



Australian Government

Independent National Security Legislation Monitor

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7th November 2013

BRET WALKER SC

**ONE NATIONAL CIRCUIT
BARTON ACT**

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BRET WALKER SC

ONE NATIONAL CIRCUIT
BARTON ACT

7th November 2013

The Hon Tony Abbott MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister

I present herewith my annual report for the period 1 July 2012 to 30 June 2013.

The preparation of an annual report by this office is required by section 29 of the *Independent National Security Legislation Monitor Act 2010* (Cth). The report is unclassified and is suitable to be laid before both Houses of Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Bret Walker'.

Bret Walker

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CHAPTER I

SUMMARY AND GENERAL COMMENT

I.1 Annual review

The year of work reported as follows attempted to cover the salient aspects of the CT Laws¹ that had been noted in the INSLM's First Annual Report but not reviewed in the INSLM's Second Annual Report. The exercise has not been exhaustive, leaving certain areas to be addressed in a report tentatively scheduled for about April 2014. Although reasonable minds may differ, the view of the INSLM is that those remaining matters are very much less pressing, partly because of the unproblematical nature of the powers and regulation comprising them, and partly because there are no empirical data arising from actual use of them.

The statutory framework governing this annual review is set by the *Independent National Security Legislation Monitor Act 2010* (Cth) ("INSLM Act") and is described in Chapters I and II of the INSLM's First Annual Report and Chapter I of the INSLM's Second Annual Report.

By and large, the cooperation and engagement of officers of Commonwealth departments and other agencies with the work of the INSLM during the year covered by this report have been exemplary. Certain deficiencies in recording systems are noted below. They are not such as to arouse major concern, although they should be rectified.

The continued involvement of scholarly and civil society contributors, directly and indirectly, to the work of the INSLM should be noted, with my gratitude.

The recommendations made in this Report by the INSLM concerning Australia's CT Laws are set out below, following the discussion, consideration and conclusions explaining each of them. They are collected in **Appendix A**.

Another year's inevitably selective bibliography comprises **Appendix B**.

¹ Being those listed in Appendix 1 of the INSLM's First Annual Report.

A record of the consultations, hearings, and other attendances by the INSLM and for the purposes of this annual review is contained in **Appendix C**.

This year, not all hearings were directed by the INSLM to be held in private, but by far most of them were, as in previous years. As before, the reason for this exercise of the INSLM's statutory power to direct hearings to be private was in all cases because operationally sensitive information could not conveniently be quarantined from the kind of discursive and somewhat spontaneous discussion that was found to be the best way of investigating the experience of those being interviewed by the INSLM.

I.2 Summary

Chapter II describes the not completely straightforward international setting in which Australia is obliged to have legislation to counter terrorism financing.

Chapter III deals with the important provisions of the *Charter of the United Nations Act 1945* (Cth) ("**UN Charter Act**"), being part only of such legislation. The many detailed recommendations made in it are largely directed to enhancing powers (including offence provisions) so as to produce a better fit of these provisions with the other mainstream CT Laws.

Chapter IV deals with offences under the *Criminal Code Act 1995* (Cth) ("**Criminal Code**") concerned with financing etc terrorism, and in particular, the system of listing, designation or proscription of terrorist organisations. The system should be streamlined so as to permit the Attorney-General to act more expeditiously than is presently possible in light of practice under the relevant inter-governmental agreement. The controversial approach of listing only part of an organisation as terrorist should stop: an organisation has the character of being terrorist or it does not. Where there are presently partial listings, consideration should be given to replacing them with listings of the whole of those organisations as terrorist organisations.

Chapter V questions the design of the Criminal Code offences concerning associating with terrorist organisations. Exceptions based on close family or public religious associations should not be available to remove criminal liability. But the relevant provisions should provide an exception for humanitarian activities under the aegis of respected organisations such as the Red Cross.

Chapter VI doubts the efficacy of our terrorism financing legislation, not so much by reason of defects in design as because there are no persuasive empirical data. We do not really know whether any terrorist activities anywhere have been constrained by Australia's rarely applied terrorism financing laws.

Chapter VII examines the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ("NSI Act"). On balance, it is a worthwhile contribution to meeting the perennial challenge of reconciling the public interest in the proper administration of justice and the public interest in national security. The improvements recommended, while considered valuable by the INSLM, are not fundamental – except that which recommends its extension to all classes of proceedings in which national security considerations with respect to Australia's counter-terrorist activities may arise.

I.3 Statutory conclusions

Pursuant to para 29(1)(a) of the INSLM Act, I report that I have reviewed the operation, effectiveness and implications of the CT Laws and related laws, being those specifically discussed below, as required by para 6(1)(a) of the INSLM Act. Pursuant to the same duty, I have also reviewed whether those laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or national security, and remain necessary, as required by para 6(1)(b) of the INSLM Act.

Specific shortcomings with recommendations for improvements are identified in relation to some provisions of these laws, further below. It is my opinion as the INSLM that those recommendations should be implemented in order to give the CT Laws the effectiveness that is desirable.

Subject to that important qualification expressed immediately above, I report that the CT Laws covered by the year of work recorded in this Report are generally satisfactory in terms of the statutory yardsticks noted above.² Thus, I answer the questions raised by para 6(1)(b) in the affirmative.

I also report that I found nothing in this year of work to suggest that the CT Laws were being used for matters unrelated to terrorism and national security, being the question the INSLM is required to address under para 6(1)(d) of the INSLM Act.

² The particular meaning given by the INSLM to the notion of necessity of the CT Laws remains as set out and discussed in Chapter I of the INSLM's Second Annual Report.

I.4 A provisional observation

Although the INSLM Act could be read as if every year a complete and equally detailed review of every aspect of the CT Laws would succeed the previous years' reports, for the reasons given in the INSLM's First and Second Annual Reports this is not practically possible. First, the application in actual cases or incidents of the CT Laws depends on the occurrence of events (including investigations), which do not follow any timetable. Second, Australia has been relatively very fortunate in avoiding so far the kind of emergencies that terrorism undoubtedly threatens.

Third, the questions that the INSLM is required to address about the CT Laws involve value judgements. The facts of the administration and exercise of the powers and authorities under the CT Laws, that would provoke and inform those judgements, change with time and experience. Fourth, considering the effectiveness and appropriateness of the CT Laws is not best carried out by a solitary person. As I have recorded previously, and again in this Report, officers of the Commonwealth and many scholars and other commentators, as well as my professional colleagues, are essential sources of experience, opinion and testing, in carrying out the INSLM's statutory functions. That exposure and consideration takes time.

For these reasons, and in this sense, the three INSLM's Annual Reports to date are cumulative, intended to be understood together. In that context, given the continued level of terrorist threat,³ it is appropriate to note the following examples of previous recommendations (all in the INSLM's Second Annual Report) to enhance the CT Laws with respect to their effectiveness in countering terrorism.

Recommendation II/4 was for consideration of authorizing control orders against persons convicted of terrorism, after their release from any imprisonment to which they have been sentenced, if they are shown to have been unsatisfactory with respect to their rehabilitation and continued dangerousness. The intention was to make available a form of protection against the threat posed by such proven offenders, upon their release into the community. The proposal was for a much more simply obtained form of control order than is presently the case, including for such proven offenders. It drew on established analogues with respect to recalcitrant sexual offenders. When the recommendation was made, there were about ten terrorist convicts already released, and about thirteen still imprisoned, of whom about three are quite likely to be released in the next five years.

³ See pp2-4 of ASIO's *Report to Parliament 2012-2013* for a description of the threat of terrorism to Australia.

Indirect support for such an approach may be seen in the following UK experience.

The Court of Appeal of England and Wales has considered notification requirements (imposed for 10 years from the date of release from imprisonment) on convicted terrorists. The Court held the notification requirements⁴ to be appropriate and not disproportionate, and upheld them as compliant with the European Convention on Human Rights.⁵ The Court held that the scheme is not disproportionate when set against the legitimate aim of the prevention of terrorism and considering “the relatively moderate intrusion caused by the interference with the private lives of convicted terrorists”⁶ The Court held that terrorism offences fall into a special category and that “even if it is the case that there may be exceptional cases [where a terrorist offender can be said to pose] “no significant future risk”, their possible existence does not preclude a general requirement of relatively moderate interference in a context such as this”.⁷

The Court held it was “important to keep in mind the gravity of the disorder or crime which is being sought to be prevented” finding that terrorism offences have unique features which compound concern (acts committed by someone motivated by extreme political or religious fanaticism) and if anything calls for a precautionary approach it is counter-terrorism.⁸

The INSLM’s recommendation was made on 20th December 2012. Nothing has come to the attention of the INSLM about any governmental or official response to it.

Recommendation IV/1 was to lower the requirement for the issue of ASIO questioning warrants, so as to eliminate the excessive last resort test and replace it with the satisfaction of the Attorney-General and the issuing authority that the issue was reasonable in all the circumstances.

Again, the INSLM has heard nothing about a governmental or official response to this suggestion. It may be that no opportunity to obtain intelligence has been lost by the last resort test remaining the law, but that would hardly justify leaving the position as it is, given the unpredictable urgency with which such occasions are apt to arise.

⁴ The notification requirements are extensive and include notification to police of a range of personal information including home address, travel plans etc and the person must make the notification in person at a police station and must allow the police to take his or her fingerprints or photographs when attending the police station. See secs 47-52 of the *Counter-Terrorism Act 2008* (UK)

⁵ *R (Mohamed Irfan) v Secretary of State for the Home Department* [2012] EWCA Civ 1471

⁶ [2012] EWCA Civ 1471 per Maurice Kay LJ at [14] (Munby and Tomlinson LJ agreeing)

⁷ *Ibid*

⁸ [2012] EWCA Civ 1471 at [12]-[13]

Recommendation VI/3 was for the exclusion from the definition of “terrorist act” of conduct governed by international humanitarian law concerning armed conflict. In effect, it would ensure the plain impossibility of terrorism being alleged against soldiers, including Australian soldiers. (Such persons being, of course, subject to the relevant laws of war including Australia’s own legislation with respect to war crimes and crimes against humanity.)

A similar view has been expressed by the INSLM’s counterpart in the UK, Mr David Anderson QC, who is the statutory Independent Reviewer of Terrorism Legislation. In turn, the UK Independent Reviewer’s concerns and suggestions to this effect were expressly noted in the unanimous reasons of the UK Supreme Court in *R v Gul* [2013] UKSC 64 at [61], [62]. Their Lordships expressly noted the UK Independent Reviewer’s mention of the INSLM’s recommendation. The suggestion conveyed by it was one of those that their Lordships regarded as meriting “serious consideration”.

Again, there is no governmental or other official response to this recommendation known to the INSLM.

It should be said that the three recommendations noted above are not unique in the lack of response – there has been no apparent response to any of the twenty-one recommendations made on 20th December 2012 by the INSLM (nor indeed to any of the forty-seven recommendations made by the COAG Review of Counter-Terrorism Legislation delivered on 1st March 2013).

The functions of the INSLM go no further than review, report and recommendation. The INSLM Act was enacted explicitly in recognition of the grave threat of terrorism and the significance of widespread concerns that the best balance be struck by Australia’s legislation to counter terrorism. When there is no apparent response to recommendations that would increase powers and authority to counter terrorism, some scepticism may start to take root about the political imperative to have the most effective and appropriate counter-terrorism laws. That would be, in the opinion of the INSLM, a regrettable atmosphere in which future and continued assessment and improvement of Australia’s CT Laws are undertaken.

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Again, the essential contribution of Teneille Elliott, my Adviser, to the year of work recorded in this Report, not least with respect to the Report itself, has been of the very highest order. I repeat my deep gratitude.

CHAPTER II

AUSTRALIA'S INTERNATIONAL OBLIGATIONS TO COUNTER TERRORISM FINANCING

II.1 Introduction

The primary sources of Australia's international obligations are the *International Convention for the Suppression of the Financing of Terrorism* (“**Terrorism Financing Convention**”) (New York, 1999), (ratified by Australia on 26th September 2002); United Nations Security Council Resolution 1373 adopted on 28th September 2001 (“**1373**”) and United Nations Security Council Resolution 1267 (imposing obligations on Member States to freeze funds and other financial assets of the Taliban) (“**1267**”).⁹

The *Suppression of the Financing of Terrorism Act 2002* (Cth) and the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) implemented Australia's obligations under the Terrorism Financing Convention and 1373 through the introduction of terrorism financing offences under the Criminal Code and a terrorist asset freezing régime under the UN Charter Act.¹⁰ The first statutory scheme is contained in Part 5.3 of the Criminal Code and criminalizes the financing of terrorism, and the funding of terrorist organisations. The second statutory scheme is contained in Part 4 of the UN Charter Act and implements a terrorist asset

⁹ See Chapter III of the INSLM's First Annual Report for a discussion of 1373. Australia is bound to observe 1373 and 1267 by its treaty obligations imposed by membership of the United Nations. The treaty is the *Charter of the United Nations 1945*, and the obligation is expressed in Art 25 as the agreement of Members to accept and carry out the decisions of the Security Council in accordance with the Charter. The Security Council's claimed power in and for 1373 directs attention to Art 39 concerning, amongst other things, threats to and breaches of the peace and empowering the Security Council to decide what measures to take in accordance with Art 41 (in the case of unarmed measures) to maintain or restore international peace and security. The power to decide those measures under Art 41 gives the Security Council very wide discretion. Australia accepts unequivocally the binding nature of 1373 and 1267.

¹⁰ The *Suppression of the Financing of Terrorism Act 2002* (Cth) introduced Div 103 into the Criminal Code and Part 4 into the UN Charter Act. The *Security Legislation Amendment (Terrorism) Act 2002* (Cth) introduced sec 102.6 (getting funds to or from a terrorist organisation) into the Criminal Code. The *Anti-Terrorism Act (No 2) 2005* (Cth) expanded the offences in sec 102.6 and Div 103 in response to Financial Action Task Force (“**FATF**”) recommendations that the wilful collection of funds for a terrorist organisation, and the funding of individual terrorists, should be criminalized under Australian law. FATF is an inter-governmental body that develops and promotes national and international policies to combat money laundering and terrorist financing. The *Anti-Terrorism Act (No 2) 2005* (Cth) expanded the offences in sec 102.6 to include the collection of funds for a terrorist organisation and introduced a new offence into Div 103 (sec 103.2) which made it an offence to fund individual terrorists (as opposed to the arguably broader funding of terrorism offence in sec 103.1).

freezing régime, which criminalizes dealing with such assets.¹¹ Both of the statutory schemes are “counter-terrorism and national security legislation” as defined in section 4 of the INSLM Act.¹²

It is a statutory function of the INSLM to review Australia’s “counter-terrorism and national security legislation”¹³ and any other law of the Commonwealth to the extent that it relates to that legislation.¹⁴ In reviewing the two statutory schemes which constitute the terrorism financing legislation expressly within the INSLM’s remit, the INSLM has also considered Part 3 of the UN Charter Act and the *Autonomous Sanctions Act 2011* (Cth) (“**Autonomous Sanctions Act**”).¹⁵ Australia has terrorism financing obligations under 1267 which it has implemented through Part 3 of the UN Charter Act. In particular, Part 3 has been considered for its potential overlap with Part 4 of the UN Charter Act.

The Autonomous Sanctions Act implements sanctions against countries and individuals either autonomously as a matter of foreign policy or to supplement UN Security Council sanctions, including by implementing measures that the Security Council “calls upon” United Nations Member States to implement. The Autonomous sanctions régime complements Parts 3 and 4 of the UN Charter Act and has been considered for its overlap with these Parts as well as its potential counter-terrorism application (eg sanctions against those responsible for human rights abuses in Syria).

The INSLM has also considered the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (“**Foreign Incursions Act**”)¹⁶ as this legislation contains offences that could include terrorism financing activity. A consideration of the Foreign Incursions Act has informed the question of the efficacy of the terrorism financing offences under the Criminal Code and UN Charter Act.

¹¹ The Criminal Code scheme is administered by the Attorney-General’s Department while the UN Charter Act scheme is administered by the Department of Foreign Affairs and Trade.

¹² The definition of “counter-terrorism and national security legislation” in sec 4 includes Part 4 of the UN Charter Act and any other provision of that Act as far as it relates to that Part as well as Chapter 5 of the Criminal Code and any other provision of that Act as far as it relates to that Chapter.

¹³ As defined in sec 4 of the INSLM Act

¹⁴ para 6(1)(a) of the INSLM Act

¹⁵ Being related laws for the purposes of subpara 6(1)(a)(ii) of the INSLM Act

¹⁶ Being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act

II.2 Terrorism Financing Convention

The Terrorism Financing Convention (to which Australia is bound) is the first comprehensive convention on the financing of terrorism.¹⁷ The Terrorism Financing Convention reflects the concern of the United Nations General Assembly that “the financing of terrorism is a matter of grave concern to the international community as a whole... [and] the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain”.¹⁸ The Convention further recognized the “urgent need to enhance international cooperation amongst States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators”.¹⁹

The Terrorism Financing Convention was the result of work done following General Assembly Resolution 51/210²⁰ which called upon all Member States:-

To take steps to prevent and counteract, through appropriate measures, the financing of terrorist and terrorist organisations, whether such financing is direct or indirect through organisations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds.²¹

¹⁷ The Convention is reproduced at **Appendix D**. The Convention was adopted by Resolution 54/109 of 9th December 1999 at the fourth session of the General Assembly of the United Nations and entered into force on 10th April 2002. The Convention was ratified by Australia on 26th September 2002. There are currently 132 signatories and 185 parties to the Convention. The Convention is one of the 13 UN sectoral conventions on terrorism (see Appendix J of the INSLM’s Second Annual Report for a complete list).

¹⁸ Terrorism Financing Convention, preambular clause

¹⁹ Terrorism Financing Convention, preambular clause

²⁰ 51/210 (17th December 1996) *Measures to eliminate international terrorism*

²¹ para 3(f) of 51/210. Article 1(1) of the Terrorism Financing Convention defines “Funds” as “assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit”. The definition of “funds” in sec 100.1 of the Criminal Code, which applies to the terrorism financing offences under the Criminal Code, is similarly broad although it also includes “property” as an express term distinct from other forms of assets.

While there is no agreed definition of terrorist act at the international level (1373 does not define terrorist act), Art 2(1) of the Terrorism Financing Convention contains a definition of terrorist act which applies for the purposes of the Convention:-

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 organisation to do or to abstain from doing any act.

The Terrorism Financing Convention requires each State Party to adopt measures as necessary to establish as criminal offences under its domestic law offences as set out in Art 2 and to make those offences “punishable by appropriate penalties which take into account the grave nature of the offences”.²² As well as the primary offence in Art 2(1), the Terrorism Financing Convention extends criminal liability to attempt, complicity and common purpose etc through ancillary offences in Art 2(4) and (5).²³

The Terrorism Financing Convention requires each State Party to adopt measures to enable a legal entity to be held liable when a person responsible for the management or control of that entity has committed an offence under Art 2. Such liability should be without prejudice to the criminal liability of those individuals who committed the offences. While the liability may be criminal, civil or administrative (and may include monetary sanctions) these should be “effective, proportionate and dissuasive” sanctions.²⁴ Each State Party is required to take appropriate measures to identify, detect and freeze or seize funds used or allocated for the purposes of committing offences in Art 2, or proceeds derived from such offences, for the

²² Article 4

²³ Similar extensions to criminal liability apply to Australia’s terrorism financing offences by virtue of sec 11 of the Criminal Code.

²⁴ Article 5. Australia’s terrorism financing laws provide for corporate responsibility separate to the criminal liability of individuals concerned. See eg subsecs 20(3C)-(3F) and 21(2C)-(2F) of the UN Charter Act and sec 12 of the Criminal Code.

purposes of forfeiture and to take appropriate action for the forfeiture of such funds.²⁵ This must be implemented “without prejudice to the rights of third parties acting in good faith.”²⁶

Importantly, Art 21 of the Terrorism Financing Convention expressly provides for the observance of international law protecting human rights in carrying out obligations under the Convention.²⁷

II.3 Terrorism financing obligations under 1373

Unlike other UN Security Council sanctions régimes, 1373²⁸ does not specifically identify a list of persons or entities to which the decision relates. Each Member State is required to implement 1373 by identifying persons or entities within the scope of 1373 and taking appropriate action in relation to them. As Mr David Anderson QC, the UK Independent Reviewer of Terrorism Legislation notes, 1373 left States “with a wide discretion” as to how lists were to be compiled and provided no definition of terrorism²⁹ and no guidance as to the standard by which individuals and entities were to be identified as “terrorists and associated entities”.³⁰

In addition to listing individuals and freezing assets, each Member State is also required under 1373 to enact legislation to prosecute those who commit terrorist acts. For example, a Member State must freeze the assets of any person or entity it believes falls within the scope of para 1(c) because they have committed, facilitated etc terrorist acts. A Member State must also

²⁵ Article 8. Australia implements this obligation through a number of means. These include the Anti-Money Laundering and Counter-Terrorism Financing regulatory régime which imposes reporting obligations on financial institutions and alternative remittance providers. This enables the monitoring of transactions and assists with the identification and investigation of terrorism financing activity by AUSTRAC, Australia’s specialist financial intelligence unit and Australian law enforcement agencies (See discussion in Chapter VI). The terrorism asset freezing régime under Part 4 of the UN Charter Act provides for the freezing of terrorist funds and proceeds of crime provisions (eg Div 400 of the Criminal Code) provide for the forfeiture of such funds.

²⁶ The terrorist asset freezing régime under Part 4 of the UN Charter Act includes an immunity provision for actions done in good faith and without negligence under that part of the UN Charter Act (sec 24) as well as limited compensation provisions for persons wrongly affected (sec 25).

²⁷ Article 21 provides that: “Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions”. Australia’s compliance with international human rights obligations in implementing its international security and counter-terrorism obligations in relation to terrorism financing is discussed in Chapter VI.

²⁸ See Chapters III and VII of the INSLM’s First Annual Report for a discussion of 1373.

²⁹ Although it does call on Member States to become parties to the Terrorism Financing Convention, which does define terrorist act.

³⁰ David Anderson QC, Independent Reviewer of Terrorism Legislation, *First Report on the Operation of the Terrorist Asset-Freezing Etc. Act 2010* (December 2011) para 3.5

ensure the perpetration (including financing) of terrorist acts are serious criminal offences in domestic law in accordance with para 2(3) of 1373.

Paragraph 1 of 1373 provides:-

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that all States shall:

- (a) Prevent and suppress the financing of terrorist acts;
- (b) 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;
- (c) 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;
- (d) 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

1373 further obliges all Member States to suppress the recruitment of members of terrorist groups and eliminate the supply of weapons to terrorists; take the necessary steps to prevent the commission of terrorist acts; deny safe haven to those who finance etc terrorist acts, prevent those who finance etc terrorist acts from using their respective territories for those purposes against other States and provide legal assistance to other countries in relation to the investigation or prosecution of such acts. Paragraph 2 of 1373 provides:-

2. *Decides also* that all States shall:

- (a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;
- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts;
- (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings;

...

Article 3(d) of 1373 also calls upon Member States to become parties as soon as possible to the relevant international conventions on terrorism, including the Terrorism Financing Convention. Australia became a party to this Convention following 1373.³¹

³¹ The Convention was open for signature from 10th January 2000, however, the majority of signatories followed 1373, with the Convention coming into force on 10th April 2002. Australia became a signatory to the Convention on 15th October 2001, two weeks after 1373 (28th September 2001), and ratified the Convention on 26th September 2002.

As stated in the INSLM's First Annual Report, 1373 is striking not only for its lack of definition of terrorism but also for a lack of explicit text in 1373 of the requirement for observance of international law protecting human rights in carrying out counter-terrorism activities.³² However, as noted in that Report, this probably has little if any adverse implication for the promotion of human rights compliance by the CT Laws, given other aspects of the United Nations' counter-terrorism work.

II.4 Terrorism financing obligations under 1267

1267 supplements the overarching obligations for countering terrorism in 1373. While 1373 is directed at terrorism more broadly, 1267 (and its successor resolutions) targets particular actors who, through their terrorist activity, are recognized by the UN Security Council as a specific threat to international peace and security and who should have specific sanctions imposed against them. Unlike 1373, which does not specifically identify persons or entities to which the decision relates, 1267 (and its successor resolutions) does list the persons or entities against whom sanctions should be applied.³³

Through 1267, the UN Security Council established an international sanctions régime against Al-Qa'ida and the Taliban prior to the events of September 11th. On 15th October 1999, the UN Security Council adopted 1267 imposing sanctions on the Taliban in response to human rights violations and the use of Afghan territory to shelter and train terrorists and plan terrorist attacks. On 19th December 2000, the UN Security Council adopted Resolution 1333 which extended the sanctions to apply to Al-Qa'ida and Usama Bin Laden. 1267 imposes financial sanctions prohibiting the unauthorized use or dealing with the assets of, or making assets available to, persons and entities designated by the UN Security Council Committee established under 1267.³⁴ 1267 also imposes travel bans and arms embargoes in relation to those listed.

