor in his 2012 Annual Report, where he specifically addressed the concerns that had been raised by the former UN Special Rapporteur previously in relation to the breadth of the Australian definition of terrorist act in this regard.

131. However, the Monitor has not shared the UN Special Rapporteur's concerns in relation to the inclusion of serious impacts on electronic systems in the definition, finding the risk of any over-reach to be "mitigated by the link to subsection 100.1(3). This link excludes such action from being a terrorist act where it is done in the course of advocacy, protect, dissent or industrial action and is not intended to cause danger to life or limb."

132. A similar view was expressed by the former Independent Reviewer of Terrorism Legislation in the UK, Lord Carlile of Berriew Q.C in his 2007 report on his review of the UK's terrorism legislation. In finding that the inclusion of serious impacts on electronic systems in the definition of terrorism was justified, Lord Carlile stated that the inclusion in the definition of acts designed to seriously interfere with or disrupt an electronic system,

> …has the potential to include internet service providers, financial exchanges computer systems, controls of national power and water, etc. The huge damage to the economy of the nation, and the potential for injury as a result, are self-evident. This category too should be included in the definition. I have concluded that the provision remains justified.[100]

133. The Council of Europe Framework Decision on Combatting Terrorism takes a different approach to the inclusion of impacts on electronic systems; government services; public utilities and transport systems as terrorist acts by including them in the following forms in the list of acts defined as terrorist offences:

- causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed

[97] United Nations General Assembly, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Ten areas of best practice in countering terrorism*, 22 December 2010, A/HRC/16/51, p.14, available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/178/98/PDF/G1017898.pdf?OpenElement

[98] Bret Walker SC, *Independent National Security Legislation Monitor Annual Report*, 16 December 2011, p.54. Available from http://www.dpmc.gov.au/inslm/docs/INSLM_Annual_Report_20111216.pdf

[99] For example see Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills (April 2002); Law Council of Australia Submission to the Senate Legal and Constitutional Committee, Anti-Terrorism Bill 2004 (26 April 2004); Law Council of Australia Submission to the Senate Legal and Constitutional Committee, Anti-Terrorism Bill (No. 2) 2004 (15 July 2004); Law Council of Australia Submission to the Senate Legal and Constitutional Legislation Committee, National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010

[100] Lord Carlile of Berriew QC, *The Definition of Terrorism – A Report by Lord Carlile of Berriew QC, Independent Reviewer of Terrorism Legislation*, March 2007, para. 71, p.40. Available from http://www.official-documents.gov.uk/document/cm70/7052/7052.pdf.

platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

- *interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life.*[101]

134. In the Law Council's view, such an approach is preferable to the current approach in section 100.1 as it involves a more direct nexus between the impact on the relevant electronic system and the effect on human life than reliance on subsection 100.1(3) to exempt the relevant act from definition as a terrorist act. A similar conclusion can be drawn in relation to the subsection 100.1(2) inclusion of serious damage to property as a terrorist act unless the relevant exemption applies. Therefore, in response to the Monitor's question about whether terrorist acts should be defined to involve dangers to life and limb as opposed only to property or infrastructure damage, the Law Council's preference is for a direct reference to dangers to life and limb even in the context of property or infrastructure damage.

The definition includes threats of action

135. The definition of 'terrorist act' in section 100.1 is defined as an action or a threat of action which, amongst other things, causes serious physical harm, results in death, endangers life or causes serious property damage (see subsection 100.1(2)).

136. The problem with this definition is that it is almost impossible to conceive of how a mere threat of action, on its own and if not carried out, could cause serious harm, death, serious property damage or the like.

137. As well as unnecessarily broadening the scope of the definition, the confusion created by the inclusion of a threat of action as sufficient to constitute a terrorist act is likely to hinder prosecutions and increase the difficulties members of the public have in understanding the legislation.

138. The PJCIS recommended in its 2006 Review of Security and Counter-Terrorism Legislation that "the 'threat' of terrorist act be removed from the definition of terrorism and be dealt with as a separate offence.[102]

139. The Law Council has submitted that the reference to threat of action should be removed from the definition of terrorist act and threats to commit a terrorist act should be the subject of a separate offence provision. In that way, the peculiar fault elements of a threat offence could be properly addressed and an appropriate penalty set. A threat to commit an act is materially different from actually committing the act. So too, a threat to commit an act is different from an attempt, a conspiracy or an incitement to commit that act. Although it might be reprehensible, it is conduct of a different type that should be addressed separately.

[101] Council of Europe, Framework Decision on Combating Terrorism, 13 June 2002, 2002/475/JHA, Article 1, available from http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:164:0003:0007:EN:PDF

[102] PJCIS *Review of Security and Counter-Terrorism Legislation*, 2006 available at http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Documents/Government%20response%20to%20the%20review%20of%20security%20and%20counter-terrorism%20legislation.pdf

## Law Council recommendations regarding the definition of 'terrorist act'

140. In respect of the definition of 'terrorist act' in section 100.1 of the Criminal Code the Law Council recommends reforms to:

(a) Review the definition of 'terrorist act' to provide a more direct reference to dangers to life and limb in relation to acts that cause serious damage to property or that interfere with telecommunications or financial systems; and

(b) Remove the reference to 'threat of action' and other references to 'threat' from the definition of 'terrorist act' in section 100.1(1) and establish a separate offence relating to threats to commit a terrorist act.