³² Unlike the Terrorism Financing Convention which contains explicit recognition of human rights obligations (Art 21).

³³ Weaknesses of the 1267 listing process are discussed in Chapter III and Appendices F and G.

³⁴ On 17th June 2011, the UN Security Council adopted new Resolutions 1988 and 1989, amending the sanctions régime in relation to the Taliban and Al-Qa'ida. Resolution 1988 creates a separate sanctions régime targeting individuals associated with the Taliban who are threats to Afghanistan's stability. Resolution 1989 refocuses the existing régime under 1267 on Al-Qa'ida and its associates. Both régimes continue to apply targeted financial sanctions, travel bans and an arms embargo against individuals and entities listed.

CHAPTER III UN CHARTER ACT

III.1 Introduction

The UN Charter Act was noted in Chapter V of the INSLM's First Annual Report.³⁵ This year, the INSLM has considered the provisions of the UN Charter Act in detail, including their practical operation. In reviewing the provisions of the Act, the INSLM has considered Australia's obligations under Art 25 of the UN Charter to enact such laws, the efficacy of the laws in preventing and prosecuting terrorism financing, the overlap between different sanctions régimes and the human rights implications of the laws.

The provisions of Parts 3 and 4 of the UN Charter Act and its regulations are explicitly made so that Australia carries out its obligations under Art 25 of the UN Charter Act. Sanctions are imposed by the UN Security Council in response to a threat to the peace, breach of the peace, or act of aggression³⁶ and decisions of the Security Council are legally binding upon all UN Member States.³⁷ Part 3 of the UN Charter Act implements all UN Security Council sanctions decisions (with a separate set of regulations for each sanctions régime) except for the counter-terrorism régime under 1373, which is implemented through Part 4 of the UN Charter Act and the *Charter of the United Nations (Dealing with Assets) Regulations 2008 (Cth)* ("**2008 Regulations**").

III.2 Part 3 of the UN Charter Act and Security Council Resolution 1267

Part 3 of the UN Charter Act (and implementing regulations) impose controls on the trade in sanctioned goods and services (such as arms supply) and includes financial sanctions prohibiting the unauthorized use or dealing with the assets of, or making assets available to, persons and entities designated by the UN Security Council under country-specific sanctions

³⁵ 16th December 2011

³⁶ Art 39 of the UN Charter

³⁷ Art 25 of the UN Charter

régimes and by the UN Security Council Committee established under (“**1267 Committee**”).³⁸ Through 1267, the UN Security Council established an international sanctions régime against Al-Qa’ida and the Taliban prior to the events of September 11. On 15th October 1999, the UN Security Council adopted 1267 imposing sanctions on the Taliban in response to human rights violations and the use of Afghan territory to shelter and train terrorists and plan terrorist attacks. On 19th December 2000, the UN Security Council adopted Resolution 1333 which extended the sanctions to apply to Al-Qa’ida and Usama Bin Laden. 1267 imposes financial sanctions prohibiting the unauthorized use or dealing with the assets of, or making assets available to, persons and entities designated by the 1267 Committee.³⁹

Australia formerly implemented 1267 under Part 4 of the UN Charter Act, however, since 2008 Australia’s obligations under 1267 have been met by Al-Qa’ida and Taliban Regulations under Part 3 of the UN Charter Act.⁴⁰ The Department of Foreign Affairs and Trade (“**DFAT**”) described sec 18 as “being intended to implement Australia’s obligations under [1267] and it was used for this purpose”.⁴¹ DFAT could not provide the INSLM with a policy reason as to why Part 4 was originally used for applying sanctions against Al-Qa’ida and the Taliban pursuant to 1267 but has since been replaced by the practice of implementing 1267 through regulations made under Part 3.

Part 4 of the UN Charter Act is restricted to the freezing of terrorist assets (with two types of offences, first, dealing with terrorist assets, and second, making assets available to terrorists). Part 3 of the UN Charter Act includes sanctions for the freezing of assets of designated persons (with the two types of offences available as for the Part 4 freezing régime)⁴² as well as prohibitions on the supply of arms to designated persons (with a third type of offence (not

³⁸ As noted above, Australia is required to implement UN Security Council decisions to comply with the UN Charter and Part 3 reflects a wholehearted implementation of Australia’s obligations to implement UN Security Council sanctions régimes.

³⁹ On 17 June 2011, the UN Security Council adopted new Resolutions 1988 and 1989, amending the sanctions régime in relation to the Taliban and Al-Qa’ida. Resolution 1988 creates a separate sanctions régime targeting individuals associated with the Taliban who are threats to Afghanistan’s stability. Resolution 1989 refocuses the existing régime under 1267 on Al-Qa’ida and its associates. Both régimes continue to apply targeted financial sanctions, travel bans and an arms embargo against individuals and entities listed.

⁴⁰ See the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth). These regulations were superseded by the *Charter of the United Nations (Sanctions – Afghanistan) Regulations 2008* (Cth), the *Charter of the United Nations (Al-Qaida and Taliban) Regulations 2008* (Cth), the *Charter of the United Nations (Al-Qaida) Regulations 2008* (Cth) and the *Charter of the United Nations (the Taliban) Regulation 2013* (Cth). All of these superseding Regulations were made under Part 3 of the UN Charter Act.

⁴¹ *DFAT Response to Question on Notice from the INSLM*, 13th August 2013

⁴² eg secs 9 and 10 of the *Charter of the United Nations (Sanctions-the Taliban) Regulation 2013* (Cth) and regs 10 and 11 of the *Charter of the United Nations (Sanctions-Al-Qaida) Regulations 2008* (Cth)

available under Part 4) for contravening the sanction on the supply of arms).⁴³ As 1267 is now implemented under Part 3 of the UN Charter Act, this third offence of providing arms to persons or entities associated with the Taliban or Al-Qa'ida is available. While the supply of arms is in all probability going to be making an "asset" available to a designated person or entity, and therefore captured by the offences under Part 4, the INSLM sees merit in amending Part 4 to include a specific offence of supplying arms or related matériel to a designated person or entity.⁴⁴

Recommendation III/1: Part 4 of the UN Charter Act should be amended to include a specific offence of supplying arms or related matériel to a designated person or entity.

III.3 Overlap of 1267 and 1373 sanctions régimes

Despite the fact that 1267 was originally implemented under Part 4 of the UN Charter Act (implementing 1373 obligations), DFAT put forward the view to the INSLM that the sanctions régimes under 1267 and 1373 "are different in nature and intended to operate separately. A person or entity designated under 1267 is not, in addition, intended or required to be captured by a 1373 listing".⁴⁵ DFAT put forward its position that:-

Australia is obliged to implement both the Al-Qaida and [Taliban] Sanctions Lists pursuant to Chapter VII of the United Nations Charter. Australia is unable to alter these lists in any way, when implementing them into Australian law.

UNSC resolution 1373 (2001) requires states to establish terrorist asset-freezing régimes. As these régimes are administered domestically, states are required to develop and implement their own procedures for listing and de-listing persons and entities. Australia's implementation of UNSC resolution 1373 (2001) is contained in Part 4 of the *Charter of the United Nations Act 1945*. The procedures set out in Part 4, for example section 15 (listings), section 15A (duration of listing) and sections 16 and 17 (revocations) are not and would not be applicable to those designated on the Al-Qaida

⁴³ eg sec 7 of the *Charter of the United Nations (Sanctions-the Taliban) Regulation 2013* (Cth), reg 8 of the *Charter of the United Nations (Sanctions-Al-Qaida) Regulations 2008* (Cth)

⁴⁴ The successor Resolutions to 1267 expressly require an arms embargo to be imposed eg para 5 of UN Security Council Resolution 1333 (2000) which requires Member States to "prevent the direct or indirect supply, sale and transfer [to the Taliban] of arms and related material of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment..." Such a prohibition in relation to those designated under Part 4 for the purposes of para 1(c) of 1373 would be within the intended scope of 1373, with its emphasis on assets. See also para 2(a) of 1373 which obliges Member States to take steps to "eliminat[e] the supply of weapons to terrorists".

⁴⁵ *DFAT Response to Question on Notice from the INSLM*, 23rd August 2013

or [Taliban] Sanctions Lists, as listings and de-listings for those Lists are solely within the competence of the [1267 Committee].⁴⁶

The INSLM does not accept DFAT's view that the two régimes operate as mutually exclusive to each other either in Australia or at the United Nations level. As regards the position under Australian law, the Minister for Foreign Affairs and Trade is required under Part 4 of the UN Charter Act to list an individual or entity if satisfied that the person or entity is "mentioned" in para 1(c) of 1373.⁴⁷ No-one is mentioned by name in 1373.

The UN Security Council does not maintain a list of individuals and entities who are to be sanctioned for the purposes of para 1(c) of 1373 and it is a matter for each Member State to determine who meets the definition in para 1(c) of 1373. In substance, the persons are those who commit or attempt to commit terrorist acts or participate in or facilitate them, and the entities are those controlled directly or indirectly by such persons – and persons and entities extend to include those acting on behalf of or at the direction of such persons or entities. On any view, Al-Qa'ida and the Taliban surely qualify under this definition.

DFAT's assertion that the requirement to list under Part 4 of the UN Charter Act does not extend to those individuals or entities already listed by the 1267 Committee is incorrect as a matter of law. There is nothing in the wording of the provisions themselves, or in the explanatory material, to suggest that those persons who fit the definition of para 1(c) of 1373 but who are on the 1267 List, are not required to be listed by the Minister under sec 15. Under the UN Charter Act as it currently applies, a person or entity associated with Al-Qa'ida or the Taliban may be subject to sanctions under both Part 3 (through Regulations implementing 1267) and Part 4 (where listed under sec 15). There is nothing in the legislation to prevent this overlap where the Minister is satisfied the person comes within para 1(c) of 1373. Australia's legislative approach in this regard reflects the approach of the UN Security Council itself which not only permits overlap between the 1267 and 1373 régimes but specifically requires Member States to include those associated with Al-Qa'ida and the Taliban in any 1373 implementing measures.

Resolutions of the UN Security Council clearly demonstrate that the view taken by DFAT is out of line with the intended overlap of 1267 and 1373. The UN Security Council expects that implementing measures taken by States under 1373 will include members of the Taliban

⁴⁶ *DFAT Response to Question on Notice from the INSLM*, 23rd August 2013

⁴⁷ sec 15 of the UN Charter Act, reg 20 of the 2008 Regulations

and Al-Qa'ida who would also be on the 1267 List. See for example UN Security Council Resolution 1390 (2002)⁴⁸:-

4. *Recalls* the obligation placed upon all Member States to implement in full resolution 1373 (2001), including with regard to any member of the Taliban and the Al-Qaida organisation, and any individuals, groups, undertakings and entities associated with the Taliban and the Al-Qaida organisation, who have participated in the financing, planning, facilitating and preparation or perpetration of terrorist acts or in supporting terrorist acts...

Further evidence that 1373 is not intended to be a stand-alone régime is found in UN Security Council Resolution 1456 (2002):-

1. All States must take urgent action to prevent and suppress all active and passive support to terrorism, and in particular comply fully with all relevant resolutions of the Security Council, in particular resolutions 1373 (2001), 1390 (2002) and 1455 (2003)...

In support of its view that those persons listed under 1267 are not required to be listed under sec 15 of the UN Charter Act, DFAT cited the practice of other UN Member States in implementing 1267 and 1373. Canada, it was noted, implements 1373 through the *Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism Regulations* (CAN) and “listed person” for the purposes of the Regulations is defined specifically to exclude Usama bin Laden or his associates, or any person associated with the Taliban.⁴⁹ Similarly, the European Union was said to implement 1267 and 1373 separately and provides that those persons listed under 1267 are “consequently...not covered” by the Common Council Position implementing 1373.⁵⁰

⁴⁸ See also the preambular clause of UN Security Council Resolution 1455 “Underlining the obligation placed upon all Member States to implement, in full, resolution 1373 (2001), including with regard to any member of the Taliban and the Al-Qaida organisation, and any individuals, groups, undertakings and entities associated with the Taliban and the Al-Qaida organisation, who have participated in the financing, planning, facilitating and preparation or perpetration of terrorist acts or in supporting terrorist acts, as well as to facilitate the implementation of counter terrorism obligations in accordance with relevant Security Council resolutions”.

⁴⁹ Under the Canadian legislation, a person may be listed under the Regulations if the Governor in Council, on the recommendation of the Minister for Foreign Affairs, is satisfied that there are reasonable grounds to believe the person “(a) has carried out, attempted to carry out, participated in or facilitated the carrying out of a terrorist activity; (b) is controlled directly or indirectly by any person conducting any of the activities set out in paragraph (a); or (c) is acting on behalf of, or at the direction of, or in association with any person conducting any of the activities set out in paragraph (a)” (reg 2) However, a “listed person” does not include “Usama bin Laden or his associates, or any person associated with the Taliban within the meaning of section 1 of the *United Nations Al-Qaida and Taliban Regulations*” (reg 1)

⁵⁰ See Council Common Position of 27th December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP) preambular clause 4.

However, Australia has not adopted an equivalent approach under the UN Charter Act and consequently there is no exclusion from Part 4 listing for those listed under Part 3.

To achieve a similar result under the UN Charter Act, sec 15 could be amended so that the Minister is not required to list a person or entity if that person or entity is already listed under 1267 and its successor Resolutions and regulations implementing sanctions under Part 3 of the UN Charter Act are in force in relation to that person or entity.

Alternatively, to exclude those persons listed under 1267 from the Part 4 Listing process, while maintaining the application of Part 4 to such entities, Australia could take an analogous approach to that taken by New Zealand. In New Zealand, the provisions of the *Terrorism Suppression Act 2002* (NZ) apply to both entities listed by the UN Security Council under 1267 and non-listed entities designated by the Prime Minister in accordance with 1373.⁵¹ Under the New Zealand legislation, the Prime Minister does not designate UN Security Council listed entities⁵² but may designate non-UN Security Council listed entities under sec 22 of the Act.⁵³ Entities already listed by the UN Security Council are automatically defined to be designated terrorist entities for the purposes of the Act and so engage its provisions without the need for further designation. The provisions of the Act (prohibitions on dealing with terrorist assets and criminal penalties for breach of these prohibitions) apply to UN Security Council listed entities and entities listed by the Prime Minister in the same way. To achieve this result in Australia, the UN Charter Act could be amended so that a “proscribed person or entity” under sec 14 is defined to mean a person or entity listed by the Minister under sec 15, proscribed by regulation under sec 18, or listed by the UN Security Council under 1267 and its successor Resolutions.

51 Like Part 4 of the UN Charter Act, the Act contains prohibitions on dealing with the property of, or making property available to, designated terrorist entities as well as criminal sanctions for breach of such prohibitions (see secs 9 and 10). The Act also contains offences similar to those in Div 103 of Part 5.3 of the Criminal Code for financing terrorism (sec 7).

52 United Nations listed terrorist entity is defined to mean an Al-Qa’ida or Taliban entity listed in 1267 or its successor Resolutions (sec 4 of the *Terrorism Suppression Act 2002* (NZ)).

53 The Prime Minister may designate an entity as a terrorist entity if the Prime Minister believes on reasonable grounds that the entity has knowingly carried out, or has knowingly participated in the carrying out of, 1 or more terrorist acts (subsec 22(1) of the *Terrorism Suppression Act 2002* (NZ)). Under subsecs 22(2) and (3), the Prime Minister may also designate other entities as an associated entity if the Prime Minister believes on reasonable grounds that the other entity (a) is knowingly facilitating the carrying out of 1 or more terrorist acts by, or with the participation of, the terrorist entity (for example, by financing those acts, in full or in part); or (b) is acting on behalf of, or at the direction of,—(i) the terrorist entity, knowing that the terrorist entity has done what is referred to in subsection (1); or (ii) an entity designated as an associated entity under subsection (2) and paragraph (a), knowing that the associated entity is doing what is referred to in paragraph (a); or is an entity (other than an individual) that is wholly owned or effectively controlled, directly or indirectly, by the terrorist entity, or by an entity designated under subsection (2) and paragraph (a) or paragraph (b).

Given the nature of such persons and entities and the importance of a coherent sanctions approach, reflected in relatively plain laws, such a change may help to simplify and strengthen the Australian contribution to the intended international scheme.

Recommendation III/2: Section 14 of the UN Charter Act should be amended to include persons listed under 1267 and its successor Resolutions in the definition of “proscribed person or entity”. Alternatively, sec 15 should be amended so that the Minister is not required to list a person or entity if that person or entity is already listed under 1267 and its successor Resolutions and regulations implementing sanctions under Part 3 of the UN Charter Act are in force in relation to that person or entity.

III.4 Weaknesses of 1267 List

While it is not for the INSLM to question the wisdom of a UN Security Council decision, the INSLM notes that there is widespread acknowledgement, including from within the UN Security Council itself, of the deficiencies and anomalies that exist in the UN Security Council 1267 List (including the listing and de-listing process).⁵⁴ While efforts have been made by the UN Security Council in recent years to improve the listing and de-listing process, with the appointment of an Ombudsperson to review listing decisions being the most notable improvement, there remain a number of outstanding concerns that the listing process does not respect due process and fair trial rights.⁵⁵

States are not required to disclose secret information to the 1267 Committee during the listing process or to the Ombudsperson or a petitioner seeking de-listing. UN Member States have expressed concern that, as a result, the 1267 Committee may make listing or de-listing decisions without access to important information, and that the initial list entries may contain errors.⁵⁶ A narrative summary of reasons for listing is prepared by the 1267 Committee in conjunction with the designating State.⁵⁷ However, the 2010 review of the 1267 listing régime

⁵⁴ See **Appendix E** for a description of the 1267 listing and de-listing process.

⁵⁵ See **Appendix F** for a description of the concerns raised in relation to the 1267 List

⁵⁶ A 2010 Review of the 1267 régime (which included a review of all listed names), undertaken by the Analytical Support and Sanctions Monitoring Team (which provides support to the 1267 Committee pursuant to UN Security Council Resolution 1526 (2004)) found that “the most corrosive issue [undermining implementation] has been a perceived lack of fairness, whether expressed by national or regional courts, by politicians or by the public at large”. S/2010/497, para 68. See Appendix F for further discussion of the Review’s findings, including anomalies and deficiencies with the 1267 listing and de-listing processes (only some of which have been remedied).

⁵⁷ As required by UN Security Council Resolution 1822 (2008)

found “these summaries often contain less than obvious justification for an initial listing, let alone for its continuation”.⁵⁸

A significant criticism of the mandate of the Ombudsperson is that it does not confer a power to overturn decisions of the 1267 Committee, meaning decisions whether to de-list remain within the discretion of the 1267 Committee.⁵⁹ The lack of procedural fairness combined with a lack of adequate independent review processes for listing decisions has led to scepticism in Europe about the 1267 régime from the perspective of its compatibility with human rights obligations. This has culminated in European court decisions annulling European regulations implementing 1267 in so far as the regulations impose sanctions on particular individuals or entities.⁶⁰

III.5 Fairness and proportionality as requirements for listing

As the decisions of the European courts have involved an assessment of the compatibility of the implementing regulations with individual rights under the European Convention on Human Rights and other European human rights obligations, care must be taken in transporting these views to Australia’s laws. Importantly, the European courts have treated sanctions as akin to criminal sanctions and have thus insisted on the fundamental rights of due process and fair trial to be respected in the application of sanctions régimes.

Perhaps even more importantly for Australia, given our legal culture, the UK Supreme Court in *Bank Mellat v Her Majesty’s Treasury (No. 2)* [2013] UKSC 39 set aside Executive Orders restricting an Iranian commercial bank’s activities on common law grounds based on the requirements of rationality and proportionality and procedural fairness. There must be a

⁵⁸ “For example, all too often narrative summaries contain no information about the activities of the listed individual or entity over the last five years or more. This lack of information may be because States do not wish to reveal what they know, or because the older information is so strong that an inference of continued activity is warranted, but it may also be an indication of inactivity. A thin narrative summary inevitably raises questions about a listing but, unfortunately, although the Team has either proposed or intends to propose 217 amendments to narrative summaries on the basis of information collected during the review, many of the least revealing narrative summaries will remain unchanged.” S/2010/497, para 57

⁵⁹ Ben Emmerson QC, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, has reported on the 1267 listing and de-listing processes, and the contribution of the Ombudsperson to the fairness of the régime. The Special Rapporteur has expressed criticisms of these processes and of the rôle and work of the Ombudsperson from a human rights perspective. See *Promotion and protection of human rights and fundamental freedoms while countering terrorism*, 26 September 2012, A/67/396, discussed at Appendix F.

⁶⁰ See eg the judgement of the Grand Chamber of the European Court of Justice in Joined Cases C-584/10 P, C-593/10 P and C-595/10 Commission, Council, United Kingdom v Yassin Abdullah Kadi, 18th July 2013. See **Appendix G** for a detailed discussion of this case.

substantial prospect that a similar outcome could ensue under the common law of judicial review of administrative conduct in Australia.

However, the INSLM does not consider that the right to a fair trial under Art 14 of the *International Covenant on Civil and Political Rights 1966* (“ICCPR”) applies to listing decisions under the UN Charter Act (or proscription under the Criminal Code).⁶¹ Australia does not fail to comply with its international human rights obligations, on that account, with respect to these listing schemes.

If Australian law, as speculated above, accords appropriate procedural fairness, or even rationality and proportionality as requisites of legality to listing decisions, under 1373, again it could be said that Australia has thereby met decent standards of fair conduct with respect to serious adverse effects on the use and ownership of private property. No-one has brought this issue to an Australian court, and it involves no cynicism to suppose that the identity of listed persons and entities to date explains their absence from this jurisdiction’s courts of law.⁶²

As the UN Security Council recently reiterated, counter-terrorism sanctions régimes are preventive, not criminal: “*Reiterating* that the measures referred to in paragraph 1 of this resolution are preventative in nature and are not reliant upon criminal standards set out under national law”.⁶³ No criminal consequences flow solely by virtue of a listing – some other conduct by an individual or entity is required before a criminal offence has been committed.

Recommendation III/3: Because Australia will continue to perform its Charter obligation to implement UN Security Council sanctions regulations, there should also be a continued responsibility to promote real improvement in the listing and de-listing processes of the 1267 Committee.

III.6 Untested efficacy of Part 3 of the UN Charter Act

While Australia undoubtedly needs Part 3 of the UN Charter Act (or something like it) to comply with its international security and counter-terrorism obligations, it is difficult for the INSLM to assess the efficacy of these provisions. There is no record of any property having

⁶¹ Art 14 of ICCPR provides fair trial rights in procedures for the determination of criminal charges against individuals and procedures to determine their rights and obligations in a suit at law, neither of which can be said to apply to the fact of listing.

⁶² See the discussion in Chapter VI of the character of persons and entities listed so far in Australia.

⁶³ UN Security Council Resolution 2083 (2012), preambular clause (referring to measures under 1267 and successor Resolutions)

been frozen, and there have been no prosecutions for offences against Part 3. The INSLM has not found any evidence, nor have discussions with Commonwealth officers shown, anything to support an inference for or against Part 3 deterring funds from coming to, or departing, Australia.

III.7 Listing under Part 4 of the UN Charter Act

The provisions of Part 4 of the UN Charter Act are explicitly made so that Australia carries out its obligations to implement para 1(c) of 1373 under Art 25 of the UN Charter.⁶⁴ Thus the listing of persons or entities, and assets or classes of assets, is intended to proscribe certain dealings with the persons or entities, and to freeze the assets, as part of the international countering of terrorism.⁶⁵

Part 4 provides a regulatory scheme for the freezing of terrorist assets and applies targeted economic sanctions against proscribed persons and entities. Part 4 also applies criminal sanctions to those who deal with proscribed persons or entities, or freezable assets. Breach of the asset freezing provisions under Part 4 is punishable by criminal conviction (including imprisonment and/or a fine).

The matter of which the Minister for Foreign Affairs and Trade must be satisfied before listing is, by regulation, specified as the fact of the person or entity being “mentioned” in para 1(c) of 1373.⁶⁶ This prescription accords with the specific limits on the power to make regulations: to give effect to a Security Council decision under Chapter VII of the UN Charter that Australia must carry out under Art 25, and that “relates to terrorism and dealings with assets”.⁶⁷ The use of the word “mentioned” in the Australian regulation to give effect, as it happens, to 1373 is unfortunate, as noted elsewhere. But this is a relatively minor point, given that it could not seriously be argued that because no person or entity is named in 1373 there is therefore no person or entity “mentioned” in it.