## The 'financing a terrorist act' offences

141. Subsection 103.1(1) provides that a person commits an offence if:

(a) the person provides or collects funds; and

(b) the person is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.

Sub-section 103.1 (2) provides that a person commits an offence under subsection (1) even if:

(a) a terrorist act does not occur; or

(b) the funds will not be used to facilitate or engage in a specific terrorist act; or

(c) the funds will be used to facilitate or engage in more than one terrorist act

142. While there is a note in subsection 103.1(1), which states that intention is the fault element for the conduct described in paragraph 1(a), the offence effectively contains no requirement that the prosecution prove that a person charged had actual knowledge of circumstances indicating a connection between his or her conduct and a terrorist act or that the person intended to provide funds to be used to facilitate or engage in a terrorist act. Rather the relevant fault element of the offence will be satisfied if it can be shown that the person was reckless as to whether the funds he or she provided or collected would be used to facilitate or engage in a terrorist act.

143. When introducing this offence, the Government stated that section 103.1 implements article 2 of the Financing Terrorism Convention and paragraph 1(b) of Resolution 1373, and draws on the language used in those international instruments.[103]

144. Article 2 of the Financing Terrorism Convention, however, contains a requirement of specific intention when attributing criminal liability for the financing of terrorism. Article 2(1) provides that a person commits an offence if that person by any means directly or indirectly, unlawfully and *wilfully*, provides or collects funds *with the intention*

[103] Explanatory Memorandum to the *Suppression of Financing of Terrorism Bill 2002* (Cth) available at http://www.austlii.edu.au/au/legis/cth/bill_em/sotfotb2002453/memo1.html.

that they should be used or in the knowledge that they are to be used to carry out a terrorist act (emphasis added).

145. Further, paragraph 1(b) of Resolution 1373, provides that State parties shall criminalize the *wilful* provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories *with the intention* that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts (emphasis added).[104]

146. Accordingly, unlike the offence in section 103.1, both international instruments contain a clear requirement of specific intent in relation to the use of the funds.

147. The Law Council also expressed similar concerns about the introduction of the offence in section 103.2 of the Criminal Code in 2005.[105] Section 103.2 provides as follows:

(1) A person commits an offence if:

(a) the person intentionally:

(i) makes funds available to another person (whether directly or indirectly); or

(ii) collects funds for, or on behalf of, another person (whether directly or indirectly); and

(b) the first-mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.

(2) A person commits an offence under subsection (1) even if:

(a) a terrorist act does not occur; or

(b) the funds will not be used to facilitate or engage in a specific terrorist act; or

(c) the funds will be used to facilitate or engage in more than one terrorist act.

148. In its 2006 Review of Security and Counter-Terrorism Legislation, the PJCIS expressed concern with the breadth of the offences in section 103 and recommended that:

(a) section 103.1(a) be amended by inserting 'intentionally' after 'the person';

(b) recklessness be replaced with knowledge in paragraph 103.1(b); and

(c) paragraph 103.2(1)(b) be redrafted to make clear that the intended recipient of the funds be a terrorist.[106]

149. In its response to the recommendations contained in this report, the Government indicated that it did not support these recommendations.[107]

104 UN Security Council Resolution 1373 (2001) 28 September 2001 at para 1(b).
105 See Law Council of Australia Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into Anti-Terrorism (No 2) Bill 2005* (11 November 2005).
106 PJCIS *Review of Security and Counter-Terrorism Legislation* (Tabled 4 December 2006) Recommendation 21, note 16.

## Law Council recommendations regarding the 'financing a terrorist act' offences

150. In respect of Division 103 of the Criminal Code, the Law Council recommends reforms to:

(a) Amend section 103.1 by:

(i) inserting 'intentionally' after 'the person' in paragraph (a) and removing the note; and

(ii) replacing the term 'reckless' with 'has knowledge' in paragraph 103.1(1)(b); and

(b) Amend section 103.2 by replacing the term 'reckless' with 'has knowledge' in paragraph 103.2(1)(b).

## Financing terrorism offences under the Charter of the United Nations Act 1945

The general scheme of the UN Charter Act

151. The UN Charter Act enables Australia to give effect to certain decisions of the UN Security Council (the Security Council).

152. Part 3 allows the Governor-General to make regulations to give effect to certain Security Council decisions by:

(a) Proscribing persons or entities;

(b) Restricting or preventing: uses of, dealings with and making available assets; supplying, selling or transferring goods or services; procuring goods or services;

(c) Providing indemnities for acting in compliance or purported compliance with the regulations;

(d) Providing compensation for owners of assets; and

(e) Authorizing the making of legislative instruments.

153. The regulations under Part 3 may be enforced by penalties of not more than 50 penalty units and through injunctions which may only be granted on application by the Attorney-General.

154. Part 4 includes provisions for freezing of assets linked to terrorist activity. The scheme is based on proscribing persons, entities and assets. It includes offences in relation to 'freezable assets' such as holding, using or dealing with such assets or making them available to a proscribed person or entity other than in accordance with a

[107] Australian Government response to PJCIS Review of Security and Counter-Terrorism Legislation - December 2008, Tabled 4 December 2006, available at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsetoPJCISReviewofSecurityandCounter-TerrorismLegislation-December2008.

procedure authorised under the Act. 'Freezable assets' are assets owned or controlled.by a proscribed person or entity; listed assets; or asses derived or generated from the formerly described assets.

155. Part 5 provides offences for contravening or giving false or misleading information in connection with a UN sanction enforcement law, which has been declared as such by the Minister by legislative instrument.

156. Part 6 provides for the provision of information about compliance with UN sanction enforcement laws to Commonwealth entities and includes an offence of failing to comply with a requirement to provide the relevant information.

157. Part 7 provides for a general regulation making power.

Part 4 of the UN Charter Act

158. When it was first introduced, Part 4 of the UN Charter Act effectively brought the provisions of the *Charter of United Nations (Anti-Terrorism Measures) Regulations 2001* (Cth) into the principal Act.

159. Under Part 4, there are two ways that a person or entity can be proscribed: either by being listed by the Minister under section 15 or through regulations made by the Governor-General under section 18.

160. As outlined below, the Law Council holds concerns with the proscription process contained in Part 4 of the UN Charter Act and the offence provisions in sections 21 and 22. These provisions can have a significant impact on the rights of the proscribed persons or entities without providing them with adequate mechanisms to challenge the proscriptions or have them revoked. The provisions also make it an offence to make funds or assets available to such persons or entities.

*Listing by the Minister*

161. Under section 15 of the UN Charter Act, the Minister must list a person, entity or asset in the Gazette if satisfied of the 'prescribed matters'. These matters are determined by regulations made by the Governor-General, the *Charter of the United Nations (Dealing with Assets Regulations 2008* (Cth) (the Regulations).[108]

162. The Regulations provide that the Minister must list a person or entity if he or she is satisfied that the person or entity is mentioned in paragraph 1 (c) of Resolution 1373).

163. The Regulations further provide that a Minister may list an asset, or class of asset, if he or she is satisfied that the asset, or class of asset, is owned or controlled by a person or entity mentioned in paragraph 1 (c) of Resolution 1373. This paragraph requires States to:

"Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned

[108] *Charter of the United Nations (Dealing with Assets) Regulations 2008* available at http://www.comlaw.gov.au/Details/F2010C00191

or controlled directly or indirectly by such persons and associated persons and entities."[109]

164. The Regulations require the Department of Foreign Affairs and Trade (DFAT) to maintain a consolidated list of persons and entities which are *designated* persons or entities, including *proscribed* persons and entities listed under section 15 and proscribed assets listed under section 15. This list is available at

http://www.dfat.gov.au/icat/UNSC_financial_sanctions.html

165. It includes Al-Qaida and the Taliban as well as certain persons and entities in countries such as Iran, Iraq and Libya.

166. Subsection 15(5) of the UN Charter Act also provides some restriction on the scope of matters that the Minister must be satisfied of before listing a person or entity. These matters must be related to a decision that:

(a) The Security Council has made under Chapter VII of the Charter of the UN;

(b) Article 25 requires Australia to carry out; and

(c) Relates to terrorism and dealings with assets.

167. The main terrorism financing offences under Part 4 of the UN Charter Act are found in sections 20 and 21.

*Terrorism financing offences under the UN Charter Act*

168. Under section 20, an individual will commit an offence if they:

(a) hold a freezable asset; and

(b) use or deal with that asset;[110] or

(c) allow the asset to be used or dealt with;[111] or

(d) facilitate the use or dealing with the asset;[112] and

(e) the use of that asset is not in accordance with a notice under section 22 of the Act.[113]

169. Section 14 of the UN Charter Act defines a freezable asset as one that is:

(a) owned or controlled by a proscribed person or entity; or

[109] United Nations Security Council, Resolution 1373, Adopted by the Security Council at its 4385th meeting on 28 September 2001, S/RES/1373, available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement

[110] UN Charter Act, s.20(1)(i)

[111] UN Charter Act, s.20(1)(ii)

[112] UN Charter Act, s.20(1)(iii)

[113] Section 22 of the UN Charter Act provides that the owner or holder of a freezable asset may apply in writing to the Minister for permission to use or deal with the asset in a specified way. The owner or holder of an asset may also apply in writing to the Minister for permission to make the asset available to a proscribed person or entity specified in the application. The Minister may, by written notice: permit a freezable asset specified in the notice to be used or dealt with in a specified way; or permit an asset specified in the notice to be made available to a proscribed person or entity specified in the notice.

(b) a listed asset; or

(c) derived or generated from assets that are owned or controlled by a proscribed entity or person, or a listed asset.

170. Section 21 of the UN Charter Act makes it an offence to directly or indirectly make an asset available to a person or entity that has been proscribed by the Minister for Foreign Affairs (the Minister) under section 15 of the Act, or by the Governor-General under section 18.