Part 4 of the UN Charter Act also permits regulations directly proscribing persons or entities identified (directly or by using a mechanism contained in the Security Council decision) in Security Council decisions under Chapter VII of the Charter.⁶⁸ As discussed above, in

⁶⁴ subssecs 15(5), 16(1), 18(2) and 19(1) of the UN Charter Act

⁶⁵ secs 14, 15, 18 of the UN Charter Act

⁶⁶ sec 15 of the UN Charter Act and reg 20 of the 2008 Regulations

⁶⁷ subsec 15(5) of the UN Charter Act

⁶⁸ sec 18 of the UN Charter Act

practice, apart from Al-Qa'ida and the Taliban,⁶⁹ this method of proscription or listing has not been used. It remains available, in a plain and useful way, so as to permit prompt implementation of Security Council decisions binding on Australia under Art 25 of the UN Charter.

III.8 Lack of definition of terrorism in 1373 and the UN Charter Act

The regrettable history of international non-achievement in relation to the definition of terrorism for the purposes of important international obligations has been touched on in earlier Reports.⁷⁰ It produces something of an anomaly when considering the ensemble of Australia's legislative responses to its international counter-terrorism obligations. In particular, the fact and nature of the differences between the definition of terrorism for the purposes of the Criminal Code and the definition of terrorism found in the Terrorism Financing Convention are difficult to justify.

On the one hand, the Criminal Code definition, by means of the statutory term "terrorist act" and its detailed elements,⁷¹ broadens the concept by comprehending dangers beyond immediate threats to life and limb, and narrows the concept by requiring motive as well as purpose. On the other hand, the Terrorism Financing Convention, as discussed in Chapter II, includes one of the rare international agreements to define terrorism, focussing on threats to life and limb but content with intimidatory political purpose without requiring ideological motive.

However, the listing system under sec 15 of the UN Charter Act does not rely explicitly on the Terrorism Financing Convention, and so the lack of a definition of terrorism in the UN

⁶⁹ From 2002-2008 regulations were made under Part 4 of the UN Charter Act listing Al-Qaida and the Taliban for the purposes of Part 4. Although DFAT was unable to provide the INSLM with a definitive answer as to why 1267 was originally implemented under Part 4 then under Part 3 from 2008 onwards, the original preference for using the Part 4 (sec 18) regulation making power may reflect the penalties available at the time for breach of sanctions implemented through regulations made under Part 3 (sec 6) compared to those made under sec 18. Prior to reforms in 2007, under subsec 12(1), 50 penalty units was the maximum available penalty for a breach of a sec 6 regulation with no penalty of imprisonment available. This was in contrast to the then maximum penalty of 5 years (now 10 years) imprisonment for breaching an offence under Part 4 (the penalty was imprisonment only with no fine available). The *International Trade Integrity Act 2007* (Cth) (implementing recommendations of the Cole Inquiry) created a new offence for people who, or corporations which, engage in conduct that contravenes a UN sanction law in force in Australia. The Act inserted subsec 6(2) into the UN Charter Act, specifying a non-exhaustive range of means by which regulations made under subsec 6(1) could give effect to a UN Security Council decision. The Act also inserted Part 5—Offences relating to UN sanctions into the UN Charter Act which enacted new offences for breaching UN sanctions. Section 27 of the UN Charter Act now provides an offence for engaging in conduct that contravenes a UN sanction enforcement law (including regulations made under Part 3) with a penalty of 10 years imprisonment and/or a triple-value fine. This mirrors the penalty for an offence against Part 4 (secs 20 and 21).

⁷⁰ INSLM's First Annual Report, pp 16, 24-25, 49-54; INSLM's Second Annual Report Ch VI

⁷¹ sec 100.1 of the Criminal Code

Charter Act itself is unlikely to be easily supplied by judicial borrowing from the Terrorism Financing Convention. Rather, the approach, as noted above, looks to 1373 and the like. Unfortunately, 1373 notoriously lacks any definition of terrorism.⁷²

A major reason for the Criminal Code to have defined terrorism was the lack of a definition in 1373. In principle, even if there had been a definition of terrorism in 1373, as a matter of international practice and explicit expectation in 1373 itself, Australia would in any event stipulate a definition for the purposes, and in the style, of Australia's municipal criminal laws. As it was done, it has the defect of including motive, leading to the INSLM's Recommendation VI/1 in the Second Annual Report.⁷³

Does the definition of terrorism in and for the purposes of the Criminal Code also provide the definition for the UN Charter Act? Are they cognate statutes so as to share the meaning and central concepts? (Both the Criminal Code definition and Part 4 of the UN Charter Act, lacking its own definition, were enacted in 2002 by the *Suppression of the Financing of Terrorism Act 2002* (Cth)). One technical difficulty in the way of that solution is the apparently designed absence of the Criminal Code definition from the UN Charter Act provisions. One strong indication in favour of that solution is the common route in 1373.

These fundamental questions should not be left in this much doubt. As neither 1373 or the UN Charter Act define "terrorist act" it is unclear what definition of terrorism is to be applied in determining which individuals or entities must be proscribed, and which assets may be proscribed, under sec 15 of the UN Charter Act.⁷⁴ While Art 2(b) of the Terrorism Financing Convention contains a definition of "terrorist act", the Australian legislature made the decision to implement the Convention by applying the definition of "terrorist act" under sec 100.1 to the terrorism financing offences in the Criminal Code.⁷⁵

The definition of "terrorist act" forms the basis of the definition of "terrorist organisation" under the Criminal Code - an organisation "directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a *terrorist act*" or where the organisation is

⁷² The breadth of para 1(c) of 1373 is not in itself objectionable as it is no doubt intended to cover the breadth of malevolent and underhand operations by which terrorism may be financed. In any event, as noted in the INSLM's previous reports, the terms of 1373 are not for the INSLM to criticize.

⁷³ Importantly, the COAG Review of Counter-Terrorism Legislation disagreed with the INSLM on this point. No published response from, or any dealing with, Commonwealth officials has addressed this issue, to date.

⁷⁴ see the transcript of evidence given by Ms Nicola McGarrity at the INSLM's public hearing on 22nd April 2013, available at www.dpnc.gov.au/inسلم

⁷⁵ The definition in sec 100.1 applies to all terrorism offences and to the definition of terrorist organisation under the Criminal Code (that is, it applies for the purposes of Part 5.3 of the Criminal Code).

proscribed by regulation, an organisation meeting that definition or who “advocates the doing of a *terrorist act*”.⁷⁶ There is no policy reason for different definitions of “terrorist act” to apply to the proscription régimes under the UN Charter Act and the Criminal Code.

The merits of carving out conduct covered by the law of war from the definition of terrorism were canvassed in the INSLM’s Second Annual Report.⁷⁷ It was recommended that there be an exclusion of such conduct.⁷⁸ It is to be noted that, as well as the Canadian precedent discussed in the INSLM’s Second Annual Report in this regard, the terms of the Terrorism Financing Convention (discussed in Chapter II) efficiently accomplishes the same carve out.

Another defect in the Criminal Code definition of terrorism is its failure explicitly to include hostage taking, notwithstanding the strong international and operational reasons for doing so, noted in the INSLM’s Second Annual Report.⁷⁹

The virtue of consistency in the definition of terrorism for the purposes of all of Australia’s legislative responses to the evil of financing terrorism is self evident. It is not, however, so great as to mandate resort to a defective definition, consistently. But the unsatisfactory and unjustified difference between the position under the UN Charter Act and the position under the Criminal Code should not continue. It bespeaks a badly crafted legislative exercise. It would be better if the central definition was improved, and then made uniform in all contexts to which it should apply.

It bears emphasis by repetition that improvements to the definition of terrorism in the Criminal Code recommended in the INSLM’s Second Annual Report are straight forward. They can be summarized as follows. The removal of motivation as opposed to purpose would ease the burden of prosecutors and reduce if not eliminate invidious evidence and argument. The inclusion of hostage taking would reflect the weight of international opinion and practice, and meet the vicious conduct of current terrorists. The carved out for armed conflict covered by International Humanitarian Law would usefully advance the coherent and principled placement of counter-terrorist legislation in the context of international control and disapproval of certain forms of violence.

⁷⁶ subsecs 102.1(1) and (2) of the Criminal Code

⁷⁷ Ch VI, 6.9

⁷⁸ Recommendation VI/3, to which no official response has been published, or raised in any way, so far.

⁷⁹ Ch VI, 6.8 and Recommendation VI/2. This recommendation, as well, has produced no governmental response. Nor has there been any official presentation of a view hostage taking should not be regarded as potentially terrorist. Meanwhile hostages continue to be taken by terrorists internationally, such as the Libyan Prime Minister in October 2013.

In short, last year's recommendations were designed to sharpen the legislative response by Australia to terrorism. They were the opposite of slackening the national resistance to terrorism. The entire lack of any response to them officially, in the context of the publication of them being officially delayed until the very last moment, raises existential questions about the rôle of the INSLM.

Be that as it may, the position produced by official inaction involves a dual but conflicted recommendation for consistency, of a better definition of terrorism than presently exists.

Recommendation III/4: The definition of "terrorist act" under sec 100.1 of the Criminal Code should be improved as recommended in the INSLM's Second Annual Report.⁸⁰ Once that is done, it should be adapted to provide the definition of terrorism in the UN Charter Act.

III.9 Asset Listing

There is a mandatory requirement⁸¹ for the Minister to list a person or entity if satisfied on reasonable grounds of the prescribed matters.⁸² However, the Minister has a discretionary power to list an asset, or class of asset, if so satisfied.⁸³ DFAT explained the distinction as:-

The ability to list an asset is not specifically required by United Nations Security Council (UNSC) resolution 1373 (2001). UNSC resolution 1373 (2001) requires Australia to freeze "funds and other financial assets or economic resources" of persons and entities.

...

The ability to list an asset is a useful tool to retain in the Act. It may be utilised where a reasonable suspicion arises⁸⁴ that an asset is owned or controlled by a listed person

⁸⁰ Recommendations VI/1, VI/2 and VI/3

⁸¹ subsec 15(1) of the UN Charter Act, the Minister "must list a person or entity...if the Minister is satisfied on reasonable grounds of the prescribed matters."

⁸² Prescribed matters being para 1(c) of 1373 (see reg 20(1) of the 2008 Regulations)

⁸³ subsec 15(3) of the UN Charter Act, the Minister "may list an asset, or class of asset...if the Minister is satisfied on reasonable grounds of the prescribed matters." Prescribed matters being para 1(c) of 1373 (see reg 20(2) of the 2008 Regulations)

⁸⁴ While DFAT uses the language of "reasonable suspicion", the statutory test requires the Minister to be "satisfied on reasonable grounds" that the asset is owned or controlled by a person or entity mentioned in para 1(c) of 1373.

or entity, but is not held in the name of the listed person or entity, for example it is in a bank account in the name of a trust company.⁸⁵

This approach by DFAT is quite erroneous. The first two quoted sentences contradict each other. The provisions of para 1(c) of 1373, along with those of 1(d), with the sanction contemplated by 1(b), all for the purpose described in 1(a), reveal no intended distinction at all between schemes to suppress terrorist financing focussed on persons and entities, from those focussed on assets. After all, the effect in all cases is on the assets of persons or entities, meaning the conduct of persons or entities with respect to their assets.

The reference to the legal ownership of a trustee obscuring the attribution of beneficial ownership to a proscribed person or entity, by DFAT in its response, is unconvincing as a ground for any such distinction. The obligation to list in the case of persons or entities is triggered by the Minister being satisfied on reasonable grounds of the prescribed matters. There is no reason whatever why the same duty should not apply whenever the Minister is satisfied on reasonable grounds of the prescribed matters in relation to an asset. The use of trusts and the like is simply an illustration of the circumstances in which it may be more or less appropriate for the Minister to be so satisfied. If he or she is not so satisfied, there will be no asset listing. That is no reason why there should not be a duty whenever he or she is so satisfied.

The present distinction manifest in subsecs 15(1) and 15(3) of the UN Charter Act is indefensible. It constitutes an unjustified lax approach to assets, at least superficially. (Superficially, because one hopes no Minister would refuse to list an asset if he or she were in fact satisfied on reasonable grounds of the prescribed matters – given that the intent is to cooperate with an international effort to deprive terrorism of its funding.) If only for the sake of coherent presentation, this false distinction should be eliminated.

Recommendation III/5: Subsection 15(3) of the UN Charter Act and Regulation 20(2) of the *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Cth) should be amended to provide that the Minister must list an asset or class of asset if satisfied on reasonable grounds of the prescribed matters.⁸⁶

⁸⁵ DFAT Response to Question on Notice from the INSLM, 7th August 2013

⁸⁶ By replacing the word “may” with “must” in both the Act and Regulations.

III.10 Supervision and reversal of listing

The scheme of the UN Charter Act appropriately reverses a listing to reflect cessation of the operation of the particular Security Council decision in question.⁸⁷ A listing ceases to have effect after three years⁸⁸ although the Minister may declare, in writing, that a declaration continues to have effect.⁸⁹ The Minister is empowered to revoke a listing if the Minister is satisfied it is no longer necessary to give effect to a relevant Security Council decision made under Chapter VII of the UN Charter, which Australia is required under Art 25 of the UN Charter to carry out and which relates to terrorism and dealing with assets. The Minister may revoke the listing on their instigation or on application by the listed person or entity.⁹⁰

The Australian scheme permits application for administrative review, by seeking the Minister to revoke a listing.⁹¹ The Minister is not required to consider more than one application every 12 months and an application to have the listing revoked may only be made by a listed person or entity.⁹² Judicial review of a Minister's decision to list a person, entity or asset under sec 15 is available.⁹³ Minds may differ as to the preferred method of providing for such review, including time stipulations such as minimum periods. The form of the legislation does not present as outside what could be reasonably contemplated in this regard. One way of testing its appropriateness is to examine its operation in practice.

In accordance with the INSLM's functions, information was sought, by way of a notice issued under subsec 24(2) of the INSLM Act, to the Secretary of DFAT, on applications for revocations of listings under sec 17. In response to this notice, DFAT provided advice to the INSLM that DFAT had found no applications under sec 17. However, material produced in response to the notice included reference to a number of such applications having been made. In response to a follow up request to DFAT for further details on these applications, DFAT advised it had located the file for one application, but had "been unable to locate the

⁸⁷ sec 19 of the UN Charter Act

⁸⁸ subsec 15A(1) of the UN Charter Act. This is the same period as for terrorist organisations proscribed by regulations under the Criminal Code.

⁸⁹ subsec 15A(2) of the UN Charter Act, provided the Minister is satisfied on reasonable grounds of the matters prescribed for the purposes of subssecs 15(2) or (4) under reg 20 of the 2008 Regulations.

⁹⁰ subsec 16(1) of the UN Charter Act

⁹¹ sec 17 of the UN Charter Act

⁹² subsec 17(3) of the UN Charter Act.

⁹³ Judicial review of the Minister's decision is available under sec 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Judicial review is also available under subsec 39B(1) of the *Judiciary Act 1903* (Cth) and sec 75(v) of the *Constitution*. No such review is available of the Governor-General's decision to make regulations proscribing persons or entities under sec 18 of the UN Charter Act. Merits review is not available under the *Administrative Appeals Tribunal Act 1975* (Cth).

other applications for revocation”⁹⁴ DFAT’s inability to locate records of the application of these provisions which the INSLM has a statutory function to review somewhat impedes the INSLM’s functions.

Recommendation III/6: DFAT office procedures should be corrected to enable retrieval and examination of administrative dealings concerning applications to review the listing of persons, entities and assets under the UN Charter Act – in accordance with usual and proper standards of official record keeping.

III.11 Reasons for revocation decision

As regards the one application for revocation of a listing under sec 17, the INSLM’s review of the file raised questions about the fairness of the revocation procedure adopted by the Minister. In particular, the INSLM is concerned that there was no provision of information to the applicants setting out the reasons in support of the Minister’s decision. In this case, the Minister noted in his response to the applicants that he had relied on both classified and unclassified information in making the decision that the listing should not be revoked, however, the Minister refused to provide any of the information (including unclassified information) in support of his decision on the basis that “the unclassified information on its own would be misleading”.

The INSLM accepts that secret information cannot be provided to an applicant. However, the INSLM questions the degree to which the refusal to provide any information affects the fairness of the revocation process.⁹⁵ In particular, there should have been, and should in future be, a serious attempt made to notify the gist of reasons where the specific information must remain secret in the interests of national security. In the case examined by the INSLM, there was no such attempt made. The efficacy as well as appropriateness of a listing system can realistically be seen as advanced by the willingness of officials to inform affected persons of the reasons why adverse action has been taken against them.

⁹⁴ *Correspondence from DFAT to the Office of the INSLM*, 5th August 2013

⁹⁵ The INSLM compares this to the approach taken by the Attorney-General in responding to requests for de-listing under the Criminal Code, where Departmental files show comprehensive statements of reasons have been provided to the applicants for the Attorney-General’s decision to maintain a listing.

Recommendation III/7: Where the Minister for Foreign Affairs and Trade declines to revoke a listing in response to an application made under sec 17 of the UN Charter Act, he or she should provide an applicant with an unclassified statement of reasons for the decision.⁹⁶

III.12 Sanctions for unauthorized dealings

It is an offence under subsec 20(1) for an individual holding a “freezable asset”⁹⁷ to intentionally⁹⁸ use or deal with the asset, or allow the asset to be used or dealt with, or facilitate the use of the asset or dealing with the asset, where the asset is a “freezable asset”⁹⁹ and the use or dealing is not in accordance with a notice under sec 22.¹⁰⁰ Strict liability applies to the circumstance that the use or dealing with the asset is not in accordance with a sec 22 notice.¹⁰¹ The penalty for this offence is imprisonment for 10 years as well as a triple-value fine (ie three times the value of the contravening transaction).¹⁰²

⁹⁶ This would be required to be provided by the Minister where a person sought judicial review of a Minister’s listing decision under sec 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Where a person is entitled to make an application under sec 5 in relation to the decision they may, by notice in writing given to the Minister, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision (subsec 13(1)). The Minister must provide this statement within 28 days (subsec 13(2)). While there are some classes of decisions under Schedule 2 that are not decisions to which sec 13 applies, decisions under Part 4 of the UN Charter Act are not such a class.

⁹⁷ A “freezable asset” is defined in sec 14 of the UN Charter Act to mean “an asset that: (a) is owned or controlled by a proscribed person or entity; or (b) is a listed asset; or (c) is derived or generated from assets mentioned in paragraph (a) or (b)”.

⁹⁸ The default fault element of intention applies to the physical element (conduct) of using or dealing with the asset under para 20(1)(b) of the Criminal Code. For offences that do not specify fault elements, subsec 5.6(1) of the Criminal Code provides that where the physical element is conduct, the default fault element is intention. Subsection 5.2(1) of the Criminal Code provides: “A person has intention with respect to conduct if he or she means to engage in that conduct”.

⁹⁹ The fault element (circumstance) as to whether the asset is a “freezable asset” is recklessness (para 20(1)(c) of the UN Charter Act and subsec 5.4(1) of the Criminal Code). Subsection 5.4(1) of the Criminal Code: “A person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.” This applies the default fault element under the Criminal Code as where the physical element is a circumstance, the default fault element is recklessness (subsec 5.6(2)). The prosecution will need to prove that the asset is a “freezable asset” and that the person was reckless as to this fact. The same issues arise here in relation to proving the person was reckless as to whether it fit the definition of “freezable asset”.

¹⁰⁰ subsecs 20(1) and 20(3C) of the UN Charter Act (individuals and bodies corporate respectively)

¹⁰¹ Strict liability applies to the fault element (circumstance) that the use or dealing with the asset is not in accordance with a notice under sec 22 (subsec 20(2)) of the UN Charter Act. This replaces the default fault element of recklessness that would otherwise apply (subsec 5.6(2) of the Criminal Code). Where an offence provides that strict liability applies to a particular physical element of the offence there are no fault elements for that physical element of the offence, however, the defence of mistake of fact under sec 9.2 of the Criminal Code is available. The existence of strict liability does not make any other defence unavailable. See subsecs 6.1(2) and (3) of the Criminal Code.

¹⁰² subsec 20(3A) of the UN Charter Act. This penalty was introduced by the *International Trade Integrity Act 2007* (Cth) which increased the penalty for breaching subsec 20(1) from a maximum period of 5 years imprisonment with no fine option. This Act implemented the Australian Government’s response to recommendations made by the Inquiry into Certain Australian Companies in relation to the United Nations Oil-for-Food Programme, and for other purposes (the Cole Inquiry).

It is an offence under subsec 20(3C) for a body corporate holding a freezable asset¹⁰³ to a) use or deal with the asset, or b) allow the asset to be used or dealt with, or c) facilitate the use of the asset or dealing with the asset, where the use or dealing is not in accordance with a notice under sec 22. For bodies corporate, the entire offence is an offence of strict liability.¹⁰⁴ The penalty for this offence is a triple-value fine (ie three times the value of the contravening transaction).¹⁰⁵

It is an offence under subsec 21(1) for an individual to intentionally make an asset available to a person or entity (either directly or indirectly)¹⁰⁶ where that person or entity is a proscribed person or entity¹⁰⁷ and the making available of the asset is not in accordance with a notice under sec 22.¹⁰⁸ The penalty for this offence is imprisonment for 10 years as well as a triple-value fine (ie three times the value of the contravening transaction).¹⁰⁹

It is an offence under subsec 21(2C) for a body corporate to make an asset available to a person or entity (either directly or indirectly) where that person or entity is a proscribed person or entity and where the making available of the asset is not in accordance with a

¹⁰³ The prosecution will need to prove that the asset is a “freezable asset”.

¹⁰⁴ subsec 20(3D) of the UN Charter Act expressly provides that an offence under subsec 20(3C) is an offence of strict liability. Where an offence provides that the offence is an offence of strict liability there are no fault elements for *any* of the physical elements of the offence and the defence of mistake of fact under sec 9.2 of the Criminal Code is available. The existence of strict liability does not make any other defence unavailable. See subssecs 6.1(1) and (3) of the Criminal Code. Additionally, it is a defence if the body corporate proves that the use or dealing was “solely for the purpose of preserving the value of the asset”, or the body corporate “took reasonable precautions, and exercised due diligence, to avoid contravening subsection (3C)” (the body corporate bears a legal burden in relation to these matters): subsec 20(3E). It is common in the regulatory area for offences to be ones of strict or absolute liability.

¹⁰⁵ subsec 20(3F) of the UN Charter Act

¹⁰⁶ The default fault element of intention applies to the physical element (conduct) of making the asset available to a person or entity asset under para 21(1)(a) of the UN Charter Act. For offences that do not specify fault elements, subsec 5.6(1) of the Criminal Code provides that where the physical element is conduct, the default fault element is intention. Subsection 5.2(1) of the Criminal Code provides: “A person has intention with respect to conduct if he or she means to engage in that conduct”.

¹⁰⁷ The fault element (circumstance) as to whether the person or entity is proscribed is recklessness (para 21(1)(b) of the UN Charter Act and subsec 5.4(1) of the Criminal Code). Subsection 5.4(1) of the Criminal Code: “A person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk”. This applies the default fault element under the Criminal Code as where the physical element is a circumstance, the default fault element is recklessness (subsec 5.6(2)).

¹⁰⁸ Strict liability applies to the fault element (circumstance) that the making available of the asset is not in accordance with a notice under sec 22 (subsec 21(2)) of the UN Charter Act. This replaces the default fault element of recklessness that would otherwise apply (subsec 5.6(2) of the Criminal Code). Where an offence provides that strict liability applies to a particular physical element of the offence there are no fault elements for that physical element of the offence, however, the defence of mistake of fact under sec 9.2 of the Criminal Code is available. The existence of strict liability does not make any other defence unavailable. See subssecs 6.1(2) and (3) of the Criminal Code.