171. Individuals who commit these offences face a maximum of 10 years' imprisonment and a fine of 2,500 penalty units or three times the transaction value (whichever amount is greater).

172. The penalty for bodies corporate includes a fine of 10,000 penalty units or three times the transaction value (whichever amount is greater).Case involving offences under the UN Charter Act.

Case law regarding the UN Charter Act

*R v Vinayagamoorthy & Ors*[114]

173. On 1 May 2007 Aruran Vinayagamoorthy and Sirajah Yathavan were charged with a number of offences under the Criminal Code relating to their alleged membership of, and support for, a terrorist organisation: the Liberation Tigers of Tamil Eelam (LTTE). In July 2007, Arumugan Rajeevan was also arrested and subsequently charged.

174. The three defendants were originally charged with the following offences:

(a) Being members of a terrorist organisation (section 102.3, Criminal Code)

(b) Making funds available to a terrorist organisation, knowing that it was a terrorist organisation (section 102.6(1), Criminal Code);

(c) Providing support or resources to a terrorist organisation, knowing that it would engage in a terrorist act (section 102.7(1), Criminal Code); and

(d) Making an asset available to a proscribed entity (section 21, UN Charter Act).

175. The Commonwealth Director of Public Prosecutions (CDPP) argued that the defendants directly or indirectly made money available to the LTTE and collected and sent between A$700,000 and A$1 million to the LTTE. In addition to this, Vinayagamoorthy was charged with making assets available to the LTTE - namely electronic components and boat design software. The prosecution argued that the electronic components were for the purpose of detonating bombs. The defendants argued that they had provided the equipment and funds purely for humanitarian purposes.[115]

176. Yathavan, Vinayagamoorthy and Rajeevan were committed to stand trial on 14 December 2007. On 6 March 2009 the prosecution withdrew the charges under the Criminal Code, but proceeded with the charges under the UN Charter Act. The prosecution withdrew the terrorist organisation charges because the Australian

[114] [2010] VSC 148
[115] See Sentas, V. (2010). 'Terrorist Organisation Offences and the LTTE: R v Vinayagamoorthy,' *Current Issues in Criminal Justice*, 22(1), p.162.

Government had not proscribed the LTTE as a terrorist organisation under the Criminal Code. Accordingly, it had to rely on the UN Charter Act as the LTTE was a proscribed entity under that Act.

177. At the time that the charges were laid the maximum penalty for the UN Charter Act offence was five years imprisonment. The penalty for this offence has since increased to ten years imprisonment.

178. In 2010, the defendants pleaded guilty to the offence under section 21 of the UN Charter Act.

179. Vinayagamoorthy was sentenced to two years' imprisonment but was released on a good behaviour bond for four years and Yathavan and Rajeevan were each sentenced to one year and released on a good behaviour bond for three years. Vinayagamoorthy's sentence was higher on account of his provision of electronic components to the LTTE.

## Law Council Concerns with Part 4 of the UN Charter Act

180. The Law Council has a number of concerns with the offences under Part 4 which are based on proscription of persons, entities and assets. These concerns relate to: the lack of a definition of 'terrorism' in the UN Charter Act; the discretion invested in the Minister to determine the duration of a listing of a person, entity or asset; and the lack of robust, independent review of the proscription process.

Absence of definition of 'terrorism'

181. Despite the heading of Part 4 being "Security Council decisions that relate to terrorism and dealing with assets" and references to terrorism in sections 15, 16 and 18, the UN Charter Act contains no definition of 'terrorism'. The Regulations also contain no definition of terrorism, although regulation 20 refers to the Minister listing a person, entity or asset if satisfied that the person or entity is mentioned in paragraph 1 (c) of Resolution 1373 or that the asset or class of assets is controlled by such a person or entity. As noted above, the paragraph provides for the freezing of funds of persons associated with terrorist acts.

182. The lack of a definition of terrorism gives rise to a broad discretion to be exercised by the Minister as to whether a decision made by the UN relates to 'terrorism and dealing with assets'. Despite the focus of the Regulations on Resolution 1373, which mentions terrorist acts, the absence of a definition of 'terrorism' in the legislation means that the potential scope of section 15 remains unclear.

183. Therefore, in response to the Monitor's question regarding the requirement in the Regulations for decisions in relation to freezing assets etc merely relate to terrorism being too loose, the Law Council considers this to be the case and that the inclusion of a definition would appropriately narrow the scope of Ministerial discretion in relation to such decisions.

184. The Law Council suggests that the scope of the Minister's power under section 15 should be clarified by adopting a definition of 'terrorism' that aligns with that outlined

by the previous UN Special Rapporteur,[116] or that aligns with the definition of 'terrorist act' in the Criminal Code as amended in line with the recommendations above

Minister's Discretion to Determine the Duration of a Listing

185. Section 15A of the UN Charter Act addresses the duration of a listing made under section 15. Generally, the maximum duration of such a listing will be three years, unless the Minister makes a declaration in writing that a specific listing continues to have effect. Such a declaration can only be made if the Minister is satisfied on reasonable grounds of the matters prescribed for the purposes of making the original listing. However the section also provides that such a declaration is not a legislative instrument, and is therefore not subject to disallowance by Parliament.