¹⁰⁹ subsec 21(2A) of the UN Charter Act. This penalty was introduced by the *International Trade Integrity Act 2007* (Cth) which increased the penalty for breaching subsec 21(1) of the UN Charter Act from a maximum period of 5 years imprisonment with no fine option. This Act implemented the Australian Government’s response to recommendations made by the Cole Inquiry.

notice under sec 22. For bodies corporate, the entire offence is an offence of strict liability.¹¹⁰ The penalty for this offence is a triple-value fine (ie three times the value of the contravening transaction).¹¹¹

III.13 *R v Vinayagamoorthy & Ors*

There has been only one prosecution for terrorism financing offences under the UN Charter Act. This case in the Supreme Court of Victoria involved the making available of funds and electronic components to a proscribed entity, the Liberation Tigers of Tamil Eelam (the LTTE) (“LTTE case”). Three men - Aruran Vinayagamoorthy, Sivarajah Yathavan and Arumugan Rajeevan, were each charged with making an asset available to a proscribed entity contrary to sec 21 of the UN Charter Act. The three men were charged for their alleged involvement with the LTTE by using the Melbourne-based Tamil Co-ordination Committee to raise monies amounting to at least \$700,000 for the LTTE under the guise of fundraising for tsunami relief.¹¹² Vinayagamoorthy was also charged with a second count under sec 21 of the UN Charter Act of providing \$97,000 worth of electrical equipment to the LTTE. Each of the men pleaded guilty to the offence and was given a suspended sentence.¹¹³

The accused transferred large sums of money to the LTTE in Sri Lanka over a three year period. It was the prosecution case that \$1,030,259 was made available to the LTTE.¹¹⁴ Although the sentencing judge, Coghlan J, found it was not possible to say precisely how much money was made available, he considered that they were large amounts (at least \$700,000).¹¹⁵ In addition to the money transmitted by the accused to the LTTE, Mr Vinayagamoorthy made

¹¹⁰ subsec 21(2D) of the UN Charter Act expressly provides that an offence under subsec 21(2C) is an offence of strict liability. Where an offence provides that the offence is an offence of strict liability there are no fault elements for *any* of the physical elements of the offence and the defence of mistake of fact under sec 9.2 of the Criminal Code is available. The existence of strict liability does not make any other defence unavailable. See subssecs 6.1(1) and (3) of the Criminal Code. Additionally, it is a defence if the body corporate proves that the use or dealing was “solely for the purpose of preserving the value of the asset”, or the body corporate “took reasonable precautions, and exercised due diligence, to avoid contravening subsection (2C)” (the body corporate bears a legal burden in relation to these matters): subsec 21(2E) of the UN Charter Act. It is common in the regulatory area for offences to be ones of strict or absolute liability.

¹¹¹ subsec 21(2F) of the UN Charter Act

¹¹² *R v Vinayagamoorthy* [2010] VSC 148 (31 March 2010), [25]–[29]

¹¹³ Yathavan and Rajeevan were sentenced to one year imprisonment but released immediately on a \$1000 recognizance release order to be of good behaviour for three years. Vinayagamoorthy was sentenced to two years imprisonment but released immediately on a \$1000 recognizance release order to be of good behaviour for four years. *R v Vinayagamoorthy & Ors* [2010] VSC 148, [67-74]

¹¹⁴ *R v Vinayagamoorthy & Ors* [2010] VSC 148, [25]

¹¹⁵ *R v Vinayagamoorthy & Ors* [2010] VSC 148, [61]

an estimated \$97,000 worth of electronic components available to the LTTE over a period of about two years.¹¹⁶

As the LTTE was a proscribed entity under sec 15 of the UN Charter Act at the time of the offending, it was not necessary for the court to make findings on whether the LTTE was, at relevant times, a terrorist organisation. Originally, the accused were also charged with more serious offences under the Criminal Code but these were later abandoned by the prosecution due to the difficulties in proving the LTTE was a “terrorist organisation” under the Criminal Code in circumstances where the LTTE was not proscribed by regulation as such. This aspect of the LTTE case is discussed in Chapter IV.

It is an offence under sec 21 of the UN Charter Act for a person to make an asset available (directly or indirectly) to a person or entity where the person or entity is proscribed and the making of the asset available is not in accordance with a Minister’s notice under sec 22 of the UN Charter Act. The fault element is recklessness – it is sufficient for the prosecution to prove that, on the basis of circumstances known to an accused, he or she was aware of a substantial risk of proscription and such a risk was unjustifiable. The Criminal Code provides that ‘recklessness’ means:-

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.¹¹⁷

In the LTTE case there was strong evidence in support of the fact that the accused knew of the proscription, however, while Coghlan J was willing to say he strongly suspected that at least one of the accused knew of the proscription, he was not satisfied that the accused did know of the proscription.¹¹⁸ Where intention cannot be proven, “recklessness” still requires that the accused is aware of a “substantial risk that the circumstance exists or will exist”. Leaving aside

¹¹⁶ *R v Vinayagamoorthy & Ors* [2010] VSC 148, [26]

¹¹⁷ sec 5.4 of the Criminal Code

¹¹⁸ *R v Vinayagamoorthy & Ors* [2010] VSC 148 [7]

the “will exist” part of the test as an organisation is either proscribed or it is not, recklessness requires that the accused is aware of a risk that the fact of proscription exists, ie a risk that the organisation has been proscribed. This differs from the recklessness requirement for terrorist organisation offences under the Criminal Code which require the accused knew there was a risk that the organisation was a “terrorist organisation” under the Criminal Code.

While this may be shown by knowledge of the proscription by regulation of an organisation as a terrorist organisation under the Criminal Code, it may also be proven by showing that the accused knew there was a risk that the organisation fit within the definition of “terrorist organisation” under the Criminal Code. As the LTTE case ultimately resulted in a plea, there are no data in this country as to how or what the evidence might be that would give rise to the circumstances in which a person would be reckless to as whether an organisation was proscribed under the UN Charter Act.

The INSLM is concerned that leaving aside financial institutions, for whom there is formal communication of the lists of proscribed individuals and entities, the communication of both the proscription process itself, and the lists of those proscribed, via Government Gazettes and DFAT lists, raise questions about the efficacy of an offence that requires knowledge on the part of a person about these processes and the contents of the lists. The lists are accessible, they can be found on the internet free of charge, but on the occasions on which people are likely to be making funds available (eg giving charitable donations) it is probably unrealistic to expect people who are asked to give money to a supposedly charitable cause to consult such sources.

The INSLM is not satisfied that persons in such circumstances are effectively “put on notice” of proscription decisions. It might be thought obvious that it is reasonable for a person not to know that another person had been listed in the Government Gazette. In addition to being published in the Gazette, the Department of Foreign Affairs and Trade must¹¹⁹ make publicly available on the internet, a Consolidated List of entities, persons and assets that are currently designated persons or entities¹²⁰ and all assets or classes of assets currently listed under sec 15 of the UN Charter Act.¹²¹

¹¹⁹ reg 40 of the 2008 Regulations

¹²⁰ Meaning a proscribed person or entity or a designated person or entity as defined in any of the Sanctions Regulations: reg 4 of the 2008 Regulations. A proscribed person or entity means a person or entity listed by the Minister under sec 15 or proscribed by regulation under sec 18 of the UN Charter Act: sec 14 of the UN Charter Act.

¹²¹ reg 40 of the 2008 Regulations

This Consolidated List contains over 2,500 separate entities, persons and assets (as well as their various aliases).¹²² This includes 93 individuals and entities (as well as their various aliases) that have been listed under sec 15 of the UN Charter Act. The remainder are those listed under UN Security Council sanctions régimes¹²³ or under the Autonomous Sanctions Act.¹²⁴ Again, it might be thought obvious that it is reasonable for a person not to know that another person had been named in a consolidated list, available only as a spreadsheet containing 2,500 separate names.

The fact that there are two proscription lists further complicates in this matter. The INSLM heard evidence that people in the Australian Tamil community were very aware of that fact that there was no listing of the LTTE under the Criminal Code but the fact that it was listed under a separate régime (the UN Charter Act) was not well known.¹²⁵ There was evidence that the accused in the LTTE case were active in trying to prevent the proscription of the LTTE as a terrorist organisation under the Criminal Code but Coghlan J was not satisfied that any of the accused knew of the fact of proscription under the UN Charter Act.¹²⁶ His Honour did accept that the evidence of the complex structuring which was used to transmit the funds to the LTTE “supports the proposition that [the accused] knew or at least knew there was a substantial risk that the LTTE was a proscribed organisation”.¹²⁷ His Honour found:-

I am satisfied that the accused knew that it was alleged that the LTTE was a terrorist organisation. I am satisfied that they knew that the organisation had been declared such in other countries. I am satisfied that they were active in trying to prevent such a

¹²² The Consolidated List includes all persons and entities to which the UN Charter Act and the Autonomous Sanctions Act applies. See: www.dfat.gov.au/icat/UNSC_financial_sanctions.html

¹²³ Pursuant to Part 3 of the Charter of the UN Act which provides for Regulations to be made to apply Security Council Sanctions. Section 6 of the UN Charter Act provides that the Governor-General may make regulations for and in relation to giving effect to decisions that the Security Council makes under Ch VII of the Charter and which Art 25 of the Charter requires Australia to carry out in so far as those decisions require Australia to apply measures that do not involve the use of armed force. See eg *Charter of the United Nations (Sanctions-The Taliban) Regulation 2013* (Cth). Currently, the UN Security Council sanctions régimes (as implemented through sec 6 of the UN Charter Act) apply to Al-Qa’ida and the Taliban, Cote d’Ivoire, Democratic Republic of Congo, Eritrea, Guinea-Bissau, Iraq, Lebanon, Liberia, Somalia and Sudan.

¹²⁴ See *Autonomous Sanctions Regulations 2011* (Cth) which imposes sanctions on listed countries. These are currently the Democratic People’s Republic of Korea, Fiji, the former Federal Republic of Yugoslavia, Iran, Libya, Myanmar, Syria and Zimbabwe. The Autonomous sanctions régime is imposed by the Australian Government as a matter of foreign policy and while it may supplement UN Security Council sanctions, including by implementing measures that the Security Council ‘calls upon’ United Nations Member states to implement, it may be entirely separate from Security Council sanctions. The Security Council sanctions régime also applies to some of the countries listed under the autonomous sanctions régime (Democratic People’s Republic of Korea, Iran and Libya) but not all.

¹²⁵ see the transcript of evidence given by Mr Phillip Boulten SC at the INSLM’s public hearing on 22nd April 2013, available at www.dpmc.gov.au/inslm

¹²⁶ *R v Vinayagamoorthy & Ors* [2010] VSC 148, [7]

¹²⁷ *R v Vinayagamoorthy & Ors* [2010] VSC 148, [13]

declaration being made in Australia. I am satisfied that their subject belief however was that the LTTE was not, insofar as they were concerned, a terrorist organisation.¹²⁸

Coghlan J noted that the funds were collected by the accused from the Tamil community in Australia and even though the LTTE had been proscribed, local Tamils continued to provide funds. In sentencing the accused, he appears to have been influenced by the fact that the proscription of the LTTE in December 2001 made conduct which had been previously lawful suddenly unlawful without any attendant change in the prevailing circumstances in Sri Lanka.¹²⁹ His Honour noted expert evidence about the operation of the LTTE as a de facto government in the north of Sri Lanka and appears to have taken this into account in sentencing the accused, finding:-

These offences have to be viewed in that context and go through the whole of the period the LTTE was proscribed in Australia under this legislation. It was operating openly in Sri Lanka in the northern part of Sri Lanka. So although there was a change in the law, which made your conduct unlawful, you were dealing with those who had control of the northern part of Sri Lanka.¹³⁰

The confusion caused by having two separate proscription régimes for terrorist organisations under Australian law is illustrated in the sentencing reasons incorrectly stating that “the LTTE has never actually been declared a terrorist organisation in Australia, although that was a matter within the power of the Government”.¹³¹ Whether or not an organisation proscribed under the UN Charter Act is also proscribed as a terrorist organisation under the Criminal Code and vice versa should not have any influence on sentencing decisions for offences under either Act. Nor is it for judges to decide what they think the nature and rôle of a proscribed organisation is - it is for the Executive to determine in accordance with law who is to be proscribed under the UN Charter Act.

Justice Coghlan accepted that the defendants were motivated partly by a desire to assist the Tamil community by raising funds for tsunami relief. His Honour found that it was not possible to say “what the funds were made available for, but it may have been open for the LTTE to apply funds as they wished”.¹³² In sentencing, he found:-

¹²⁸ *R v Vinayagamoorthy & Ors* [2010] VSC 148, [16]

¹²⁹ *R v Vinayagamoorthy & Ors* [2010] VSC 148, [8]

¹³⁰ *R v Vinayagamoorthy & Ors* [2010] VSC 148, [21]

¹³¹ *R v Vinayagamoorthy & Ors* [2010] VSC 148, [9]

¹³² *R v Vinayagamoorthy & Ors* [2010] VSC 148, 31 March 2010, [30]

I am prepared to accept as a general proposition that you were each motivated by a desire to assist the Tamil community in Sri Lanka. I would not go so far as saying that your aims were entirely humanitarian. But *I do accept that they were not purposely to assist terrorist activity* [emphasis added].¹³³

His Honour found the offending conduct of the men to fall “at the lower end of seriousness of offences of this kind at that time”¹³⁴ and as such sentenced each of the men to one year imprisonment for the offence (wholly suspended). His Honour also found that the offending conduct was “somewhere in the middle of the range...because of the amounts involved and because, in particular, the inherent risks of providing funds in the way that they were.”¹³⁵

Courts in Canada, the UK and other like-minded countries have shown a similar reluctance to impose substantial terms of imprisonment when sentencing for terrorism financing offences (implementing 1373). The British Columbia Court of Appeal upheld a sentence of six months imprisonment for an individual convicted of collecting funds in Canada for the LTTE.¹³⁶ In upholding the sentence as appropriate, the court took into account the fact that the individual has only fundraised \$3,000 (that is, they took into account the fact that he was not very good at canvassing funds).¹³⁷ The court held the sentence reflected the fact that by the time the accused was before the court, concern about the financing of the LTTE had abated due to its defeat and that the lack of remorse shown by the accused was not surprising given his Tamil heritage (presumably factors going to deterrence).¹³⁸ The sentence was held to be appropriate even though the accused admitted that he knew the LTTE was banned and that it was illegal to collect money on its behalf in Canada.¹³⁹

In the LTTE Case, Vinayagamoorthy, also made available electronic components capable of remotely detonating improvised explosive devices. In sentencing for this charge, Coghlan J was satisfied the matériel supplied to the LTTE “was put to a direct military purpose”¹⁴⁰ Despite this finding, the sentence of imprisonment for 18 months was wholly suspended.

¹³³ *R v Vinayagamoorthy & Ors* [2010] VSC 148, 31 March 2010, [31]

¹³⁴ *R v Vinayagamoorthy & Ors* [2010] VSC 148, 31 March 2010, [68]

¹³⁵ *R v Vinayagamoorthy & Ors* [2010] VSC 148, 31 March 2010, [62]

¹³⁶ *R v Thambaiathurai* [2011] BCCA 137, 21 March 2011. The court found no reason to criticize the approach or conclusion of the sentencing judge who found that while the offending conduct fell at the low end of the scale, a suspended sentence would not adequately serve the objectives of deterrence and denunciation and ordered a sentence of six months imprisonment (the maximum period of imprisonment for the offence being 10 years). [24-25]

¹³⁷ *R v Thambaiathurai* [2011] BCCA 137, 21 March 2011, [23]

¹³⁸ *R v Thambaiathurai* [2011] BCCA 137, 21 March 2011, [22]

¹³⁹ *R v Thambaiathurai* [2011] BCCA 137, 21 March 2011, [8]

¹⁴⁰ *R v Vinayagamoorthy & Ors* [2010] VSC 148, 31 March 2010, [37]

Vinayagamoorthy had arranged for the sending of those devices and at least one of them finished up in a landmine. Justice Coghlan was satisfied that the material before him was sufficient to establish that fact but he did not accept that it followed that Vinayagamoorthy intended that to occur.¹⁴¹ His Honour accepted that there are other uses to which such devices may be put (without providing any examples of such innocuous uses).¹⁴² His Honour did not accept that Vinayagamoorthy had an expectation that the devices would be used for a hostile purpose in the way the prosecution alleged.¹⁴³ These findings were made in relation to devices that “the LTTE routinely used...in terrorist acts and on the evidence, there was no other reasonable use of them”¹⁴⁴

Despite agreeing with the prosecution submissions on sentence that the accused were “members and controllers of the LTTE in Australia”, Coghlan J did not consider the accused were members of a terrorist organisation, “but in sending funds to the LTTE they took the risk that the funds were being used inappropriately, whatever their belief and desire was. There is ample material from which it can be concluded that the accused knew of the military activities of the LTTE and of their military preparedness even during the ceasefire”¹⁴⁵

In summary, Australia’s only practical experience of these offences being prosecuted reveals little about the efficacy of the legislation in preventing or deterring such conduct. The pleas of guilty to the financing offences came as a result of perceived difficulties in proving the terrorist character of the LTTE, and that it was appreciated by the accused, weakening the case on the charges for the most serious terrorist offences of possible relevance to these cases.

The remarks on sentencing seem, with respect, to contain traces of that forensic history. Rather than accepting the legislated significance of the listing of the LTTE for the purposes of the offences to which the accused pleaded guilty under the UN Charter Act, Coghlan J seems to have taken into account matters which could be urged in favour of the LTTE as an organisation, such as its quasi-governmental activities. To put it mildly, such an approach is at odds with the nature of an offence committed by proscribed dealings in relation to a listed entity.

Nonetheless, the criticisms that are available to be made of the approach on sentencing in these cases do not undermine the efficacy and appropriateness of the legislation in question.

¹⁴¹ *R v Vinayagamoorthy & Ors* [2010] VSC 148, 31 March 2010, [37]

¹⁴² *R v Vinayagamoorthy & Ors* [2010] VSC 148, 31 March 2010, [37]

¹⁴³ *R v Vinayagamoorthy & Ors* [2010] VSC 148, 31 March 2010, [37]

¹⁴⁴ *R v Vinayagamoorthy & Ors* [2010] VSC 148, 31 March 2010, [26]

¹⁴⁵ *R v Vinayagamoorthy & Ors* [2010] VSC 148, 31 March 2010, [27]

Much more experience of prosecutions including those that are fully contested would be needed in order to provide empirical conclusions on this topic. It is to be hoped the data will remain unavailable, in the sense that one hopes for a lack of pro-terrorist conduct of this kind.

III.14 Disparity in penalties between the UN Charter Act and the Criminal Code terrorism financing offences

The principal criminal sanctions imposed by the UN Charter Act are found in sec 20 (dealing with freezable assets) and sec 21 (making assets available to a proscribed person or entity). They both turn on the absence of Ministerial permission to deal with assets contrary to those provisions, by way of a sec 22 notice. The sec 20 and sec 21 offences involve strict liability for the element comprising the lack of an applicable sec 22 notice.¹⁴⁶

By dint of applying the relevant general principles of criminal responsibility in the Criminal Code, the fault element for the circumstance involving the listing of the relevant persons, entities or assets in each of the sec 20 and sec 21 offences is recklessness.¹⁴⁷ That is, the prosecution must show that the accused was aware of a substantial risk that the person, entity or asset was listed and that having regard to the circumstances known to the accused it was unjustifiable to take that risk.¹⁴⁸

Issues arising from the concept of recklessness concerning the listing of a person, entity or asset under the UN Charter Act are addressed further below. The separate issue of immediate concern is whether these UN Charter Act offences compare appropriately as to their penalty provisions with the penalty provisions under sec 102.6 of the Criminal Code. The offences created by sec 102.6 may be seen as the principal Australian criminal legislation directed against the evils of financing terrorism. One difference between the UN Charter Act offences and these Criminal Code offences is that the former comprehend dealings with a listed individual, whereas the latter concern dealings with organisations (which by definition are bodies corporate or unincorporated bodies, as opposed to individuals).¹⁴⁹

As noted above, listing under the UN Charter Act requires satisfaction as to the terrorist character of the persons or entities in question. That terrorist character is thereby an element in the offences under secs 20 and 21 of the UN Charter Act. The offences under sec 102.6 of the Criminal Code explicitly require proof of the terrorist character of the organisation in

¹⁴⁶ subsecs 20(2) and 21(2) of the UN Charter Act

¹⁴⁷ paras 20(1)(c) and 21(1)(b) of the UN Charter Act; subsec 5.6(2) of the Criminal Code.

¹⁴⁸ subsec 5.4(1) of the Criminal Code

¹⁴⁹ sec 100.1 of the Criminal Code

question.¹⁵⁰ Thus the UN Charter Act and the Criminal Code terrorism financing offences are on a par concerning the terrorist character of the proscribed party to the criminalized dealings.

There is no requirement for any of these terrorism financing offences that the funds be used for a terrorist act – it is sufficient that they are going to a terrorist organisation and therefore may support that organisation in its terrorist purposes.

Section 102.6 of the Criminal Code enacts two offences, exactly similar but for the fault element in relation to the character of the organisation as a terrorist organisation: under para 102.6(1)(c) the fault element is knowledge, while under para 102.6(2)(c) it is recklessness. Different penalties apply depending on whether the person knew the organisation was a terrorist organisation (25 years imprisonment) or was reckless as to the fact (15 years imprisonment).

These penalties are commensurate with other terrorist organisation offences under Div 102 of the Criminal Code. For example, recruiting for a terrorist organisation (sec 102.4), providing training to, or receiving training from, a terrorist organisation (sec 102.5), and providing support to a terrorist organisation (sec 102.7) all carry penalties of 25 and 15 years respectively for knowing and reckless behaviour.

Nothing has been found by the INSLM to question the appropriateness of these admittedly stern penalties under the Criminal Code. (It could not be said that the periods of 25 and 15 years are uniquely correct as a matter of policy, but rather that they make sense given the moral culpability of conduct constituting the offences, given the overlap of such conduct with such grave offences as doing acts in preparation for a terrorist act¹⁵¹ and in light of international comparators¹⁵²).

Consideration of these UN Charter Act and Criminal Code penalty provisions thus raises the obvious question whether the 10 years penalty provided for the former is anomalous in light of the 15 years provided for the recklessness offence under the latter.¹⁵³ In general, it would seem

¹⁵⁰ paras 102.6(1)(b) and 102.6(2)(b) of the Criminal Code

¹⁵¹ sec 101.6 of the Criminal Code, penalized by imprisonment for life

¹⁵² eg the penalty for the terrorism financing offences under secs 15-18 of the *Terrorism Act 2000* (UK) is 14 years (sec 22) and the penalty for the provision of material support to terrorists or terrorist organisations under the US Code is 15 years (18 USC § 2339A and B).

¹⁵³ The implications of executive responsibility for prosecution when the choice of charge has a substantial effect on the relevant penalty, for otherwise similar conduct of comparable culpability, are illustrated in the recent High Court decision of *Magaming v The Queen* [2013] HCA 40 (11 October 2013).

appropriate for prescribed penalties, that operate as maximums for the purposes of exercising the judicial discretion in sentencing, to be fairly similar for fairly similar offences. So far as concerns the UN Charter Act terrorism financing offences and the recklessness offence under sec 102.6 of the Criminal Code, they are very close to exactly similar offences.

Perhaps the only real difference that might arguably affect culpability for the purposes of considering penalties, between these offences, is that the terrorist character in the case of the UN Charter Act offences is constituted by the anterior satisfaction as to that character by the Minister by way of the listing process itself - whereas under the Criminal Code offence the terrorist character must be proved by evidence at trial. However, proof under the Criminal Code of that terrorist character may in turn be accomplished by adducing evidence that the organisation is engaged in (etc) the doing of a terrorist act (etc) or by proving that it is specified by the regulations for the purposes of the statutory definition.¹⁵⁴ A prerequisite for making such regulations is satisfaction by the Minister on reasonable grounds that the organisation is engaged (etc) in the doing of a terrorist act (etc), with other safeguards concerning procedure and currency.¹⁵⁵

In this manner, it emerges that there is virtually exact similarity between the UN Charter Act offences and the Criminal Code offence if the terrorist character of the organisation is proved by the regulation alternative. It is only if the Criminal Code offence is proved by evidence of terrorist conduct to show the character of the organisation that this difference in the manner and forum of proof subsists. Does that possible difference justify such a large disparity in the penalties?

On balance, and especially because the same higher penalty applies however the Criminal Code recklessness offence is proved as to the terrorist character of the organisation, in the opinion of the INSLM this disparity is arbitrary. It cannot be justified. It would permit a most unfortunate aspect of prosecutorial discretion to excite grievance in the case of unexplained resort to one or other of these offences. It would be better if the anomaly were removed.

Disparities in penalties that ought be removed could be addressed by lowering one set of penalties or raising the other. For the reasons noted above in relation to the scheme of appropriately stern penalties under the Criminal Code, on balance the preferred approach, in the view of the INSLM, is that the UN Charter Act offences should have the same penalties as the 15 years prescribed for the Criminal Code recklessness offence.

¹⁵⁴ paras (a) and (b) of the definition of "terrorist organisation" in subsec 102.1(1) of the Criminal Code

¹⁵⁵ subsecs 102.1(2)-(6) of the Criminal Code

Recommendation III/8: The maximum period of imprisonment for offences under subsec 20(1) (dealing with freezable assets) and subsec 21(1) (giving an asset to a proscribed person or entity) of the UN Charter Act should be increased to 15 years.

By way of addendum, so to speak, to this recommendation and in accordance with subpara 6(1)(a)(ii) of the INSLM Act, it should be noted that the offence created by sec 27 of the UN Charter Act, for contravening a UN sanction enforcement law, also provides for 10 years imprisonment. Obviously, UN sanctions are and are likely to continue to be part of the international response to terrorism; equally obviously, they are well adapted to form part of the international effort to counter terrorism financing specifically. If the recommendation above were to be accepted, it would make sense for the sec 27 penalty to be increased in the same way, and for the same reasons.