186. Section 16 states the Minster *may* revoke a listing by a notice in the Gazette if the Minister is satisfied that it is no longer necessary to give effect to the relevant Security Council decisions (emphasis added). It provides that the Minister may revoke the listing either at the Minister's own instigation or on application by the listed person or entity.

187. In response to the Monitor's question as to whether the Minister should be required to revoke a listing when satisfied it is not longer necessary, the Law Council considers that the Minister should be required to revoke a listing in these circumstances. Such a provision would increase the accountability and fairness of the revocation process.

188. Listings and proscriptions are also automatically revoked when the UN decision no longer binds Australia.[117]

Review of Ministerial Listings

189. Section 17 of the UN Charter Act enables a person or entity listed in accordance with section 15 to apply to the Minister have the listing revoked. A listed person or entity may write to the Minister setting out the reasons why a listing should be revoked. According to the Explanatory Memorandum for *Suppression of the Financing of Terrorism Bill 2002* (Cth) (SFT Bill), the sort of information that should be provided is evidence that the person or entity is not associated with terrorist activities.[118]

190. The Law Council supports a mechanism for revocation of a listing but notes that section 17 is limited in a number of respects. For example, under subsection 17(3) the Minister is not required to consider an application by a listed person or entity if the listed person or entity has made an application under this section within one year before the current application.

191. In response to the Monitor's question regarding whether the once yearly obligation for the Minister to consider a listing revocation gives too much discretion or creates undesirable flexibility, the Law Council considers that this limitation is too inflexible and that Minister should be required to consider applications for revocation without this limitation.

[116] Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, *Australia: Study on Human Rights Compliance while Countering Terrorism*, A/HRC/4/26/Add.3 (14 December 2006), [10]-[16

[117] UN Charter Act s19.

[118] See Explanatory Memorandum to the SFT Bill, p 17, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1485

192. Another limitation of the Ministerial review process is that there is no provision for the owner of assets to ask the Minister for revocation of a decision to have the assets listed.

193. It would appear that the decision of the Minister that he or she is satisfied that the prescribed matters have been met in relation to a particular listing made under section 15 of the UN Charter Act is subject to judicial review under the ADJR Act. This allows for the review of 'decisions of an administrative character' on grounds such as denial of natural justice; failure to take into account relevant considerations; taking into account irrelevant considerations; improper purpose; and error of law. As noted in the Bills Digest to the SFT Bill, the scope of this review may be limited by the drafting of section 15 and the Regulations, which sometimes require the Minister to be 'satisfied on reasonable grounds', and at other times require the Minister to merely be 'satisfied' of certain matters.[119]

194. The Law Council also notes that the Regulations would also be subject to disallowance by Parliament. However Parliamentary scrutiny of regulations is generally not as robust as that of primary legislation.

195. In response to the Monitor's question as to whether there should be wider judicial review of listing decisions including revocation applications, the Law Council considers that there should be improved judicial review mechanisms to provide greater fairness and transparency in the revocation process. The Law Council suggests that consideration be given to an alternative approach that would provide independent oversight of the Minister's decision to list an entity, person or asset. Guidance may be gained from the Model Legislative Provisions on Measures to Combat Terrorism, prepared by an Expert Working Group on Legislative and Administrative Measures to Combat Terrorism of the Commonwealth Secretariat.[120]

196. This approach would:

(a) permit a specified entity to make an application for the revocation of a listing;

(b) require the Minister to provide reasons for any decision to refuse the application;

(c) permit the applicant to apply to a judge for a review of that decision;

(d) provide a procedure for determining the application that would:

- allow for the judge to hear all or part of the relevant evidence or information in the absence of the applicant or any counsel representing the applicant, if the judge is of the opinion that the disclosure of the information would be prejudicial to national security or endanger the safety of any person;

- provide the applicant with a statement summarising the information available to the judge, so as to enable the applicant to be reasonably informed of the reasons for the decision, without disclosing any

[119] For further discussion of this issue see the Bills Digest to the *Suppression of Financing of Terrorism Bill 2002*, available at http://aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1485

[120] A copy of this model legislation is available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7b32AF830D-F83A-4432-8051-750C789531A5%7d_final_terrorism_law.pdf, see in particular Part VIII.

information the disclosure of which would, in the judge's opinion, be prejudicial to national security or endanger the safety of any person;

- provide the applicant with a reasonable opportunity to be heard; and
- determine whether the decision is reasonable on the basis of the information available to the judge and, if found not to be reasonable, make an order compelling the Minister to revoke the listing made.

197. Consideration could also be given to a system of regular review by the PJCIS of all the listings made under section 15 to determine whether there are still reasonable grounds, for any such listing to continue to apply, and if it determines that there are no such reasonable grounds, recommend to the Minister, the revocation of the listing.

Proscription by regulations made by the Governor -General

198. Section 18 of the UN Charter Act permits the Governor-General to make regulations to proscribe a person or entity if that person or entity is identified in a relevant UN Security Council decision. Subsection 18(3) permits such regulations to incorporate lists of persons or entities identified by the UN. Such regulations may incorporate such lists as they are updated.