III.15 Disparity in mental elements between the UN Charter Act and the Criminal Code terrorism financing offences

As noted above, the UN Charter Act terrorism financing offences are made out by proof of recklessness as to the listing of the persons, entities or assets, which involves their terrorist character or connexion. One of the Criminal Code offences, on the other hand, is made out by proving knowledge of that terrorist character. That is the offence for which 25 years imprisonment is provided as the penalty. Relevantly, in accordance with the general principles of criminal responsibility under the Criminal Code, that element requires proof that the accused is aware that the terrorist character exists.¹⁵⁶ As might be expected given the greater burden involved in proving knowledge, proof of it will satisfy the fault element of recklessness.¹⁵⁷

However, as the UN Charter Act offences stand, proof of knowledge by the accused of the terrorist listing of the person, entity or asset in question at his or her trial will not lead to an increased penalty to reflect the increased culpability over recklessness. For the reasons noted above, this is an anomaly in the legislative sanctioning of similar conduct under different statutes, that is better avoided.

Recommendation III/9: Section 20 (dealing with freezable assets) and sec 21 (giving an asset to a proscribed person or entity) of the UN Charter Act should be amended to include an offence with the mental element of knowledge that the person, entity or asset is listed. The

¹⁵⁶ sec 5.3 of the Criminal Code

¹⁵⁷ subsec 5.4(4) of the Criminal Code

maximum period of imprisonment for each of these offences should be 25 years. (As noted above, for the sake of schematic order, a corresponding amendment should be considered for sec 27 of the UN Charter Act (contravening a UN sanction enforcement law)).

III.16 Is the prosecution burden under UN Charter Act terrorism financing offences too high?

The only successful prosecutions for terrorism financing are the pleas of guilty in substitution for more serious offences in the LTTE case discussed above, and the convictions after contested trial in the Melbourne Pendennis cases noted in the INSLM's First Annual Report and elsewhere in this Report. Thus the prosecution case was not tested in the LTTE case, and in Melbourne Pendennis it was certainly not to the forefront of the proceedings given that those charged and convicted of the sec 102.6 offences in that trial were also charged and convicted of other more serious offences.

The INSLM has also examined the records of other investigations and considerations of prosecution for terrorism financing offences, where no charges ensued. The details are not significant for present purposes, and include operationally sensitive information and information that might prejudice performance by a law enforcement or security agency of its functions – and so must not be published.¹⁵⁸ The INSLM has also received from involved Commonwealth officers detailed and, with respect, thoughtful description of critical aspects of those investigations and considerations in light of the terrorism financing offence provisions under examination. None of that information should be published either, because it is of the same kind.

The overwhelming impression formed by the INSLM in light of this information is of the formidable, bordering on impracticable, requirements for the proof of terrorism financing offences in many of the circumstances that can be envisaged to excite suspicion of such crimes being committed. In turn, doubts are raised concerning the efficacy of these apparently important terrorism financing offences, both for the national security of Australia and in order to discharge Australia's international counter-terrorism obligations.

The elements of the sec 21 offence under the UN Charter Act will be used to illustrate the following discussion whether this state of affairs can or should be altered by legislative amendment. To recall, the first physical element is the conduct of making an asset available to a person or entity; the second physical element is the circumstance of the person or entity

¹⁵⁸ para 29(3)(a) and subpara 29(3)(b)(ii) of the INSLM Act

being terrorist listed (“proscribed”), as analyzed above; the third physical element is the circumstance of the making available not being in accordance with a sec 22 authorisation notice; with intention as the mental element for the first of these, recklessness for the second and strict liability for the third.

There may be room for unnecessary argument in relation to recklessness as the mental element for the circumstance of the person or entity being terrorist listed. That is because the listing will be achieved by regulation, being subordinate legislation within the meaning of sec 9.4 of the Criminal Code. The general provisions of sec 9.4 are problematical in application to sec 21 of the UN Charter Act. What does it mean to say that a person “can be” criminally responsible “even if” the person is mistaken about the existence of relevant subordinate legislation? Does it mean that ignorance of a regulation cannot inform the judgement whether a person is aware of a substantial risk within the meaning of the recklessness mental element under sec 5.4 of the Criminal Code?¹⁵⁹

It would be better if such questions were scotched before an otherwise meritorious prosecution fails on this account. Recklessness is probably a proportionate mental element for these terrorism financing offences, so far as concerns listing (subject to the pessimism as to the prosecution prospects, discussed below).

Legislative amendment is appropriate to deal with this admittedly marginal problem, that arises from the peculiar aspect of these offences that the circumstance in question happens to be the state of subordinate legislation.

Recommendation III/10: Sections 20 and 21 (and sec 27, for the sake of schematic order) of the UN Charter Act should be amended to stipulate that the mental element for the asset being freezable, the person or entity being proscribed or the conduct contravening a UN sanction enforcement law is in each case recklessness notwithstanding sec 9.4 of the Criminal Code.

It does not seem that extending the assessment of these prosecution difficulties to include the offence of attempting to commit a sec 21 offence could offer any appropriate easing of the prosecution burden of proof, given the statutory stipulation of intention and knowledge in

¹⁵⁹ The INSLM received advice from the Attorney-General’s Department on the interpretation of sec 9.4 of the Criminal Code and its application to offences under the UN Charter Act. This advice accorded with the above view that ignorance of a regulation cannot inform the judgement whether a person is aware of a substantial risk within the meaning of the recklessness mental element under sec 5.4 of the Criminal Code.

relation to each physical element of the offence attempted. (For sec 21, that would not include the third physical element with its special liability provision).¹⁶⁰

The operations of most if not all of the terrorist to which Australian donations to which would amount to offences under sec 21 of the UN Charter Act are carried out in other countries and more or less clandestinely in many regards including the receipt and expenditure of funds. The agency and representation of persons in the nature of middlemen or brokers by which it may be suspected assets are being made available within the meaning of sec 21 rarely if ever facilitate proof of their authority or mission on behalf of a listed person or entity. In many if not all such cases, proof of such essential links, to make good the element of “makes... available to a person...”, will also require information from or relating to other countries.

It is notorious that conditions in most if not all those other countries, in present global circumstances relating to terrorism, are distinctively inimical to the gathering of criminal intelligence let alone admissible evidence.

In short, practical experience to date warrants considerable pessimism in relation to assembling prosecution cases sufficiently cogent to justify laying and attempting to prove such serious charges. Without admissions by the accused, perhaps from intercepted communications,¹⁶¹ the inherent nature of these terrorism financing offences has focussed the attention of the INSLM on the possibility of amendments to ease this prosecution burden.

The paucity of prosecutions contrasted with the apprehended frequency of such offending is enough to indicate the possibility of amending these laws so as to reduce the prosecution burden. In principle, that should be seriously considered only if such lowering of the prosecution burden could be accomplished without rendering the resultant offences arbitrary in the sense of being oppressive. Equally, serious consideration should be given only to amendments with some reasonable prospect of actually working, by appreciably reducing the prosecution burden. These criteria present a major challenge, which the INSLM has not been able to meet. The reasons for this absence of any recommendation to reduce the prosecution burden for these offences for these terrorism financing offences follow.

¹⁶⁰ subsecs 11.1(3), (3A) and (6A) of the Criminal Code

¹⁶¹ Such utterances, of course, cannot be expected to deliver convincing proof of all the relevant elements – precautions taken by the guilty speakers, such as code and other ellipsis, render even this form of evidence problematical. Notions of coded speech bring in their train highly contestable issues of supposedly expert “interpretation”.

III.17 Possible variants of mental element for sec 21 of the UN Charter Act

The INSLM has considered options for reform of sec 21 of the UN Charter Act to overcome the difficulties of proof associated with proving “recklessness” in relation to the fact of proscription. As is discussed in Chapters V and VI, remittances from diaspora communities represent a considerable international flow of funds and the INSLM is concerned to ensure Australia’s terrorism financing offences do not chill genuinely charitable or benevolent conduct. This is a matter of constant concern in considering possible amendment of the terrorism financing offences, given the values sought to be protected by Arts 18, 19, 21, 22, 26 and 27 of ICCPR (and in light of Art 5’s operation).

The theoretical possibility of making offences such as the offence created by sec 21 of the UN Charter offences of absolute liability within the meaning of sec 6.2 of the Criminal Code, so that there is no fault element and no defence of mistake of fact, can be rejected peremptorily. This would be an intolerably arbitrary and disproportionate response to such conduct.

The giving of an asset to a proscribed person or entity by a body corporate is an offence of strict liability.¹⁶² The INSLM considered whether strict liability should be applied where an individual gives an asset to a proscribed person or entity. If strict liability was applied there would be no fault elements for any of the physical elements of the offence but the defence of mistake of fact would be available to the individual.¹⁶³ The defence of mistake of fact for strict liability offences provides:-

- (1) A person is not criminally responsible for an offence that has a physical element for which there is no fault element if:
 - (a) at or before the time of the conduct constituting the physical element, the person considered whether or not facts existed, and is under a mistaken but reasonable belief about those facts; and
 - (b) had those facts existed, the conduct would not have constituted an offence.

- (2) A person may be regarded as having considered whether or not facts existed if:
 - (a) he or she had considered, on a previous occasion, whether those facts existed in the circumstances surrounding that occasion; and

¹⁶² subsec 21(2C)-(2D) of the UN Charter Act

¹⁶³ sec 6.1 of the Criminal Code

- (b) he or she honestly and reasonably believed that the circumstances surrounding the present occasion were the same, or substantially the same, as those surrounding the previous occasion.¹⁶⁴

The INSLM considers the defence of mistake of fact would be oppressively difficult to raise in relation to an offence against sec 21 of the UN Charter Act as it would require that the individual had turned their minds to the fact of proscription and the person or entity's possible inclusion on a list and that they had a mistaken but reasonable belief that the person or entity was not proscribed. This strains credulity in light of the likely lack of knowledge within the general community about proscription under the UN Charter Act.

Even if an individual had turned their mind to the proscription process and the person or entity's inclusion on a list (a doubtful proposition in most cases), there is still the question of how the individual had a mistaken but reasonable belief that the person or entity was not proscribed. What steps could realistically be taken by a person to reach a mistaken but *reasonable* belief about the fact of proscription? Would this require a misinterpretation or misreading of a Gazette, negligent legal advice, police guidance or community views? To be reasonable a person would probably be required to do something more than merely make inquiries of the person to whom they are giving a donation.

As the defence of mistake of fact would impose the forensic burden of raising sufficient indications of its possible application, on the accused, and that exercise would be beset with the difficulties noted above, the INSLM is not satisfied that strict liability would be an appropriate standard to apply to individuals under sec 21 of the UN Charter Act.

The next possibility that the INSLM considered is whether negligence could be applied to sec 21 of the UN Charter Act. The Criminal Code provides that "negligence" means:-

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- (b) such a high risk that the physical element will exist or will exist; that the conduct merits criminal punishment for the offence.¹⁶⁵

¹⁶⁴ sec 9.2 of the Criminal Code

¹⁶⁵ sec 5.5 of the Criminal Code

The INSLM rejects this approach for the reasons described by the COAG Committee in its Review of Counter-Terrorism Legislation as well as the lack of any practical benefit this would provide to the prosecution in proving their case. The COAG Committee rightly described, and it is worth repeating here, the difficulties in applying negligence to terrorism financing:-

...negligence involves the application of the 'reasonable person' test. To that extent, it is not necessary to prove that the person actually turned his mind to the circumstance in question, as it is where 'recklessness' is the fault element. Rather, the position is determined by asking what a reasonable person would do 'in the circumstances', and whether the defendant's behaviour is so great a falling short of that objective standard as to warrant or merit criminal punishment. A number of difficult questions immediately arise: how would a jury determine, for example, what a reasonable person would do in circumstances where donations were sought and made for the benefit of overseas organisations? How would a jury fit into this context the fact that likely defendants are persons of very different religious and cultural backgrounds, many of whom may be immigrants, uneducated, and members or former members of repressed groups in society? How would an objective standard of behaviour in this field be established and how could its limits be defined? These considerations highlight the extent to which the fault element of negligence is quite unsuitable for the offence under consideration.¹⁶⁶

The Committee concluded that the introduction of a new negligence based terrorism financing offence under the Criminal Code would be neither necessary nor proportionate and a risk existed "that such an offence would be perceived as discriminatory, inflammatory and misdirected. It may quite unintentionally target innocent and otherwise praiseworthy behaviour".¹⁶⁷ The Committee found no evidence to suggest such an offence would be effective or beneficial or was operationally necessary (besides making the task of law enforcement agencies less difficult in terms of proof). Further, no international instrument supported such an offence and no intelligence agency or the Government proposed such an offence.¹⁶⁸ The Committee was firmly of the view that negligence as a fault element "seems singularly inappropriate in connection with terrorism law" and noted that negligence does not appear as a fault element in any of the other counter-terrorism offences in Part 5.3 of the Criminal Code.¹⁶⁹

¹⁶⁶ COAG Review of Counter-Terrorism Legislation, *Final Report*, para 158

¹⁶⁷ COAG Final Report, para 161

¹⁶⁸ COAG Final Report, para 161

¹⁶⁹ COAG Final Report, para 154

The INSLM agrees with the COAG Committee and considers these views apply to the terrorism financing offences under the UN Charter Act with one key difference – that being the fact that applying a negligence standard to sec 21 of the UN Charter Act would not relieve the prosecution of the burden of proving knowledge of a “high risk” that the organisation was proscribed.¹⁷⁰ The same issues that arise in relation to proving recklessness (that is, proving knowledge of the proscription process and lists) would apply to a negligence based offence under the UN Charter Act.

Australia’s international obligations require wilful and intentional terrorism financing conduct to be criminalized. The retention of a recklessness standard (which fairly conveys the relevant essence of intentional conduct) accords, in the opinion of the INSLM, with these obligations.

The INSLM is sympathetic to the burdensome position of the prosecution in proving a terrorism financing offence under the UN Charter Act, but is not satisfied that the lowering of the fault elements to negligence or strict liability would be appropriate. The difficulty of proof associated with the offences as they currently stand is an acceptable trade-off for ensuring innocent conduct is not captured by the offence and charitable giving is not discouraged. This is particularly so given the range of other overlapping offences under the Criminal Code that could be applied.

III.18 Immunity for actions and injunction power

The INSLM maintains the view¹⁷¹ that the provisions that provide immunity for actions done in good faith and without negligence under Part 4 of the UN Charter Act¹⁷² probably reflect an appropriate protection for officers of the Commonwealth and others attempting to do their duty.¹⁷³ The INSLM is also satisfied that the broad injunction power¹⁷⁴ is comparable to other familiar provisions (eg in the trade practices context) and is not inappropriate assessed by established precedent.

¹⁷⁰ This differs from the terrorism financing offences under the Criminal Code. Under the Criminal Code, the prosecution would have two options– the prosecution could show knowledge of a “high risk” of proscription by regulation of an organisation as a “terrorist organisation” or of a “high risk” that the organisation fit within the definition of “terrorist organisation” under the Criminal Code.

¹⁷¹ See the INSLM’s First Annual Report, pp 39, 40

¹⁷² sec 24 of the UN Charter Act

¹⁷³ Although the limited compensation provisions under sec 25 of the UN Charter Act do not provide a mirror of all the situations where a person could suffer loss by mistakes in administration of the listing scheme.

¹⁷⁴ sec 26 of the UN Charter Act

III.19 Asset freezing records

As with Part 3, Australia undoubtedly needs Part 4 of the UN Charter Act (or something like it) to comply with its international security and counter-terrorism obligations. Unfortunately it is difficult for the INSLM to assess the efficacy of these provisions. The INSLM requested information from the responsible Government agencies on any funds that have been frozen under Part 4. The INSLM's enquiries revealed only one instance of terrorist asset freezing pursuant to Part 4 of the UN Charter Act that involved an entity proscribed by the Minister under sec 15 of the UN Charter Act.

Both DFAT and the Australian Federal Police ("AFP") were unable to provide the INSLM with a confirmed account of all assets that have been frozen under Part 4 of the UN Charter Act. The AFP originally informed the INSLM that it did not hold any records of assets that have been frozen under Part 4 of the UN Charter Act. DFAT was able to provide some details but not the sum in question of one instance of assets having been frozen under that Part. A further search by the AFP revealed it did hold records of this matter. The AFP was unable to explain why this matter was not initially identified by the AFP in response to the INSLM's request. Due to the lack of adequate record keeping by these agencies, the INSLM cannot definitively report the number or value of assets that have been frozen under Part 4 of the UN Charter Act.

The INSLM's comments and Recommendation III/6 regarding the keeping of proper records of the application of the Charter of the UN Act are worth repeating here. In order for the INSLM to carry out the functions assigned by Parliament, it is necessary for definitive answers to be able to given when the INSLM requests information on the application of legislative provisions within his or her statutory remit.

It follows from these sparse data that the INSLM has not found any evidence, nor have discussions with Commonwealth officers shown, anything to support an inference for or against Part 4's efficacy, such as may have been shown by the effect or not of deterring nefarious funds from coming to, or departing, Australia.

III.20 Suggested improvements to Part 4 of the UN Charter Act

The INSLM has a number of suggested improvements for the operation of Part 4 of the UN Charter Act, drawn from analogy with the Criminal Code terrorist organisation listing provisions.

Recommendation III/11: The Minister’s discretionary power under subsec 16(1) of the UN Charter Act to revoke a listing where the statutory basis for listing is no longer satisfied should be repealed and replaced with a mandatory requirement that the Minister revoke a listing where the statutory basis for listing is no longer satisfied.¹⁷⁵

Recommendation III/12: Subsection 17(1) of the UN Charter Act should be amended to provide open standing for any person to apply to the Minister to have a listing revoked.¹⁷⁶

Recommendation III/13: Subsection 17(3) of the UN Charter Act should be repealed and replaced with a provision that where subsequent revocation applications are made by the same person or entity, the Minister need only consider any relevant new material in support

¹⁷⁵ It is unclear why this is expressed as a discretionary power, rather than a mandatory requirement to revoke a listing where the statutory basis for listing is no longer satisfied. A listing can only be made where the Minister is satisfied on reasonable grounds of the prescribed matters (subsecs 15(1) and (3) of the UN Charter Act). Subsection 15(5) of the UN Charter Act provides that a matter must not be prescribed unless the prescription of that matter would give effect to a decision of the UN Security Council (a decision which forms the basis for a revocation of listing under subsec 16(1) of the UN Charter Act). It would seem open to challenge the validity of a listing that has not been revoked in circumstances where the Minister is satisfied that it is no longer required to give effect to a UN Security Council decision.

This de-listing process contrasts with the approach taken for de-listing terrorist organisations under the Criminal Code. Before the Governor-General can make a regulation specifying an organisation for the purposes of para (b) of the definition of “terrorist organisation” under subsec 102.1(1) of the Criminal Code, the Attorney-General must, in accordance with subsec 102.1(2), 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)”. If an organisation is specified by regulations made under sec 102.1 and the Attorney-General ceases to be satisfied of the prerequisite grounds for making the regulations set out in subsec 102.1(2), then the Attorney-General must make a written declaration that effect and the regulations specifying the organisation as a terrorist organisation cease to have effect when the declaration is made (subsec 102.1(4)).

¹⁷⁶ The restriction of standing to listed persons or entities is more restrictive than the de-listing provisions under the Criminal Code. Subsection 102.1(17) of the Criminal Code provides open standing for an individual or organisation (which may or may not be the listed terrorist organisation) to make a de-listing application to the Attorney-General on the grounds that there is no basis for the Attorney-General to be satisfied of the prerequisite grounds for making the regulations set out in subsec 102.1(2) of the Criminal Code. The Attorney-General is required to consider all de-listing applications (subsec 102.1(17) of the Criminal Code).

of the applicant's grounds that there is no basis for the Minister to be satisfied of the listing decision.¹⁷⁷

Recommendation III/14: Extended geographical jurisdiction (category D) should be applied to all offences under Part 4 of the UN Charter Act.¹⁷⁸ It is unclear why category D extended geographical jurisdiction (the furthestmost extension of jurisdiction that can be applied to a law of the Commonwealth) is applied to the Criminal Code terrorism financing offences (as a wholehearted implementation of 1373¹⁷⁹) but category A is applied to the terrorism financing offences under Part 4 of the UN Charter Act.¹⁸⁰

III.21 ASIO questioning powers and UN Charter Act offences

The Australian Security Intelligence Organisation's ("ASIO") power to compel answers to questioning under Div 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) ("ASIO Act") may only be exercised where "there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important *in relation to a terrorism offence*".¹⁸¹ The ASIO Act defines "terrorism offence" to mean an offence against Subdivision A of Division 72 (International terrorist activities using explosive or lethal devices) or Part 5.3 (Terrorism) of the Criminal Code.¹⁸² As discussed

¹⁷⁷ Pursuant to subsec 17(3) of the UN Charter Act, the Minister is not required to consider more than one application from a listed person or entity per year. This is more restrictive than the de-listing process under the Criminal Code which requires the Attorney-General to consider all de-listing applications, regardless of how recently an application for de-listing was made by that individual or organisation (subsec 102.1(17) of the Criminal Code). The Attorney-General must consider the de-listing application (subsec 102.1(17)). There is no limit to the amount of applications that can be made each year. There is no evidence that this provision is being used in a manner inconsistent with its purpose, that is, it is not being misused through the making of multiple applications which do not contain relevant new material. In any event, where the Attorney-General had recently dealt with an application, he or she would only need to consider any relevant new material in support of grounds that there is no basis for the Minister being satisfied of the grounds for listing.

¹⁷⁸ Subsec 20(4) of the UN Charter Act currently applies sec 15.1 of the Criminal Code to an offence against subsec 20(1) or (3C) of the UN Charter Act. Subsection 21(3) of the UN Charter Act applies sec 15.1 of the Criminal Code to an offence against subsec 21(1) or (2C). Subsections 20(4) and 21(3) should be amended to apply sec 15.4 of the Criminal Code. See also discussion in Chapter VI.1.

¹⁷⁹ See eg para 1(e) of 1373 which requires States to "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures taken against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts".

¹⁸⁰ While both category A and D extend jurisdiction beyond the "standard geographical jurisdiction" provided for in sec 14.1 of the Criminal Code, the extended geographical jurisdiction (category A) that applies to the offences under Part 4 of the UN Charter Act is more limited than the category D extended geographical jurisdiction that applies to the Criminal Code offences. See also discussion in Chapter VI.1.

¹⁸¹ paras 34D(4)(a) and 34E(1)(b) (QWs) and paras 34F(4)(a) and 34G(1)(b) (QDWs) of the ASIO Act. In addition to this criterion, there are other mandatory criteria that must be met before such powers can be exercised. The INSLM's previous review of these powers, and recommendations in relation to them, are in Chapters IV and V, and Recommendations IV/1-IV/8 and V/1-V/2, of the INSLM's Second Annual Report.

¹⁸² sec 4 of the ASIO Act

above, the offences under Part 4 of the UN Charter Act implement Australia's international counter-terrorism obligations under 1373 and relate to potentially very serious terrorism financing activity (as illustrated by the LTTE case). ASIO should have the power to compel answers to questioning in relation to these terrorism offences.

Recommendation III/15: ASIO's questioning powers should be amended to include offences against Part 3 insofar as it relates to terrorism, and Part 4 of the UN Charter Act.¹⁸³

III.22 *Crimes Act 1914 (Cth)* definition of terrorism offence and UN Charter Act offences

For the same reasons, there should be consistency of approach in the application of stipulated non-parole periods and bail restrictions, as well as the application of police detention and investigation powers, for terrorism offences. There is no reason in principle or policy to distinguish UN Charter Act terrorism financing offences from Criminal Code terrorism financing offences, in this or any other criminological sense.

Sections 15AA and 19AG of the *Crimes Act 1914 (Cth)* (“**Crimes Act**”) make specific provisions for access to bail before conviction and the imposition of non-parole periods in sentencing, in relation to persons charged with or convicted of terrorism offences.

The provisions of Div 3A of Part IAA of the Crimes Act regulate the search, information gathering, arrest and related powers affecting persons suspected of terrorism offences. They bear comparison with ASIO's questioning and detention warrant powers under the ASIO Act. The provisions of Part IC of the Crimes Act relate to the investigation of terrorism offences and regulate questioning and detention of persons arrested for terrorism offences.¹⁸⁴

Subsection 3(1) of the Crimes Act provides that “terrorism offence” “means: (a) an offence against Subdivision A of Division 72 of the Criminal Code [explosives and lethal devices]; or (b) an offence against Part 5.3 of the Criminal Code [Terrorism]”. This definition does not include any of the terrorism offences under the UN Charter Act.

Section 15AA of the Crimes Act regulates access to bail before conviction in relation to persons charged with certain offences, as set out in subsec 15AA(2). These offences include “a

¹⁸³ The position of the INSLM remains that these powers should be amended by omitting the specific régime of questioning and detention warrants, in accordance with Recommendation V/1 in the INSLM's Second Annual Report. Part 3 of the UN Charter Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹⁸⁴ These provisions of the Crimes Act are “counter-terrorism and national security legislation” within the meaning of sec 4 of the INSLM Act. See Chapter VI of the INSLM's First Annual Report for further discussion of these provisions.

terrorism offence” as defined in subsec 3(1) of the Crimes Act (other than an offence against sec 102.8 of the Criminal Code).¹⁸⁵

Section 19AG of the Crimes Act provides minimum non-parole periods for sentences for certain offences: sec 24AA of the Crimes Act (Treachery), Divs 80 (Treason and urging violence) or 91 (offences relating to espionage and similar activities) of the Criminal Code, or a “terrorism offence” as defined in subsec 3(1) of the Crimes Act.¹⁸⁶

The search, information gathering, arrest and related powers in Div 3A of Part IAA of the Crimes Act relate to the investigation of a “terrorism offence” as defined in subsec 3(1) of the Crimes Act. The questioning and detention powers in Part IC of the Crimes Act apply in relation to persons arrested for a “terrorism offence” as defined in subsec 3(1) of the Crimes Act.

Recommendation III/16 Paragraph 15AA(2)(a) of the Crimes Act should be amended to include offences against Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act, as offences to which subsection 15AA applies.¹⁸⁷

Recommendation III/17 Subsection 19AG(1) of the Crimes Act should be amended to include offences against Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act, as minimum non-parole offences.¹⁸⁸

Recommendation III/18 Offences against Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act, should be defined as terrorism offences for the purpose of Div 3A of Part IAA of the Crimes Act.¹⁸⁹

Recommendation III/19 Offences against Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act, should be defined as terrorism offences for the purpose of Part IC of the Crimes Act.¹⁹⁰

¹⁸⁵ para 15AA(2)(a) of the Crimes Act

¹⁸⁶ subsec 19AG(1) of the Crimes Act

¹⁸⁷ Part 3 of the UN Charter Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹⁸⁸ Part 3 of the UN Charter Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹⁸⁹ Part 3 of the UN Charter Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹⁹⁰ Part 3 of the UN Charter Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

III.23 Australia's autonomous sanctions régimes

In addition to the UN Security Council sanctions régimes implemented under Parts 3 and 4 of the UN Charter Act, Australia has autonomous sanctions régimes which implement sanctions imposed by the Australian Government as a matter of foreign policy. Australia's autonomous sanctions are implemented under the Autonomous Sanctions Act and the *Autonomous Sanctions Regulations 2011* (Cth) ("**Autonomous Sanctions Regulations**") (these Regulations implement all Australian autonomous sanctions régimes).¹⁹¹

Autonomous sanctions may be entirely separate from UN Security Council sanctions or may supplement UN Security Council sanctions (including by implementing measures that the UN Security Council "calls upon" Member States to implement, as opposed to requiring them to do so in the exercise of Chapter VII powers).¹⁹²

The UN Charter Act and the Autonomous Sanctions Act and their regulations use common terms to describe sanctions measures, however, different sanctions régimes impose different sanctions measures. Like Parts 3 and 4 of the UN Charter Act, autonomous sanctions régimes can impose restrictions on dealing with a "designated person or entity" or using or dealing with a "controlled asset".¹⁹³ For example, a person or entity the Minister is satisfied "has contributed to, or is contributing to, Iran's nuclear or missile programs" may be designated.¹⁹⁴

ASIO and AFP officials have expressed concern about individuals travelling from Australia to Syria to take part in hostilities, in circumstances where they could be committing terrorism offences under the Criminal Code or offences under the Foreign Incursions Act. The AFP submitted to the INSLM:-

¹⁹¹ An autonomous sanction is intended to "influence, directly or indirectly...in accordance with Australian Government policy" a foreign government entity or member of that entity, or another person or entity outside Australia, or involves the "prohibition of conduct in or connected with Australia that facilitates, directly or indirectly, the engagement by [such a person or entity] in action outside Australia that is contrary to Australian Government policy." See sec 4 of the Autonomous Sanctions Act.

¹⁹² The UN Security Council sanctions régimes also apply to some of the countries to whom Australia's autonomous sanctions régimes apply (eg Democratic People's Republic of Korea, Iran and Libya) but not others (eg Syria).

¹⁹³ Targeted financial sanctions are implemented under the Autonomous Sanctions Regulations (regs 6, 14 and 15). Any person holding assets owned or controlled by designated persons or entities must freeze these assets. There is a prohibition on using or dealing with these assets without authorization. It is also prohibited to directly or indirectly make an asset available to, or for the benefit of, a designated person or entity without authorization. The offences and penalties for breaching autonomous sanctions measures reflect that in Parts 3 and 4 of the UN Charter Act (ten years imprisonment and/or a triple-value fine, as well as strict liability elements in the offences).

¹⁹⁴ reg 6 of the Autonomous Sanctions Regulations

There has never been an international civil conflict that has prompted as many Australians to travel to a warzone as the Syria crisis has, other than perhaps the Balkans war.

Of significant security threat to Australia is the growing trend of Australians travelling offshore to engage in, or support terrorist activities or conflict. These individuals not only potentially commit criminal offences, but upon their return to Australia they potentially pose a significant national security risk in terms of their ability to conduct an attack on Australian soil, radicalise others and impart knowledge and skills gained offshore.¹⁹⁵

ASIO reported to Parliament that:-

There has been an increase in Australians travelling overseas to participate in terrorist training or engage in foreign disputes—Syria is the primary destination. The concern is not only for Australians who risk their lives overseas, but also the likelihood of radicalised Australians returning home with an increased commitment and capability to pursue violent acts on our shores.¹⁹⁶

...

Ongoing conflicts overseas present a range of security challenges for Australia. The Syrian conflict has resonated strongly in Australia, partly because of deep familial ties to Lebanon that exist here. Many Australians—a significantly greater number than we have seen for any comparable conflict—have travelled to the region, including several to participate directly in combat or to provide support to those involved. As at 30 June 2013, four Australians were known to have been killed in Syria.

ASIO is concerned about the potential for Australians in Syria to be exposed further to extremist groups and their ideology. Such groups include the recently proscribed terrorist organisation Jabhat al-Nusra. An individual who becomes involved in the conflict and who holds, or develops, an extremist ideology could return to Australia not only with the intent to facilitate attacks onshore but also with experience and skills in facilitating attacks. In addition, the individual's social connections with international fighters could make such attacks easier to carry out. Alternatively, such an individual could become involved in terrorist activity elsewhere, exploiting the relative travel advantages Australian citizenship brings.

¹⁹⁵ AFP Submission to the INSLM, 14th October 2013

¹⁹⁶ ASIO's Report to Parliament 2012-2013, pviii

We expect these challenges to play out over several years and have a medium-to long-term influence on the extremist environment in Australia, beyond any immediate resolution to the Syrian civil war.¹⁹⁷

The autonomous sanctions which apply to Syria have application in this respect. For Syria, “a person or entity that the Minister is satisfied is providing support to the Syrian régime” may be designated. A person or entity that “the Minister is satisfied is responsible for human rights abuses in Syria” (including the use of violence against civilians and other abuses) may also be designated and this designation requires no connection to the Syrian régime.¹⁹⁸ As acts committed during an armed conflict governed by international humanitarian law are not excluded from the definition of “terrorist act” under the Criminal Code¹⁹⁹, this latter category of designated persons or entities could be seen a counter-terrorism measure if applied to terrorists.

Part 4 of the UN Charter Act is restricted to the freezing of terrorist assets (with two types of offences first, dealing with terrorist assets and second, making assets available to terrorists). Part 3 of the UN Charter Act includes sanctions for the freezing of assets of designated persons (with the two types of offences available as for the Part 4 freezing régime)²⁰⁰ as well as prohibitions on the supply of arms to designated persons (with a third type of offence (not available under Part 4) for contravening the sanction on the supply of arms).²⁰¹ Compared to the UN Charter Act, there is a much wider range of sanctions measures available under the autonomous sanctions régimes.²⁰²

¹⁹⁷ ASIO's *Report to Parliament 2012-2013*, p3

¹⁹⁸ reg 6 of the Autonomous Sanctions Regulations. Currently all designated persons and entities under the Autonomous Sanctions Regulations (Syria) have a connection to the Syrian régime. Members of opposition groups who may come within the latter category for designation under reg 6 may be the subject of alternative sanctions régimes (eg Jabhat al-Nusrah is designated under Part 4 of the UN Charter Act as coming within para 1(c) of 1373). Aside from Iran and Syria, designations may also be made in relation to the Democratic People's Republic of Korea, Fiji, the former Federal Republic of Yugoslavia, Libya, Myanmar and Zimbabwe and persons and entities associated in specified ways with these countries.

¹⁹⁹ See the INSLM's Second Annual Report, 20th December 2012, pp122-124 esp Recommendation VI/3 for a discussion of how such an exclusion could operate.

²⁰⁰ eg secs 9 and 10 of the *Charter of the United Nations (Sanctions-the Taliban) Regulation 2013* (Cth), regs 10 and 11 of the *Charter of the United Nations (Sanctions-Al-Qaida) Regulations 2008* (Cth)

²⁰¹ eg sec 7 of the *Charter of the United Nations (Sanctions-the Taliban) Regulation 2013* (Cth), reg 8 of the *Charter of the United Nations (Sanctions-Al-Qaida) Regulations 2008* (Cth)

²⁰² eg travel restrictions prohibiting travel by designated persons to Australia, restrictions on public-provided financial assistance for trade or investment with a sanctioned country, suspension of non-humanitarian development assistance or of Government-to-Government links with a sanctioned country.

Of relevance from a counter-terrorism perspective, autonomous sanctions measures may include embargoes on the supply of arms or related matériel²⁰³ and travel restrictions which prevent a person from travelling to, entering or remaining in Australia.²⁰⁴ Taking the example of Syria, the autonomous sanctions regulations provide that a person may not supply arms or related matériel (either directly or indirectly) to Syria, or for use in Syria, or for the benefit of Syria.²⁰⁵ As this sanctions the supply of arms to both sides of a conflict it cannot be said to be a counter-terrorism measure notwithstanding its application to those seeking to support terrorism, or to commit terrorist acts, in Syria.

Beyond noting overlaps between the UN Charter Act and autonomous sanctions régimes and recognizing the potential contribution the autonomous sanctions régimes may make to counter-terrorism efforts, the INSLM is not in a position to be able to assess the application of the autonomous sanctions régimes to the counter-terrorism context. Similarly as emerged with respect to the UN Charter Act, the INSLM has not found any evidence, nor have discussions with Commonwealth officers shown anything, to support an inference for or against the autonomous sanctions régimes deterring funds from coming to, or departing, Australia. There is no record of any property having been frozen, and there have been no prosecutions for offences under the autonomous sanctions régimes.

²⁰³ regs 4 and 12 of the Autonomous Sanctions Regulations and reg 11 of the *Customs (Prohibited Exports) Regulations 1958* (Cth)

²⁰⁴ The Minister for Foreign Affairs and Trade may make a declaration that a person meets the criteria for a sanctions régime under reg 6(1)(b) of the Autonomous Sanctions Regulations which will result in the Minister for Immigration and Citizenship denying the issue of a new visa or the cancellation of an existing visa. The persons who may be declared are the same as those who may be “designated persons” under reg 6.

²⁰⁵ reg 4 of the Autonomous Sanctions Regulations

CHAPTER IV

TERRORISM FINANCING OFFENCES UNDER THE CRIMINAL CODE

IV.1 Terrorism financing offences under the Criminal Code

Part 5.3 of the Criminal Code contains offences which criminalize the financing of terrorism, and the funding of terrorist organisations. There are two sets of terrorism financing offences under the Criminal Code – funding a terrorist organisation under sec 102.6 of Div 102 and financing terrorism/terrorists under secs 103.1 and 103.2 of Div 103. These offences are intended to implement Australia's obligations under the Terrorism Financing Convention.

For the purposes of the terrorism financing offences under the Criminal Code, the definition of “terrorist act” in sec 100.1 of the Criminal Code applies, rather than the definition of “terrorist act” under Art 2(1) of the Terrorism Financing Convention. The differences between the definitions is discussed in Chapter III.

Extended geographical jurisdiction (category D) is applied to all of the terrorism financing offences under the Criminal Code, reflecting Australia's wholehearted implementation of 1373.²⁰⁶ Category D extended geographical jurisdiction is the furthestmost extension of jurisdiction that can be applied to a law of the Commonwealth.²⁰⁷ It extends criminal liability for terrorism offences under the Criminal Code to conduct by a person with no connection to Australia, where that conduct and the results of it do not occur in Australia eg a person commits an offence punishable by life imprisonment if the person provides funds and is reckless as to whether the funds will be used to facilitate or engage in a terrorist act regardless of whether the person, the conduct, or the result of the conduct, has any connexion to Australia.²⁰⁸

²⁰⁶ Conforming to the requirement under para 2(e) of 1373 that Australia ensure any person financing etc a terrorist act is treated as committing a serious crime and punishable as such under domestic law.

²⁰⁷ sec 102.9 of the Criminal Code applies sec 15.4 to an offence against Div 102 of Part 5.3 and sec 103.3 applies sec 15.4 to an offence against Div 103 of Part 5.3. Section 15.4 of the Criminal Code provides that Australia has jurisdiction to prosecute these offences a) whether or not the conduct constituting the alleged offence occurs in Australia; and b) whether or not the result of the conduct constituting the alleged offence occurs in Australia.

²⁰⁸ sec 103.3 of the Criminal Code applies extended geographical jurisdiction category D to an offence against subsec 103.1(1) of the Criminal Code.

IV.2 Section 102.6 funding terrorist organisations

Division 102 of the Criminal Code contains offences which apply in relation to “terrorist organisations”²⁰⁹ including the offence of funding a terrorist organisation under sec 102.6.

Section 102.6 (Getting funds to, from or for a terrorist organisation) was introduced by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) to implement 1373 and criminalized the intentional receipt of funds from, or making funds available to, a terrorist organisation. Section 102.6 was amended by the *Anti-Terrorism Act (No. 2) 2005* (Cth) to expand the offence to include the collection of funds.²¹⁰ Section 102.6 concerns the provision of funds to or from a terrorist organisation by way of the intentional receipt, collection or provision of funds (whether directly or indirectly) to a terrorist organisation.

It is an offence under subsec 102.6(1) for a person to intentionally²¹¹ get funds to, from or for a terrorist organisation²¹² knowing²¹³ that the organisation is a terrorist organisation. The penalty for this offence is 25 years imprisonment. It is an offence under subsec 102.6(2) for a

²⁰⁹ subsec 102.1(1) of the Criminal Code defines terrorist organisation to mean: “(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”.

²¹⁰ This was in response to a FATF recommendation in its 2005 country evaluation report that Australia should criminalize the intentional collection of funds for terrorist organisations. See FATF, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: Australia* (Country Evaluation Report, 14 October 2005), pp7, 32-33.

²¹¹ For the physical element (conduct) of receiving funds from, making funds available to, or collecting funds for, or on behalf of, an organisation the fault element is specified as intention: “the person intentionally” (para 102.6(1)(a)). Subsection 5.2(1) of the Criminal Code: “A person has intention with respect to conduct if he or she means to engage in that conduct.” This expressly applies the default fault element under the Criminal Code as where the physical element is conduct, the default fault element is intention (subsec 5.6(1)).

²¹² para 102.6(1)(b) requires that the organisation is a “terrorist organisation” (as defined in sec 102.1). Where an organisation has been specified by regulations for the purposes of para (b) of the definition of “terrorist organisation” in sec 102.1, the organisation is, as a matter of law, a “terrorist organisation”. Otherwise, it is necessary for the prosecution to prove that the organisation is a terrorist organisation within the meaning of para (a) of the definition in sec 102.1.

²¹³ The fault element (circumstance) as to whether the person knows the organisation is a terrorist organisation is knowledge (para 102.6(1)(c)). Section 5.3 of the Criminal Code: “A person has knowledge of a circumstance or a result if she or she is aware that it exists or will exist in the ordinary course of events.” This applies a different (higher) fault element compared to the default element under the Criminal Code, which applies the default fault element of recklessness to circumstances (subsec 5.6(2)).

person to intentionally²¹⁴ get funds to, from or for a terrorist organisation²¹⁵ where the person is reckless²¹⁶ as to whether that organisation is a terrorist organisation. As the fault element regarding the circumstance as to whether the person knew the organisation was a terrorist organisation is recklessness, rather than knowledge, the penalty for this offence is 15 years imprisonment, reflecting the lower culpability of the individual.

There are two ways by which an organisation can be identified as a “terrorist organisation”. First, an organisation may be found to be such an organisation by a court as part of the prosecution for an offence against Div 102. For this to occur, the prosecution in a criminal trial needs to prove an organisation meets the statutory definition of “terrorist organisation”.²¹⁷ Second, an organisation may be proscribed as a “terrorist organisation”

²¹⁴ For the physical element (conduct) of receiving funds from, making funds available to, or collecting funds for, or on behalf of, an organisation the fault element is specified as intention: “the person intentionally” (para 102.6(2)(a)). Subsection 5.2(1) of the Criminal Code: “A person has intention with respect to conduct if he or she means to engage in that conduct.” This expressly applies the default fault element under the Criminal Code as where the physical element is conduct, the default fault element is intention (subsec 5.6(1)).

²¹⁵ para 102.6(2)(b) requires that the organisation is a “terrorist organisation” (as defined in sec 102.1). Where an organisation has been specified by regulations for the purposes of para (b) of the definition of “terrorist organisation” in sec 102.1, the organisation is, as a matter of law, a “terrorist organisation”. Otherwise, it is necessary for the prosecution to prove that the organisation is a terrorist organisation within the meaning of para (a) of the definition in sec 102.1.

²¹⁶ The fault element (circumstance) as to whether the person knows the organisation is a terrorist organisation is recklessness (para 102.6(2)(c)). Subsection 5.4(1) of the Criminal Code: “A person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk?”. This applies the default fault element under the Criminal Code as where the physical element is a circumstance, the default fault element is recklessness (subsec 5.6(2)).

²¹⁷ Within the meaning of para (a) of the definition of “terrorist organisation” in subsec 102.1(1) “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).” All of the prosecutions to date for offences under Div 102 have involved the prosecution proving an organisation to be a “terrorist organisation” within the meaning of para (a) of the definition. This reflects the nature of the criminal conduct prosecuted, which has involved small, informal groups of individuals forming their own “terrorist organisation” within the meaning of para (a) rather than offences involving conduct related to large formal organisations such as Al-Qa’ida (an organisation which is proscribed for the purposes of para (b) of the definition).

through regulations.²¹⁸ The scheme permits application for administrative review, by way of a de-listing application to the Attorney-General.²¹⁹

If an organisation is proscribed by regulations to be a terrorist organisation under the Criminal Code, and the Attorney-General ceases to be satisfied that the organisation meets the definition of “terrorist organisation” under the Criminal Code, he or she is required to make a declaration to that effect and the regulations proscribing that organisation cease to have effect when the declaration is made.²²⁰ Such a declaration does not prevent the organisation from being subsequently specified by regulations if the Attorney-General becomes satisfied that the organisation meets the definition of “terrorist organisation” under the Criminal Code.²²¹

IV.3 Consultation on listing and de-listing terrorist organisations under the Criminal Code

Pursuant to Div 3 of the Intergovernmental Agreement on Counter-Terrorism Laws (“IGA”),²²² which was signed at the COAG meeting on 25th June 2004, the Commonwealth is required to consult with the States and Territories in relation to the listing of terrorist organisations under the Criminal Code. Para 3.4 of the IGA provides:-

3.4 Consultation on regulations specifying terrorist organisations

²¹⁸ Before the Governor-General can make a regulation specifying an organisation for the purposes of para (b) of the definition of “terrorist organisation” under subsec 102.1(1), 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)” (subsec 102.1(2)). Judicial review of the Attorney-General’s decision is available under sec 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Where a person is entitled to make an application under sec 5 in relation to the decision they may, by notice in writing given to the Attorney-General, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision (subsec 13(1)). The Attorney-General must provide this statement within 28 days (subsec 13(2)). While there are some classes of decisions under Schedule 2 that are not decisions to which sec 13 applies, decisions under Part 5.3 of the Criminal Code are not such a class.

Judicial review is also available under subsec 39B(1) of the *Judiciary Act 1903* (Cth) and sec 75(v) of the *Constitution*. No such review is available of the Governor-General’s decision to make regulations proscribing the organisation as a terrorist organisation. Merits review is not available under the *Administrative Appeals Tribunal Act 1975* (Cth).

²¹⁹ The de-listing process under the Criminal Code provides open standing for anyone to make a de-listing application to the Attorney-General and requires the Attorney-General to consider all de-listing applications, regardless of how recently an application for de-listing was made by that individual or organisation. If an organisation is proscribed by regulations as a terrorist organisation under the Criminal Code any individual or organisation may make a de-listing application to the Attorney-General on the grounds that there is no basis for the Attorney-General to be satisfied of the prerequisite grounds for making the regulations set out in subsec 102.1(2). The Attorney-General must consider the de-listing application (subsec 102.1(17)). There is no limit to the amount of applications that can be made each year.

²²⁰ subsec 102.1(4) of the Criminal Code

²²¹ subsec 102.1(5) of the Criminal Code

²²² A copy of the text of the IGA is provided at **Appendix I**.

- (1) 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.
- (2) 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 and provide reasons for their objections, the Commonwealth will not make the regulation at that time.
- (3) 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.
- (4) 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.
- (5) The other parties will use their best endeavours to respond within a time frame nominated by the Commonwealth.
- (6) 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.

Subparagraph 3.4(1) of the IGA provides that before making a regulation listing a terrorist organisation for the purposes of the Criminal Code, the Commonwealth Government will consult with the States and Territories about the proposed listing. Subparagraph 3.4(2) provides that if a majority of the parties (meaning the self-governing Territories have equal voting rights) object to the making of a regulation specifying a terrorist organisation within a timeframe nominated by the Commonwealth and provide reasons for their objections, the Commonwealth will not make the regulation at that time.

Subparagraph 3.4(3) further provides that the Commonwealth Government will provide the States and Territories with the text of the proposed regulation and the Commonwealth is to use its best endeavours to give the States and Territories a reasonable time to consider and comment on the proposed listing.

Subparagraph 3.4(4) requires the Commonwealth to provide the States and Territories with a written brief on the terrorist-related activities of the organisation to be listed and to offer an oral briefing by the Director-General of Security. Subparagraph 3.4(5) requires the States and Territories to use their best endeavours to respond within the time-frame nominated by the Commonwealth. Subparagraph 3.4(6) of the IGA provides that approval for regulations listing terrorist organisations must be sought by the Prime Minister and responses given by Premiers and Chief Ministers (although agreement has since been reached for correspondence to be between Attorneys-General).

The Commonwealth Government has also established as a matter of practice, a process of consulting with the States and Territories in relation to the de-listing of terrorist organisations under the Criminal Code. Consultation on a proposed de-listing is intended to provide the States and Territories with an opportunity to provide any comment on the Attorney-General's decision to de-list (such as evidence the organisation continues to meet the definition of "terrorist organisation" under the Criminal Code). The "veto provisions" do not apply to de-listing decisions.

It is clear that from a constitutional perspective, the IGA has no effect on the power of the Governor-General to make regulations specifying an organisation as a "terrorist organisation" under the Criminal Code. The fact that the IGA has no legal enforceability but is intended to be a document of political intent was confirmed in the INSLM's discussions with AGD officers.

The INSLM has reviewed whether the consultation process has added value to the proscription process or has hindered the effectiveness of the statutory provisions. The INSLM has read the files for every proposed proscription by regulation, or proposed de-listing of an organisation, under the Criminal Code. The INSLM has also questioned agencies about the usefulness of the State and Territory consultation process. The INSLM has come to the view that the consultation process and "veto power" of the States and Territories should be discontinued.

The consultation process has caused considerable delays to the proscription process, in some cases by over 12 months. In this way, the consultation process has the ability to severely hinder the effectiveness of the proscription régime by preventing the efficient proscription of terrorist organisations.