199. The need for this provision is outlined in the Explanatory Memorandum to the SFT Bill as follows:

"Proposed section 18 provides a means of proscribing persons and entities by reference to a decision of the United Nations Security Council that identifies persons and entities to which the decision relates. Security Council decisions often list the persons or entities against whom sanctions should be applied. Enabling those lists to be directly incorporated by the regulations as they exist from time to time is more expedient than requiring the Minister to list each person and entity by notice in the Gazette. However, the ability for the Minister to list persons and entities by notice in the Gazette is necessary to cover Security Council decisions, like Resolution 1373, which do not specifically identify persons or entities to which sanctions should be applied."[121]

200. The Law Council holds similar concerns with this method of proscription as that described above. Subparagraph 18(2)(c) refers to 'terrorism', which as noted above, is not defined in the UN Charter Act.

201. The Law Council is also concerned that unlike the Ministerial listing, there is no mechanism to apply for revocation of a proscription under section 18. There are also no limits placed on the duration of listings made under section 18, outside of section 19 which provides that the regulations cease to have effect when Article 25 of the Charter of the United Nations ceases to require Australia to carry out the UN decision.

202. Although regulations proscribing persons or entities under section 18 would be subject to disallowance by Parliament, they are also unlikely to attract the robust scrutiny that generally applies to primary legislation.

[121] See Explanatory Memorandum to the SFT Bill, p 17, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1485

Offence Provisions

203. The Law Council also holds concerns with the two offence provisions in sections 20 and 21 of the UN Charter Act.

204. These offence provisions were introduced to comply with Australia's obligations under Resolution 1373 to freeze assets and the obligations under the Financing Terrorism Convention to forfeit or confiscate certain assets or funds connected to terrorism activities.

205. Section 20 prohibits a person who holds a 'freezeable asset' from using or dealing with the asset or otherwise allowing or facilitating its use or dealing unless this is in accordance with a notice under section 22.

206. A person will not commit an offence if the use or dealing has been authorised by the Minister under section 22. Section 22 provides that the owner of an asset may apply in writing to the Minister for permission to make the asset available to a proscribed person or entity or, to use or deal with the asset in a specified way. The Minister, or a delegate, may grant permission by written notice. The notice may be subject to conditions and must be given to the owner of the asset as soon as practicable after it is made. According to the Explanatory Memorandum to the SFT Bill it was intended that section 22 would only be used in exceptional circumstances, for example, to protect the rights of third parties.[122]

207. It is also a defence if the person can show that the use or dealing was solely for the purpose of preserving the value of the asset. However the burden of proving that this was the purpose of the dealing rests with the defendant (subsection 20(3)).

208. Section 21 prohibits a person from directly or indirectly making assets available to proscribed persons or entities if the action is not in accordance with a notice under section 22. 'Assets' are defined broadly in section 14 as including 'property or any kind' as well as legal documents or instruments evidencing title to property.

209. Sections 20 and 21 are based on the now superseded regulations 9 and 10 of the *Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001* (Cth) but with increased penalties.

210. Both offences involve the applications of section 15.1 of the Criminal Code giving them some extra-territorial application. This means that Australian citizens or bodies corporate who deal in freezable assets or make assets available to proscribed entities in foreign countries will be liable for prosecution.

*Fault elements*

211. Sections 20 and 21 of the UN Charter Act do not specify a fault element for each element of the offences, although strict liability applies to certain elements, such as the circumstance that the use or dealing was not in accordance with a notice under section 22.

212. Section 5.6 of the Criminal Code states that where there is no fault element specified for a physical element that consists of:

(a) Conduct, the fault element of intention applies; or

[122] See Explanatory Memorandum to the SFT Bill, p 20, available at http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1485

(b) A circumstance or a result, the fault element of recklessness applies.

213. In *R v Vinyaagamorthy and Ors,*[123] Coghlan J held that the fault element of recklessness applied to the relevant physical elements in section 21. It followed that it was sufficient for the prosecution to show that the accused were aware of a substantial risk of proscription and that such a risk was unjustifiable. Although Coghlan J observed that in the circumstances of the case, on the question of moral culpability, the difference between actual knowledge and recklessness was 'not all that significant', the Law Council considers that knowledge that a person or entity is proscribed should be required for this offence and the section 20 offence.

214. The Law Council also considers that the application of strict liability to the circumstance that the use or dealing was not in accordance with a notice under section 22 should be replaced with a knowledge requirement as in fraud cases as noted by Dr Neal at the hearing on 22 April 2013.[124]

*Particular considerations for bodies corporate*

215. Subsections 20(3C) to (3F) and subsections 21(2C) to (2E) apply to bodies corporate. The Bills Digest to the SFT Bill suggested that these provisions:

"…would seem to require institutions such as banks to thoroughly examine their accounts and have appropriate systems in place to ensure that they do not permit any dealings with freezable assets or make assets available to proscribed entities."[125]

216. This is recognised in subsections 20(3E) and 21(2E) in providing defences to the offences in section 20(3C) and 21(2C), which create strict liability offences for bodies corporate in relation to the above conduct and circumstances. It is a defence for a body corporate if it proves that it took reasonable precautions, and exercised due diligence, to avoid contravening the provision.