The INSLM has formed the view that the consultation process has added no value to the proscription process. Agencies did not provide any evidence showing that input from the States and Territories had improved the quality of the proscription process. The proscription

of terrorist organisations is a matter for national security agencies - ASIO provides advice to the Attorney-General in the form of a Statement of Reasons that outlines the organisation's involvement in terrorism. The Statement of Reasons will outline why, in ASIO's view, the organisation meets the legislative test for listing. Whenever possible, the Statement of Reasons will be prepared as a stand-alone document, based on unclassified information about the organisation, which is corroborated by classified information. This enables the Statement of Reasons to be made available to the public, and provides transparency as to the basis on which the Attorney-General's decision is made. ASIO submitted the following to the INSLM:-

In terms of the corroborating classified intelligence, because the proscribed organisations are based overseas much of the classified reporting relied upon in each statement of reasons comes from intelligence partners rather than Australian law enforcement agencies. The classified reporting relied upon in drafting the statement of reasons is drawn from ASIO's corporate systems, including material from the Joint Counter Terrorism Teams (JCTT) based in most Australian States and including ASIO, Federal, State and Territory law enforcement agencies. It is usually through these already established collaboration mechanisms that any security relevant information from law enforcement partners will be passed to ASIO, rather than as a direct result of the proscription process.²²³

The INSLM considers that the process already in place for consultation between ASIO and its State and Territory law enforcement partners in developing the Statement of Reasons is the most appropriate means for incorporating State and Territory input into the proscription process. This process allows the States and Territories to provide material relevant to the question of whether an organisation meets the statutory test for proscription under the Criminal Code.

If the Attorney-General ceases to be satisfied that an organisation meets the statutory criteria for proscription under the Criminal Code, the Attorney-General must make a written declaration to that effect and the regulations, to the extent to which they proscribe the organisation as a "terrorist organisation", cease to have effect when the declaration is made. There is no statutory basis on which the Attorney-General, on ceasing to be satisfied that an organisation meets the statutory criteria for proscription under the Criminal Code, may delay making the declaration in order to consult with the States and Territories. There is a very strong policy argument in favour of the Attorney-General making a declaration as soon as practical given the legal consequences of proscription.

²²³ *ASIO Submission to the INSLM*, 8th October 2013

Recommendation IV/1: As soon as the Attorney-General ceases to be satisfied that an organisation meets the statutory criteria for proscription under the Criminal Code, the Attorney-General must make a written declaration to that effect as soon as practical. Such a decision should be capable of being taken without consultation with the States and Territories, with any consultation taking place on a case by case basis and only where there is a demonstrated need to consult in order for the Attorney-General to determine whether to make such a declaration. Any such consultation must not unduly delay the Attorney-General's decision. The Commonwealth should inform the other parties to the IGA that the Criminal Code requires the Attorney-General to proceed in this way, and that the IGA either does not contain any contrary provision on its proper interpretation, or is incapable of altering the legal position if it purported to do so.

IV.4 The practice of listing only part of an organisation under the Criminal Code

For the terrorist organisation offences under the Criminal Code to be effective, no distinction can meaningfully be made between so-called “military wings” of terrorist organisations and their other political and social wings. The INSLM notes that under Part 4 of the UN Charter Act, in order to carry out Australia's international counter-terrorism obligations under 1373, the whole of Hamas and Hizballah are proscribed terrorist entities (and see Chapter III and **Appendix H**). However, under the Criminal Code only the “military wings” of these organisations (variously named) are proscribed.

What may fairly be called the listings of these parts of Hizballah and Hamas as terrorist organisations under the Criminal Code were achieved by the *Criminal Code Amendment Regulation 2012 (No. 6)* (Cth) (“**the ESO listing**”) and the *Criminal Code Amendment Regulation 2012 (No. 7)* (Cth) (“**the Brigades listing**”). The reasons based on publicly available materials disclosed with each of the ESO and Brigades listings raise serious doubts about the efficacy of their purported implementation of Australia's terrorist organisation listing system. They are also accordingly of doubtful validity as a matter of law.

Critiques of the reasons disclosed for the ESO and Brigades listings are contained in Appendix H. As explained in Appendix H, these reasons strongly indicate that the ESO and the Brigades are but part, respectively, of Hizballah and Hamas; that accordingly it is Hizballah and Hamas that the Attorney-General should have been satisfied were terrorist organisations; that an unjustified resort to an unarticulated notion of sub-organisations has been had; and that the purpose of criminalizing and thus deterring financial assistance to terrorist organisations has been mis-served by these part listings.

As noted in Chapter III and above, the terrorism financing offences created by the UN Charter Act may be committed in relation to Hizballah and Hamas because they are listed entities under that statutory scheme. One presumes and hopes that the body of classified and unclassified information that produced the listing of Hizballah and Hamas, being the whole of each of them, for the purposes of those terrorism financing offences was substantially the same as the information used for the listing of parts of them under the Criminal Code.

Could it be that the UN Charter Act's use of the expression "entity" distinguishes listings under it from listings under the Criminal Code with its use of the word "organisation"? Surely not. Or, if so, there is no substantive justification for a distinction, given the international obligations of Australia to counter terrorism by legislating effectively including criminally against its financing. In the opinion of the INSLM, there is no reason why part of an entity could or should be listed under the UN Charter Act and there is equally no reason why part of an organisation could or should be listed under the Criminal Code. In both cases, the critical terrorist character needs to be attributed to what the facts support as the group of people or social assemblage that answers the description of "entity" or "organisation" as the case may be.

As explained in Chapter V, the beneficial purpose of countering terrorism by depriving the entities or organisations which are terrorist of their access to funds and other wherewithal, is not effectively served by permitting people to give or supply them money and resources for their supposedly non-terrorist activities. A consistent application of that policy should preclude the device of listing only the bad or terrorist part of an entity or organisation.

The success and influence of Hizballah's political party is closely related to the development of its military apparatus and its entrenched investment in providing social services to the community is aimed at creating a strong resistance community that supports the organisation's military aims. Hence, the social and political aspects of the organisation are inseparable from its military functions. The same can be said of Hamas which has long maintained simultaneous activities with respect to the provision of education, welfare and other services to Palestinians at the same time as it has maintained activities that some may call military

and Australian law regards as terrorist. There is a unity of purpose between the organisation's militant and non-militant activities and no distinction can properly be made between them.²²⁴ Support to the non-military wing as a matter of course provides support to the military wing, be it in the form of charitable donations being used to fund the military wing or through political legitimacy or community support for the terrorist aims and activities of the organisation.²²⁵ The statutory power to list pertains to the listing of an organisation, and not to parts or some only of its aspects. In the view of the INSLM, the Australian legislation is in this regard sensible and appropriate – it attributes a terrorist character to an organisation because of its connexion with terrorist acts, an attribution which cannot logically be removed or attenuated by its connexion with other kinds of acts as well. In other words, Australia's counter-terrorism laws do not permit the blunder of permitting the listing of organisations only if they are exclusively or purely dedicated to terrorism and nothing else.

²²⁴ Senior leaders of both Hamas and Hizballah have publicly refuted claims that the political and military “wings” of their organisation are ideologically autonomous or operate independently from each other, stating that the facets within their respective organisation form part of a singular organisation with shared ideological objectives and a unified leadership. Hizballah has stated that a unity of purpose among the group's diverse activities is essential to its success and no distinction can be made between its political and terrorist wings. Hamas has stated that the political apparatus is sovereign over the military apparatus, with no wings that are separate from the “one body” of Hamas. See Matthew Levitt, “On a Military Wing and a Prayer” (February 12, 2013) *Foreign Policy*, Jim Zanotti, *Hamas: Background and Issues for Congress*, Congressional Research Service Report for Congress (2010), Tavishi Bhasin & Maia Carter Hallward “Hamas as a Political Party: Democratization in the Palestinian Territories” (2013) 25 *Terrorism and Political Violence* 75–93, *Senior Hizballah Officials and Associates: There Is No Distinction between Hizballah's Political and Military Arms*, The Middle East Research Institute (July 24, 2013), Matthew Levitt, “Hamas from Cradle to Grave” (Winter 2004) *Middle East Quarterly* 3-15, Matthew Levitt and Jonathan Prohov, “There Is No Distinct Hezbollah ‘Military Wing,’ So Why Ban It?” (July 25, 2013) The Washington Institute for Near East Policy, Netherlands General Intelligence and Security Service (AIVD), *General Intelligence and Security Service Annual Report 2004*, United States Office of the Coordinator for Counter-Terrorism, *Country Reports on Terrorism 2012*, James B. Love, “Hezbollah: Social Services as a Source of Power” (2010) 10 *Joint Special Operations University Report* 1-50, Benedetta Berti, “Armed Groups as Political Parties and Their Role in Electoral Politics: The Case of Hizballah” (2011) 39 *Studies in Conflict & Terrorism* 942-962.

²²⁵ See eg Matthew Levitt, *Hamas: Politics, Charity, and Terrorism in the Service of Jihad* (2006), Benedetta Berti, “Armed Groups as Political Parties and Their Role in Electoral Politics: The Case of Hizballah” (2011) 39 *Studies in Conflict & Terrorism* 942-962, Anat Kurz et al, “The Institutional Transformations of Hamas and Hizballah” (2012) 15 *Strategic Assessment* 87-98, James B. Love, “Hezbollah: Social Services as a Source of Power” (2010) 10 *Joint Special Operations University Report* 1-50, Jonathan Masters, *Hamas*, Council on Foreign Relations (2012), “*Lebanese Hezbollah: A Profile*” Library of Congress (April 2012), Casey L. Addis & Christopher M. Blanchard, *Hezbollah: Background and Issues for Congress*, Congressional Research Service Report for Congress (January 3, 2011), Matthew Levitt, “On a Military Wing and a Prayer” (February 12, 2013) *Foreign Policy*, Jim Zanotti, *Hamas: Background and Issues for Congress*, Congressional Research Service Report for Congress (2010), Tavishi Bhasin & Maia Carter Hallward “Hamas as a Political Party: Democratization in the Palestinian Territories” (2013) 25 *Terrorism and Political Violence* 75–93, Matthew Levitt, “Hamas from Cradle to Grave” (Winter 2004) *Middle East Quarterly* 3-15, Matthew Levitt and Jonathan Prohov, “There Is No Distinct Hezbollah ‘Military Wing,’ So Why Ban It?” (July 25, 2013) The Washington Institute for Near East Policy.

It follows from this reading and justification of Australia's terrorist listing legislation that the practice of purporting to list so-called parts or wings of an organisation as terrorist should never have occurred, should be reversed, and should not be repeated.²²⁶

In assessing the effectiveness of the Criminal Code proscription régime and terrorist organisation offences, the INSLM has reached the view that the distinction between artificially separated wings of an organisation allows the organisation to receive support which is of some benefit to its terrorist activities. Proscription of only part of an organisation limits the counter-terrorism effectiveness of the proscription régime and terrorist organisation offences under the Criminal Code.

Recommendation IV/2: When proscribing an eligible organisation under the Criminal Code as a “terrorist organisation”, the entire organisation should be proscribed and not just its “military wing”. It follows that the ESO and Brigades listings should be revoked and replaced, if the facts continue to support the current reasons for them, by listings of Hizballah and Hamas.²²⁷

IV.5 Difficulties of proving an offence against sec 102.6

As the LTTE case²²⁸ shows, the prosecution faces a substantial burden in proving a terrorist organisation offence under the Criminal Code where the organisation is not proscribed by regulation. Each of the three men in that case were originally charged with the following offences:-

- Intentionally being a member of a terrorist organisation (subsec 102.3(1) of the Criminal Code);
- Intentionally making funds available to a terrorist organisation (subsec 102.6(1) of the Criminal Code);

²²⁶ The Government takes the view that a part or a “wing” of an organisation can be listed, provided that it retains a degree of separateness for this purpose. The Government obtained legal advice in formulating its position. The Parliamentary Joint Committee on Intelligence and Security has noted this Government view (see for example, *Review of the re-listing of Hamas' Brigades, PKK, LeT and PIJ as terrorist organisations* at paras 2.18 and 2.19). The separateness, it would seem, would need to be such as to render a “military wing” a distinct organisation. However, it is quite difficult to see how it could be a distinct organisation if it is aptly described as a “wing” of an organisation – meaning a part or component of a whole.

²²⁷ Hence, consideration should be given under para (b) of the definition of “terrorist organisation” in subsec 102.1(1) of the Criminal Code, and under subsecs 102.1(2) and (2A) of the Criminal Code to new regulations to replace regs 4Q and 4U of the *Criminal Code Regulations 2002* (Cth)

²²⁸ For a detailed description of this case see Chapter III.

- Intentionally providing support or resources to a terrorist organisation (subsec 102.7(1) of the Criminal Code); and
- making an asset available to a proscribed entity (sec 21 of the UN Charter Act).

However, due to difficulties with proof all charges under the Criminal Code were withdrawn and the only charges proceeded with at trial were for offences under sec 21 of the UN Charter Act.

There are inherent difficulties in proving an organisation is a “terrorist organisation” under the Criminal Code where the organisation is not proscribed by regulation. As the majority of terrorist organisations are based overseas, prosecutors will need to rely on mutual assistance from foreign governments to collect the evidence they need to prove that the organisation is one 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)”.²²⁹

Terrorist organisations are quite likely in readily imaginable cases to be based in failing or failed states which may lack the capacity to provide assistance to the prosecution in the form of admissible evidence (eg Somalia). As was the case with the LTTE, governments of countries where terrorist organisations are engaged in terrorism are also likely to be preoccupied with fighting the terrorist organisation and may lack the capacity or will to assist a prosecution in Australia.

Commenting on the difficulty of proving criminal activity that takes place in foreign jurisdictions, the AFP submitted to the INSLM that “if people are in Syria fighting with terrorist organisations, then gathering the evidence and material in relation to that, in a form that can be put before the court, is challenging to say the least.” The AFP further submitted: “while authorities from bordering countries to Syria are assisting the AFP in regards to Australians travelling there, it is difficult to keep tabs on every person who travels to Syria as some have dual passports and others enter the country away from designated border crossings”.²³⁰

While Sri Lanka was providing mutual assistance to the prosecution in the LTTE case, Bongiorno J in granting bail to the accused, recognized that while the investigation process had already taken two years, and despite the cooperation of the Sri Lankan authorities, the prosecution was still having difficulty in getting evidentiary material in admissible form

²²⁹ subsec 102.1(1) of the Criminal Code

²³⁰ *AFP Submission to the INSLM*, 14th October 2013

from Sri Lanka and this would cause inevitable delays.²³¹ Even where a foreign government cooperates, the proof of elements for terrorism financing offences by reference to events and circumstances in another country will always be difficult.

Where foreign government officials are available to give evidence as to the nature of an organisation and its terrorist activities, those witnesses may suffer from issues of credibility such that their evidence cannot satisfy a jury that the organisation is a terrorist organisation. This was a major issue for the prosecution's case in the LTTE case. In that case, the prosecution sought to rely on the evidence of the then Sri Lankan army chief, General Sarath Fonseka, whose credibility was questionable due to his (and the Sri Lankan Government's) alleged involvement in war crimes and human rights abuses against the LTTE. He was the subject of vigorous defence cross-examination and may not have convinced a jury that the LTTE was a terrorist organisation.

The prosecution also had difficulty identifying appropriate witnesses whom the court would accept as expert witnesses for the purposes of proving the organisation was a "terrorist organisation". It should be noted that even where appropriate experts can be identified such experts may not be able to give direct evidence that an organisation is a terrorist organisation and the relevancy and weight of their evidence may be questionable due to the foundation of their opinions (eg where the expert in question has consulted only government sources).²³²

In proving an organisation is a terrorist organisation the prosecution may need to counter arguments made by the defence, or beliefs held by the judge or jury, that the organisation was not a terrorist organisation but was engaged in a legitimate struggle for liberation and were in fact "freedom fighters". At the bail hearing for the accused, in the LTTE case, commenting on the need to prove the LTTE was a "terrorist organisation" for the purposes of the Criminal Code, Bongiorno J commented that "the Crown case is not without its problems in that area"²³³ and noted that:-

The LTTE had not been regarded as a terrorist organisation although it was formerly regarded as a terrorist organisation in Sri Lanka it has not been so regarded since 2002 when a truce between it and the Government of Sri Lanka was first brokered through the good offices of the Government of Norway. Since that time the LTTE has been recognised as a party to the peace process in Sri Lanka and its leader, whatever he

²³¹ *Vinayagamoorthy v DPP (Cth)*, 212 FLR 326 (2007) per Bongiorno J at 326-327

²³² See Coghlan J's judgement on the admissibility of expert evidence relating to the LTTE in *R v Vinayagamoorthy* (2008) 200 A Crim R 186

²³³ *Vinayagamoorthy v DPP (Cth)*, 212 FLR 326 (2007) per Bongiorno J at 329

might have been accused of doing in earlier years, was, and is said still to be, a part of that process.²³⁴

Where an organisation is proscribed by regulation, to prove an offence against subsec 102.6(1) or (2) that a person gave funds to a terrorist organisation knowing it to be a terrorist organisation or reckless as to whether it was a terrorist organisation, the prosecution will not be relieved of the burden of proving the defendant knew or was reckless as to whether it was a terrorist organisation. The burden placed on the prosecution in proving the recklessness mental element that the person was reckless as to the fact of proscription is discussed in Chapter III and applies equally to section 102.6 offences. As the CDPP submitted to the INSLM:-

Unless it can be established that the defendant knew the organisation was specified in the regulations, which is unlikely in the majority of court cases, the only way the prosecution will be able to prove the necessary knowledge on the part of the defendant would be to prove that they knew the organisation was directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act.²³⁵

This will require the prosecution to prove that the person knew the organisation was “directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act” or that they were reckless as to the fact. This will in turn require the prosecution to prove that the defendant knew, or was aware of a substantial risk that, the organisation was engaged in these activities and that the organisation was in fact engaged in these activities.

Similar consideration has been given by the INSLM to the question whether it would be proper or feasible to ease the prosecution burden with respect to the sec 102.6 offences, as has been reported in Chapter III in relation to the corresponding UN Charter Act offences.

For such a serious offence, it is not inappropriate if the elements including mental elements are as provided for by sec 102.6. If anything were to be considered by way of reform, it may be to substitute knowledge for recklessness concerning the terrorist character of the organisation in question – but that would greatly and in the INSLM’s view inappropriately increase the prosecution burden. The concept of a substantial and unjustifiable risk at the heart of recklessness is probably the best balance to be struck. The provisions should therefore not be amended.

²³⁴ *Vinayagamoorthy v DPP (Cth)*, 212 FLR 326 (2007) per Bongiorno J at 328-329

²³⁵ *CDPP Submission to the INSLM*, 6th August 2013

IV.6 Terrorism financing offences under Div 103 of the Criminal Code

The *Suppression of the Financing of Terrorism Act 2002* (Cth) introduced Div 103 (Financing terrorism) into the Criminal Code.²³⁶ It is an offence under subsec 103.1(1) for a person to intentionally²³⁷ provide or collect funds where he or she is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.²³⁸ The penalty for this offence is life imprisonment.

It is an offence under subsec 103.2(1) for a person to intentionally²³⁹ make funds available to another person or collect funds for, or on behalf of, another person (whether directly or indirectly) where the first-mentioned person is reckless²⁴⁰ as to whether the other person will use the funds to facilitate or engage in a terrorist act. The penalty for this offence is life imprisonment.

²³⁶ The *Anti-Terrorism (No. 2) Act 2005* (Cth) amended the offence provision in sec 103.1 and inserted a new offence provision (sec 103.2) into Div 103. Section 103.1 (Financing terrorism) was amended to provide that a person commits an offence even if a terrorist act does not occur and even if the funds will not be used to facilitate or engage in a terrorist act, or will be used in more than one terrorist act. A new offence of financing an individual terrorist (sec 103.2) was inserted into Div 103. The efficacy and necessity of sec 103.2 will be discussed later, as the INSLM has not been made aware of any circumstances (real or imagined) where conduct specified in sec 103.2 would not be captured by the broader funding of terrorism offence in sec 103.1.

The new offence in sec 103.2 resulted from Australia's acceptance and implementation of FATF recommendations. In its 2005 country evaluation report, FATF noted that sec 103.1 did not adequately cover the provisions of FATF Special Recommendation II, which requires terrorist financing offences to include the provision of funds to, or the collection of funds for the use of, an individual terrorist. While FATF's recommendations are not legally binding, Australia responded to this recommendation by the enactment of sec 103.2 which requires that the funds intentionally be made available to, or collected for, or on behalf of, another person. See FATF, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: Australia* (Country Evaluation Report, 14 October 2005) pp 32-33. In the view of the INSLM, FATF was wrong in its reading of sec 103.1, and it remains doubtful whether sec 103.2 was ever necessary to render Australia compliant with FATF Special Recommendation II.

²³⁷ The physical element (conduct) of providing or collecting funds is intention (para 103.1(1)(a) and subsec 5.6(1) of the Criminal Code). Subsection 5.2(1) of the Criminal Code: "A person has intention with respect to conduct if he or she means to engage in that conduct." This applies the default fault element under the Criminal Code as where the physical element is conduct, the default fault element is intention (subsec 5.6(1)).

²³⁸ The fault element (circumstance) as to whether the funds will be used to facilitate or engage in a terrorist act is recklessness (para 103.1(1)(b) and subsec 5.4(1) of the Criminal Code). Subsection 5.4(1) of the Criminal Code: "A person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk." This applies the default fault element under the Criminal Code as where the physical element is a circumstance, the default fault element is recklessness (subsec 5.6(2)).

²³⁹ For the physical element (conduct) of making funds available to another person or collecting funds for, or on behalf of, another person the fault element is specified as intention: "the person intentionally" (para 103.2(1)(a)). Subsection 5.2(1) of the Criminal Code: "A person has intention with respect to conduct if he or she means to engage in that conduct." This expressly applies the default fault element under the Criminal Code as where the physical element is conduct, the default fault element is intention (subsec 5.6(1)).

²⁴⁰ The fault element (circumstance) as to whether the funds will be used by the other person to facilitate or engage in a terrorist act is recklessness (para 103.2(1)(b) and subsec 5.4(1) of the Criminal Code). Subsection 5.4(1) of the Criminal Code: "A person is reckless with respect to a circumstance if: (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk." This applies the default fault element under the Criminal Code as where the physical element is a circumstance, the default fault element is recklessness (subsec 5.6(2)).

A person commits an offence under subsecs 103.1(1) or 103.2(1) even if the terrorist act does not occur, or the funds will not be used to facilitate or engage in a specific terrorist act, or the funds will be used to facilitate or engage in more than one terrorist act.²⁴¹

IV.7 Overlap between the Div 103 offences

Under sec 103.1 of the Criminal Code it is an offence for a person to intentionally provide or collect funds in circumstances where he or she is reckless as to whether the funds will be used to facilitate or engage in a terrorist act. It is an offence under sec 103.2 of the Criminal Code to intentionally make funds available or to collect funds for, or on behalf of, another person (whether directly or indirectly) in circumstances where the first-mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act. Section 103.2 differs from sec 103.1 because it requires the funds to be made available to or collected for, or on behalf of, another person. Nicola McGarrity notes:-

The only significant difference between the two offences is that s 103.2 requires that the funds be made available to or collected for, or on behalf of, *another person*. This probably does not make much difference where the offence relates to the provision of funds or the making available of funds. It would be necessary in practice, even under s 103.1, for the offender to hand over the funds to another person. However, this difference has greater significance where the offence relates to the collection of funds. Section 103.2 seems to require that the first-mentioned person have a specific person in mind when collecting the funds. Further, the prosecution must prove that the first-mentioned person is reckless as to whether that specific person (and not some other unknown individual or entity) will use the funds to facilitate or engage in a terrorist act.²⁴²

The INSLM agrees that sec 103.2 does not capture any conduct not already captured by sec 103.1 and is in fact more limited in scope than sec 103.1. In discussions with AGD officers no evidence was put forward to suggest otherwise. The INSLM agrees with the COAG Committee that sec 103.2 be repealed on the basis that the offending conduct contemplated is already covered by sec 103.1.²⁴³

Recommendation IV/3: Section 103.2 of the Criminal Code should be repealed.

²⁴¹ subsecs 103.1(2) and 103.2(2) of the Criminal Code

²⁴² Nicola McGarrity, 'The Criminalisation of Terrorist Financing in Australia' (2012) 38 3 *Monash University Law Review* 8

²⁴³ *COAG Final Report*, para 147 and Recommendation 26

CHAPTER V

HUMANITARIAN AID AND AUSTRALIA'S COUNTER-TERRORISM LAWS

V.1 Introduction

Australia's terrorism financing laws criminalize the provision of funds and assets to proscribed organisations regardless of who is providing the funds or assets, what those funds are for, or the nature of those assets. Thus, the provision of medical supplies to a hospital or funds to employ a doctor could constitute assets and funds for the purposes of Australia's terrorism financing laws.

The principal focus of the INSLM's inquiry into the issues raised by this position is whether the laws against the financing of terrorism are consistently and well framed so as to strike a proper balance between the aim of financially strangling terrorism and the encouragement of charitable donation to humane causes.

The INSLM heard submissions at public hearings that offences for funding terrorists and terrorist organisations, under the UN Charter Act and the Criminal Code, should not extend to all funding given to those persons and organisations but should instead be limited to funding for terrorist acts. Submissions were put to the INSLM that "benevolent" funding provided to terrorists and terrorist organisations (for the purposes of building orphanages, hospitals etc) should not be criminalized as these activities do not relate to the commission of terrorist acts. The COAG Review received similar submissions.