217. As Dr Neal noted at the public hearing on 22 April 2013, the availability of this defence to bodies corporate means that they are treated differently under the UN Charter Act from individuals and that this infringes the principles underlying Commonwealth criminal law which require that bodies corporate be criminalised in ways which are as closely analogous to individuals as possible.

*Offences Broader than International Obligations*

218. The Law Council is concerned that the offences in sections 20 and 21 of the UN Charter Act are broader in scope than is required to fulfill Australia's obligations under the Financing Terrorism Convention and Resolution 1373.[126]

219. Article 8 of the Convention for the Suppression of the Financing of Terrorism requires State Parties to:

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[123] [2010] VSC 148

[124] See Transcript of Proceedings, Independent National Security Legislation Monitor, Public Hearing, 22 April 2013, p 44, available at http://www.dpmc.gov.au/inslm/docs/inslm-public-hearing-2013-04-22.pdf

[125] Bills Digest to the SFT Bill, p 15 available at http://aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1485

[126] United Nations Security Council, Resolution 1373, Adopted by the Security Council at its 4385th meeting on 28 September 2001, S/RES/1373, available from http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement

"…take appropriate measures, in accordance with its domestic legal principles, for the identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing the offences set forth in article 2 as well as the proceeds derived from such offences, for purposes of possible forfeiture."

220. Paragraphs 1(c) and (d) of Resolution 1373 require States to:

"Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities."

"Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons."

221. While these obligations are broadly expressed, they do contain important limiting features that the Law Council suggests should be reflected in the offences in the UN Charter Act. For example, there is a requirement that there be a certain nexus between the freezing of funds or assets, or the prohibition on dealing with funds or assets and the commission of terrorist acts. This would be better reflected in the UN Charter Act if the term 'terrorism' was defined so that there remained at all times a clear link between the listed persons and entities and the commission or facilitation of terrorism. Independent oversight and review of the listing processing under the UN Charter Act would also reinforce this nexus.

222. The obligations under Resolution 1373 also imply that the person who possesses or is dealing with the funds or assets intends to make the funds or assets available to 'persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities', or at least has knowledge that the funds or assets may be used for this purpose.

223. This conclusion is re-enforced by Article 2 of the Financing Terrorism Convention which provides that:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and *wilfully*, provides or collects funds *with the intention that they should be used* or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. (emphasis added).

224. As noted above, the offences in sections 20 and 21 of the UN Charter Act currently employ the fault elements of recklessness for the relevant physical elements. The Law Council suggests that these offences should be amended to reflect a requirement of knowledge or intention that the funds or assets would be used for one of the purposes prohibited under the Financing Terrorism Convention or Resolution 1373.

225. For example, section 21 could be amended to provide that an individual commits an offence if he or she, directly or indirectly, makes an asset available to a person or entity in circumstances where he or she knows or ought reasonably to known that the person or entity to whom the asset is made available is a proscribed person or entity; and the making available of the asset is not in accordance with a notice under section 22.

226. The Law Council also notes that Australia's obligations under the Financing Terrorism Convention and Resolution 1373 must be implemented in accordance with Australia's obligations under other conventions to which it is a party, including human rights conventions.[127] The former Special Rapporteur stated that:

> "…the prohibition of terrorist conduct must be undertaken by national or international prescriptions of law. To be 'prescribed by law' the prohibition must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct. Terrorism offences should also plainly set out what elements of the crime make it a terrorist crime. Similarly, where any offences are linked to "terrorist acts", there must be a clear definition of what constitutes such acts. [128]

227. For these reasons, the Law Council suggests that the scope of the offences in section 20 and 21 should be clarified by addressing the absence of a definition of 'terrorism' in the UN Charter Act and by ensuring adequate independent review of the discretion invested in the Minister to list and the Governor-General to make regulations listing persons, entities and assets for the purposes of these offences.

Unintended Consequences of Asset Freezing

228. At the time the *Suppression of the Financing of Terrorism Bill 2002* (Cth) was introduced, there was discussion at the inquiry into the bill by the Senate Committee on Legal and Constitutional Affairs and in the Bills Digest to the SFT Bill about an instance where the asset freezing powers conferred by the previous regulations had been mistakenly applied. Evidence given to the Committee revealed that the Commonwealth Bank (CBA) froze the bank accounts of a Melbourne music business for 26 days solely because the business shared its name with a Peruvian terrorist organisation - the Shining Path.[129]

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[127] See for example 'Promotion and Protection of Human Rights', Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin (28 December 2005), E/CN.4/2006/98 available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/168/84/PDF/G0516884.pdf?OpenElement

[128] Ibid at para [46].

[129] See Senate Committee on Legal and Constitutional Affairs, Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2002-04/terrorism/index.htm; See also Bills Digest to the SFT Bill, pp 15-16, available at http://aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r1485;

229. The Minister listed the Shining Path as a proscribed entity in the Government Gazette on 21 December 2001. Following the gazettal, the CBA notified the AFP that it had an account matching the name of the proscribed entity. The AFP informed the bank that it was a match in name only and that it was up to the bank to decide whether they would deny access to the account.[130]

230. The experience in this situation was said to highlight the need for improved administrative arrangements, or perhaps an amendment to the Bill, to deal with cases of mistaken identity more quickly. For example, the Senate Committee expressed the view that:

"The Committee has serious concerns about the impact on individuals and businesses whose assets may be incorrectly frozen merely because their name is similar to one that is gazetted by the Minister for Foreign Affairs as being a .terrorist organisation. The Committee concerns are reinforced by the fact that the proposed legislation does not contain provisions that address the unfortunate situation that occurred with the Shining Path business in Melbourne."

"The Committee considers that provision must be made, either by way of an amendment to the Bill or under Regulations, whereby the AFP are contacted before action is taken to freeze an asset, to ascertain if there is a possible match between the proscribed person or entity and the owner of the asset. The Committee also considers that where assets are frozen, the holders of those assets must be advised, in writing, as soon as possible and their rights and obligations explained."[131]

231. This led the Committee to recommend that:

(a) provision be made, either by way of an amendment to the *Suppression of the Financing of Terrorism Bill 2002* or under regulations, that before any decision is taken to freeze assets in respect of a proscribed person or entity, the Australian Federal Police set an appropriate course of action in consultation with the relevant financial institution or institutions before any asset is frozen; and

(b) once action has been taken to freeze an asset, the owner of assets must be advised in writing as soon as possible and their rights and obligations explained.[132]

232. The Regulations now include a procedure for a person who holds an asset that he or she suspects may be a controlled asset to request the assistance of the AFP to determine whether or not the asset is owned or controlled by a designated person or entity.[133] The Regulations also outline what a person who is holding an asset must do if the person forms an opinion that: the asset is a controlled asset; or the asset, having been a controlled asset, or having been previously treated by the person as a controlled asset, is not, or is no longer, a controlled asset. This includes notifying the AFP.[134]

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[130] Ibid
[131] Report of the Senate Committee on Legal and Constitutional Affairs, Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills - paras 4.46-4.47 available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2002-04/terrorism/index.htm
[132] Ibid, Recommendation 7.
[133] Regulation 41
[134] Regulation 42

## Law Council's Recommendations in relation to Part 4 of the UN Charter Act

233. The Law Council recommends the following reforms to Part 4 of the UN Charter Act:

(a) that the scope of the powers under section 15 and section 18 be clarified by adopting a definition of 'terrorism' that aligns with internationally accepted definitions of 'terrorist act', such as that outlined by the UN Special Rapporteur or that aligns with the definition of 'terrorist act' in the Criminal Code as amended in line with the recommendations above;

(b) that consideration be given to an alternative approach to proscribing persons, entities and assets that would provide judicial oversight of the Minister's decision to list an entity, person or asset, for example by allowing a judge of to hear an application for review of a decision not to revoke a listing;

(c) that consideration be given to a system of regular review, for example by the Parliamentary Joint Committee on Intelligence and Security, of all the listings made under section 15 to determine whether there are still reasonable grounds for any such listing to continue to apply, and where it determines that there are no such reasonable grounds, recommend to the Minister, the revocation of the listing; and

(d) that the offences in sections 20 and 21 of the UN Charter Act be amended to include a requirement of knowledge or intention that the funds or assets would be used for one of the purposes prohibited under the Convention or Resolution 1373; and

(e) that the provisions relating to defences for bodies corporate under the UN Charter Act be reviewed for consistency with the provisions relating to individuals.

## Conclusion

234. The Law Council has a number of concerns with the process for proscription of terrorist organisations; the grounds for proscription and the processes for review of proscription under the Criminal Code. The Law Council considers that reforms are necessary in relation to narrowing the scope of the definition of a terrorist act and for improving accountability, fairness and transparency in relation to the proscription of terrorist organisations under the Criminal Code.

235. The Law Council is also concerned about the broad scope of the offences relating to receiving funds from, making funds available to or collecting funds on behalf of terrorist organisations. The Law Council considers that reforms are necessary to narrow the scope of these offences and to facilitate the ability of legal practitioners to rely on a relevant exemption from committing an offence if they provide legal assistance to people charged with terrorist organisation offences or seeking assistance to comply with relevant laws.

236. The Law Council is also concerned with the complexity and broad scope of the offences of providing support to a terrorist organisation under the Criminal Code and

considers that reforms are necessary to clarify and narrow the scope of these offences.

237. The Law Council is concerned with the lack of a definition of terrorism in the UN Charter Act and regulations made pursuant to that statute. It is also concerned about the broad scope of executive discretion in relation to proscribing persons, entities and assets under that legislation and the limited scope of the discretion to revoke such proscriptions. It considers that reforms are necessary in this regard.

238. The Law Council is also concerned about inappropriate fault elements in offences under the UN Charter Act and the scope of these offences. It is also concerned about provisions applying to bodies corporate. It also considers that reform of these provisions is necessary

239. The Law Council's recommendations aim to improve the fairness, transparency and accountability of the financing terrorism regimes under the Criminal Code and the UN Charter Act while recognizing the need for and Australia's obligations to criminalise terrorism financing related activities. The Law Council hopes that its recommendations are of assistance to the Monitor in this regard.

## Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.