One example given to the INSLM was that at a time during the civil war in Sri Lanka, the LTTE had effective control and operated a de facto government over the northern part of Sri Lanka. It was put to the INSLM that during that time the only way to provide humanitarian assistance to this area was by providing money to the LTTE to distribute.²⁴⁴

²⁴⁴ See the transcript of evidence given at the INSLM's public hearings by Mr Phillip Boulten SC on 22nd April 2013 and Dr Patrick Emerton on 24th April 2013, available at www.dpmc.gov.au/inslm

V.2 Humanitarian terrorists?

The INSLM does not accept that a distinction should be drawn between funds provided for bombs and funds hopefully provided for hospitals or orphanages. Nor should a distinction be drawn between different terrorist organisations so as to label some “freedom fighters” providing essential services to the community and who should be exempt from Australia’s terrorist financing laws. Importantly, the definitions of “terrorist act” and “terrorist organisation” under the Criminal Code, and 1373 (which forms the basis for listing under the UN Charter Act), provide no possibility for such an approach.

The UN has repeatedly made clear that all terrorist acts are to be regarded as terrorist *regardless of motivation*. Australia’s definition of terrorist act under the Criminal Code requires that an act be intended to advance a “political, religious or ideological cause” but does not make a distinction between such causes nor does it exempt acts from coming within the definition on the basis that the cause is a worthy one and the action taken is therefore noble.

The INSLM has previously reported on the issue of motivation in the definition of “terrorist act” in the Criminal Code²⁴⁵ and maintains the position (supported by the stance of the UN) that there can be no distinction, based on the motive or cause of the terrorists, between the terrorist actions of so-called “freedom fighters” and others.²⁴⁶

However counter-intuitive, at least superficially, it should properly be an offence to fund hospitals and orphanages run by terrorist organisations.²⁴⁷ The “humanitarian” activities of terrorist organisations (eg building orphanages for the children of suicide bombers) are part

²⁴⁵ See INSLM’s Second Annual Report pp112-120

²⁴⁶ eg UN Security Council Resolution 1989 (2011), preambular clause: “Reaffirming that terrorism in all its forms and manifestations constitutes one of the most serious threats to peace and security and that *any acts of terrorism are criminal and unjustifiable regardless of their motivations*, whenever and by whomsoever committed, and reiterating its unequivocal condemnation of Al-Qaida and other individuals, groups, undertakings and entities associated with it, for ongoing and multiple criminal terrorist acts aimed at causing the deaths of innocent civilians and other victims, destruction of property and greatly undermining stability”. [emphasis added]

See also the *International Convention for the Suppression of the Financing of Terrorism*, Art 2(1) which provides that: “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 organisation to do or to abstain from doing any act*”. [emphasis added]

²⁴⁷ For an opposite view see Prof Ben Saul’s submission to the COAG Review where he argues against the criminalization of providing funds to medical services and hospitals run by terrorist organisations, including armed groups controlling territory and administering civilian communities and services in armed conflict (citing the LTTE in Sri Lanka and Al-Shabaab in Somalia as examples).

of the hearts and minds campaign to recruit members and gain support in communities.²⁴⁸ Further, the clandestine nature of terrorist organisations means that it is impossible to know what the funds were actually used for. The INSLM agrees with the findings of the COAG Review:-

The need to permit the passage of funds for humanitarian purposes must be set against the fact that the (often) opaque organisational structure of terrorist organisations prevents or at least substantially inhibits certainty in ascertaining the real and ultimate destination of funds. There is a risk that exempting funding for the ‘humane’ operations of terrorist groups could cloak more sinister end purposes for those funds. The Committee’s view is that the Government should be taken to have carefully considered the nature of the organisation during the proscription process, and have determined that any funds to that organisation, for whatever purpose, should attract a criminal offence, providing knowledge or recklessness can be demonstrated.²⁴⁹

So far as concerns legislation that criminalizes the funding of terrorist organisations, even if the funding is supposedly for humanitarian purposes only, it is unlikely that such prohibitions will be counter-productive in combating the evils of terrorism. As Prof Ben Saul states:-

Global counter-terrorism law is attractive to states precisely because it extends the reach of the legal regulation of violence against civilians... For instance, members of diaspora communities who raise funds in a neutral state for suicide bombing in a civil war or an occupation in another state can be prosecuted under terrorist financing laws, whereas war crimes liability might not extend so far (such as where the funds are not for specific attacks, and because material support for terrorism is not a war crime). Holding the financiers criminally liable in the neutral state not only enhances the protection of civilians in war, but it is also hard to see how it could undermine incentives for armed groups on the ground – that is, the fighters themselves – to comply with IHL [International Humanitarian Law] on the battlefield.²⁵⁰

The successful prosecution in Australia of individuals who financed terrorist activity overseas (members of the Tamil diaspora providing funds and detonators for explosive devices to the LTTE) seems to support this point.²⁵¹

²⁴⁸ See the discussion in Chapter IV in relation to the “social work” carried out by Hizballah and Hamas.

²⁴⁹ COAG *Final Report*, para 119

²⁵⁰ Prof Ben Saul, *International Humanitarian Law Challenges Series – IHL and Terrorism Part IV – Ben Saul responds*, 27th April 2013

²⁵¹ See Chapter III for further discussion of this case.

In principle, and upon consideration of practicalities, there is therefore little to be said, in the opinion of the INSLM, in favour of a general policy of permitting the funding of humanitarian activities by terrorist organisations. There is a considerable element of fiction in the device of distinguishing activities labelled good from activities labelled bad when they are all conducted by and to advance the sway of the same terrorist organisation. It is not immediately obvious why funding the feeding of assassins' families is less harmful than funding the assassins to enable them to feed their families themselves. In appropriate cases, of course, the facts concerning the intended use of illicit funds may well require to be taken into account in favour of a convicted person, in the exercise of the sentencing discretion. Those facts should remain irrelevant to proof of the offence itself (so long as the present mental elements, which address the relevant terrorist characterization, have been proved).

V.3 Humanitarian exceptions in Australia's counter-terrorism laws

Australia's counter-terrorism laws only partly embody this approach. The offences of associating with a terrorist organisation under sec 102.8 of the Criminal Code contain an exception where "the association is only for the purpose of providing aid of a humanitarian nature".²⁵² The Foreign Incursions Act²⁵³ contains offences relating to incursions into foreign States and recruitment for service in armed forces in foreign States. Section 7 contains offences related to preparations for incursions into foreign States for the purpose of engaging in hostile activities. However, subsec 7(1B) provides that: "A person shall not be taken to have committed an offence against this section merely because of doing an act by way of, or for the purposes of, the provision of aid of a humanitarian nature".

This differs from the approach taken for the offences of funding, training or supporting a terrorist organisation under secs 102.5, 102.6 and 102.7 of the Criminal Code and sec 21 of the UN Charter Act (giving an asset to a proscribed person or entity)²⁵⁴ which provide no exceptions for activities that are humanitarian in character.

The offences of training a terrorist organisation, or receiving training from a terrorist organisation, do not require an intention that the training would help the organisation

²⁵² para 102.8(4)(c) of the Criminal Code provides that the offence of associating with a terrorist organisation under sec 102.8 does not apply where "the association is only for the purpose of providing aid of a humanitarian nature."

²⁵³ Considered under subpara 6(1)(a)(ii) of the INSLM Act

²⁵⁴ As well as sec 9 of the *Charter of the United Nations (Sanctions-the Taliban) Regulation 2013* (Cth) and reg 10 of the *Charter of the United Nations (Sanctions-Al-Qaida) Regulations 2008* (Cth) (giving an asset to a designated person or entity).

engage in terrorist activity.²⁵⁵ The provision of training in IHL, surgery etc would therefore come within the scope of the offences. The Attorney-General's Department ("AGD") in its 2009 *National Security Legislation Discussion Paper on Proposed Amendments*, proposed amendments that would allow the Attorney-General to declare certain aid organisations exempt from the application of the training offence in sec 102.5 of the Criminal Code.²⁵⁶ These amendments were not subsequently progressed.²⁵⁷

The offences of getting funds to, from, or for a terrorist organisation²⁵⁸ and the offences of giving an asset to a proscribed person or entity²⁵⁹ do not require any link to whether the asset or funds would assist the organisation to engage in terrorist activity. The provision of medical assistance to the wounded, or food supplies to the displaced, where those assisted were associated with proscribed terrorist organisations, would therefore come within the scope of the offences.

While there is no exception for humanitarian assistance under sec 21 of the UN Charter Act, sec 22 of the UN Charter Act allows for the Minister to issue a notice that certain "authorised dealings" with assets are exempt from the sec 21 offences.²⁶⁰ The owner or holder of an asset can apply to the Minister for permission to make the asset available to a proscribed person or entity.²⁶¹ If a humanitarian organisation were to provide medical supplies and a sec 22 order were not in place (or the provision of the supplies were not in accordance with a sec 22 order) then sec 21 would apply.²⁶² The Minister may issue a sec 22 notice on his or her own initiative or on application under subsec 22(2). The power to issue a sec 22 notice is discretionary and

²⁵⁵ sec 102.5 of the Criminal Code. The COAG Review recommended that sec 102.5 be amended to specifically exclude training for purposes unconnected with terrorist acts, such as training in IHL, human rights treaties, conflict mediation and first aid: See *COAG Final Report* pp24-26 and Recommendation 16.

²⁵⁶ pp66-73

²⁵⁷ As noted in the COAG Final Report there has been no explanation of this lack of progress.

²⁵⁸ sec 102.6 of the Criminal Code

²⁵⁹ sec 21 of the UN Charter Act, sec 9 of the *Charter of the United Nations (Sanctions-the Taliban) Regulation 2013* (Cth) and reg 10 of the *Charter of the United Nations (Sanctions-Al-Qaida) Regulations 2008* (Cth) (giving an asset to a designated person or entity).

²⁶⁰ A similar scheme operates under sec 11 of the *Charter of the United Nations (Sanctions-the Taliban) Regulation 2013* (Cth) and reg 12 of the *Charter of the United Nations (Sanctions-Al-Qaida) Regulations 2008* (Cth) allowing the Minister to grant permits for the making available of an asset to a designated person or entity in a way that would otherwise contravene sec 9 and reg 10 respectively.

²⁶¹ subsec 22(2) of the UN Charter Act

²⁶² The provision of medical supplies by a humanitarian organisation to a proscribed person or entity would be an "asset".

there is no list of considerations (in either the Act or the Regulations) that must be taken into account by the Minister in determining whether to issue a sec 22 notice.²⁶³

The offences of providing support to a terrorist organisation under the Criminal Code require that “the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation”.²⁶⁴ Given the elements of these offences, it might at first sight be thought that it is unlikely humanitarian conduct would be captured.

While the support offences under sec 102.7 of the Criminal Code require the support to be of a kind that would help the organisation carry out terrorist activities, the breadth of the term “support or resources” has been criticized for not reflecting an adequate threshold for criminally culpable conduct.²⁶⁵ It is certainly obscure how it is intended that these offence provisions extend beyond the ambit of conduct covered by, say, the offence of aiding the doing of an act in preparation for, or planning a terrorist act.²⁶⁶ That obscurity is the more troubling given that one offence is punishable by 25 years imprisonment and the other by life imprisonment.

In particular, depending upon the facts of the case, there could be invidious difficulty in characterizing the doing of acts such as providing for the general succour (food, medicine, social work) of the members or associates of a known terrorist organisation. Is this “assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)” within the meaning of subsec 102.1(1) of the Criminal Code as imported into para 102.7(1)(a) (providing support to a terrorist organisation)? More precisely, would a person providing such succour be intentionally providing “support or resources that would help the organisation engage in” such assistance or fostering?

The INSLM has considered the approach of the United States in restricting the offence of providing support or resources to “material support or resources” to a designated terrorist

²⁶³ Under reg 31 of the 2008 Regulations where an application has been made under sec 22 in relation to a “freezable asset” the Minister may authorize the use or dealing with the freezable asset if it is a “basic expense dealing”, “contractual dealing” or “extraordinary expense dealing”. However, this does not apply to an application to make an asset available to a proscribed person or entity as such an application does not relate to a “freezable asset”.

²⁶⁴ paras 102.7(1)(a) and (2)(a) of the Criminal Code

²⁶⁵ eg Law Council of Australia, *Submission to the INSLM on Financing Terrorism Offences*, paras 4, 113-117 and 236; Human Rights Law Centre, *Submission to the INSLM*, para 21; Gilbert + Tobin Centre of Public Law, *Submission to the COAG Review*, p22; Prof Ben Saul, *Submission to the INSLM’s 2012 Review*, p7

²⁶⁶ secs 101.6 and 11.2 of the Criminal Code

organisation.²⁶⁷ The US material support offence does not require the material support or resources to be provided for an illicit purpose (and hence humanitarian aid could come within the scope of the offence).²⁶⁸ Like the scheme for Ministerial certificates under sec 22 of the UN Charter Act, the US material support law provides that permission can be granted in advance for the provision of aid where the Secretary of State determines the aid may not be used to carry out terrorist activity.²⁶⁹ It is doubtful whether the epithet “material” obviates the difficulties sketched above.

The exception for providing aid of a humanitarian nature to the offence of knowingly associating with a terrorist organisation (sec 102.8 of the Criminal Code, as noted above) highlights a less than uniform observance of the UN principle that terrorism bears its defining character regardless of its motivation. So far as concerns private individuals or organisations lacking broad recognition as neutral charities, all the problems noted above in these carve outs from offences designed to strangle support for terrorist organisations are likely to exist. (As discussed further below, an important distinction should be observed in the case of certain humanitarian endeavours such as those of the International Committee of the Red Cross (“ICRC”).

The structure and elements of sec 102.8 of the Criminal Code have their own difficulties. At first sight, the conduct for which imprisonment for only 3 years is provided as a penalty involves morally reprehensible conduct that generally attracts international or universal condemnation. For similar reasons as those noted above, the following aspects of the sec 102.8 offence overlap uneasily with cases that would be covered by both sec 102.3 (membership) and sec 102.7 (support).

²⁶⁷ “Material support or resources” is defined in the US Code as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials”: 18 USC § 2339A(b).

²⁶⁸ It is an offence to knowingly provide material support or resources to a designated foreign terrorist organisation, or to attempt or conspire to do so: 18 USC § 2339B(a). In *Holder v Humanitarian Law Project* 561 U.S. ___, 177 L Ed 2d 355 (2010) (Nos. 08–1498 and 09–89) 552 F. 3d 916, the Supreme Court upheld the constitutionality of the material support law. The court found that Congress had intended to prevent any material support or resources, even aid for the purpose of helping the group to enter into peace negotiations as this could free up its resources for terrorist activities. The Court found that training PKK members to use international law to resolve disputes peacefully; teaching PKK members to petition the United Nations and other representative bodies for relief; and engaging in political advocacy on behalf of Kurds living in Turkey and Tamils living in Sri Lanka did fit into the law’s category of material aid: “training”, “expert advice or assistance”, “service” and “personnel”.

²⁶⁹ Only aid in the form of “training”, “personnel” and “expert advice or assistance” can be permitted: 18 USC § 2339B(j). For a discussion of the US material support law see Prof David Cole “Terror Financing, Guilt by Association and the Paradigm of Prevention in the ‘War on Terror’” in Bianchi & Keller (eds), *Counterterrorism: Democracy’s Challenge* (2008).

The offence of association requires, for a first offence, 2 or more occasions of the accused's intentional association with another person known by the accused to be a member (etc) of an organisation known by the accused to be a listed terrorist organisation. The offence also requires that the accused's association with that other person provides support to the organisation, being support intended by the accused to assist the terrorist organisation to expand or to continue to exist. In short, the conduct is repeated dealings knowingly with a terrorist organisation with the intention that those dealings help the organisation to flourish or survive.

V.4 Other inappropriate exceptions

It is a little curious that an offence so constructed has carve outs that do not exist for any of the other offences in relation to terrorist organisations noted above. For want of a better place in this Report, the following discussion is by way of digression from the topic of humanitarian exception to Australia's counter-terrorism laws.

The exception for a close family member where cultural background shows a family or domestic concern²⁷⁰ either would never be engaged, or else should not be available as a matter of policy. That is, how could it reasonably be regarded as a matter of family or domestic concern, whatever the cultural background in question, to meet with one's nephew intending thereby that an organisation one knows to be a listed terrorist organisation should be assisted to flourish or survive? Alternatively, meeting with one's nephew intending thereby to assist what one knows to be a listed terrorist organisation to flourish or survive does not readily commend itself as socially acceptable regardless of the cultural background in question.

Next, the offence of associating with terrorist organisations does not apply if the organisation is in a place being used for public religious worship and takes place in the course of practising a religion.²⁷¹ This should be viewed against the background that at the core of these offences, ultimately, is the notion of a "terrorist act" – which is presently defined so as to require the prosecution to prove the existence of, among other possibilities, the intention of advancing a religious cause.²⁷² This exception is not, unlike the close family member exception, based on the nature of the association, actually or as it may be reasonably regarded. Rather, it operates as an exception based upon the location of the association and its occurrence during religious

²⁷⁰ para 102.8(4)(a) of the Criminal Code

²⁷¹ para 102.8(4)(b) of the Criminal Code

²⁷² subsec 100.1(1) of the Criminal Code definition of "terrorist act" para (b)

practice, such as listening to homilies or worshipping by means such as prayer. It is significant, of course, that the place is “being used for *public* religious worship”.

It is understandable, given Art 18 of ICCPR, that Australia would try to be sensitive in relation to congregations of the devout with respect to their possible terrorist criminality. However, Art 18(3) of ICCPR permits the limitation of the freedom of religion by laws necessary to protect public safety or the fundamental rights of others. Effective counter-terrorist laws plainly fit that category. And Australia has enacted religious motivation (or alternatively, political or ideological motivation) as a necessary element for the core definition of “terrorist act”. The record of Australia’s terrorist cases to date includes the use by the prosecutors of substantial amounts of damaging material comprising religiously couched admissions of murderous intentions. No-one could seriously object to the admission of such evidence to prove such intentions.

This exception is special to religion, as opposed to politics or other ideology. That is at odds with the respect shown by Arts 18, 19, 21 and 22 of ICCPR for what might be called the freedoms of secular thought.

It is difficult to conceive why the prosecution of a person for associating with a terrorist organisation could in one case allege that the accused attended a political meeting designed to help the organisation to flourish or survive, while in another case it could not allege that the person attended a religious gathering designed to help such an organisation to flourish or survive. And it would be fatuous to suggest that public religious gatherings are incapable of being occasions when such support could be provided.

Recommendation V/1: The exceptions in paras 102.8(4)(a) and (b) of the Criminal Code from the offence of associating with terrorist organisations, concerned with close family associations and public religious associations, should be repealed.

V.5 Possible exceptions for humanitarian agencies

Since Henry Dunant’s response to the horrors of Solferino, the idea of neutral agencies, independent of warring parties, able and permitted to render humane assistance to the victims of armed violence, combatant or not, has spread to be more or less universal. The status and prestige of the ICRC bespeak the power of that idea. There is no reason that this humane policy should be banished from the fields of armed violence that are not governed by the laws of war between States.

The lending of humanitarian assistance to all sides of a conflict, say in the nature of an insurrection, where one side fits the definition of a terrorist organisation, should also attract the benefits of this policy. But the policy should be seen as one where the nature and standing of the humanitarian agency is not merely incidental but is rather essential to the viability of that policy. For these reasons, agencies such as the ICRC, and support for their activities, should never fall foul of laws designed to counter terrorism by strangling support for terrorist organisations or preventing the financing of terrorism. The Red Crescent should be able to provide medical assistance to bombers alongside victims, without criminal liability.²⁷³

The First UN Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism, Martin Scheinin, reported on the importance of ensuring that exceptions from terrorism financing measures, in particular the freezing of assets, exist on humanitarian grounds. This is to ensure that non-governmental organisations which promote the protection of economic, social and cultural rights, can continue to function.²⁷⁴

The argument that preventing all support to terrorist individuals and organisations will make it more difficult for them to exist and to carry out terrorist acts in the future does not apply to the provision by such dedicated agencies of humanitarian aid. The delivery by them of such aid (eg delivery of training on IHL or provision of medical assistance to detainees) will not assist terrorist organisations to commit terrorist acts in such a way as to justify its prevention.

The INSLM is concerned that Australia's terrorism financing laws (as well as offences for training and supporting terrorist organisations) may result in what Prof Ben Saul describes as

²⁷³ See pp122-124 and Recommendation VI/3 of the INSLM's Second Annual Report for a discussion of IHL and the definition of "terrorist act" in the Criminal Code, including a recommendation that conduct covered by IHL should be excluded from the definition. Note also that the definition of terrorist act contained in the Financing of Terrorism Convention specifically refers to the intentional killing or maiming of those not involved in armed conflict (Art 2(b)). In *R v Gul* [2013] UKSC 64 (23 October 2013), the UK Supreme Court determined that the statutory definition of "terrorism" in sec 1 of the *Terrorism Act 2000* (UK) includes military attacks by non-state armed groups in non-international armed conflict. After finding that the definition had been drafted in deliberately wide terms, the Court considered whether the definition must be interpreted more restrictively so as not to conflict with the UK's international obligations. While the Court found significant support for the idea that the definition should not extend to situations of armed conflict, such support "falls far short of amounting to a general understanding which could be properly invoked as an aid to statutory interpretation" [45]. The Court held that there is no reason for interpreting the UK definition of terrorism more narrowly on the basis of international obligations as there is no accepted definition of terrorism in international law and although certain of the UN sectoral conventions on terrorism define terrorism to exclude activities of armed forces during an armed conflict, "it is quite impossible to suggest there is a plain or consistent approach in UN Conventions on this issue" [47]. The Court noted that while the issue is one for Parliament to decide, the concerns and suggestions about the width of the UK statutory definition identified in reports of the UK Independent Reviewer of Terrorism Legislation "merit serious consideration" and any legislative narrowing of the current definition "is to be welcomed, provided that it is consistent with the public protection to which the legislation is directed" [62].

²⁷⁴ Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism*, 16 August 2006, A/61/267, para 41

“the criminalization of legitimate humanitarian action by neutral and independent actors like the ICRC, impeding their work and aggravating human suffering in war.”²⁷⁵ The genuinely humanitarian activities of people in such humanitarian agencies assisting populations in conflict zones should not fall within Australia’s counter-terrorism offences.

The UN Security Council has demanded that measures taken by States to counter-terrorism “must comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular, international human rights, refugee, and humanitarian law.”²⁷⁶ The Security Council has acknowledged that:-

...a great number of States and humanitarian organizations have expressed concerns at the possible adverse impact of sanctions on the most vulnerable segments of the population. Concerns have also been expressed at the negative impact sanctions can have on the economy of third countries.

In response to these concerns, relevant Security Council decisions have reflected a more refined approach to the design, application and implementation of mandatory sanctions. These refinements have included measures targeted at specific actors, as well as humanitarian exceptions embodied in Security Council resolutions.²⁷⁷

Australians are apparently travelling to conflict zones overseas in large enough numbers to excite the concern of our security and law enforcement agencies. Some of these individuals are thought to be undertaking genuinely humanitarian activities while others are engaging in conduct properly criminalized by Australia’s counter-terrorism and foreign incursion offences. The AFP’s submission to the INSLM recognized this trend in relation to the conflict in Syria:-

²⁷⁵ Prof Ben Saul, *International Humanitarian Law Challenges Series – IHL and Terrorism Part IV – Ben Saul responds*, 27 April 2013

²⁷⁶ UN Security Council Resolution 1456 (2003), para 6

²⁷⁷ UN Security Council, *Security Council Sanctions Committees: An Overview* <http://www.un.org/sc/committees/>. On 17th April 2000, the Security Council established the Informal Working Group on General Issues of Sanctions to develop general recommendations on how to improve the effectiveness of UN sanctions. In 2006, the Working Group submitted its report to the Security Council (S/2006/997), which contained recommendations and best practices on how to improve sanctions. The Report included a recommendation that the Security Council give “due consideration” to the humanitarian impact of resolutions during their drafting and “standardize humanitarian and other exemptions to all targeted measures, including arms embargoes, travel restrictions, aviation bans and financial sanctions.” para 3. The Security Council noted the recommendation and stated it is: “[c]ommitted to ensuring that fair and clear procedures exist for granting humanitarian exemptions” (UN Security Council Resolution 1730 (2006), preambular clause). A significant reform in this regard has been the establishment of the Office of the Ombudsperson to consider de-listing requests and make recommendations on such requests to the Security Council (see UN Security Council Resolution 1904 (2009)).

There has never been an international civil conflict that has prompted as many Australians to travel to a warzone as the Syria crisis has, other than perhaps the Balkans war... The vast majority of Australians in Syria are there doing humanitarian work. There are however some who are there fighting with the Free Syrian Army or other groups that aim to overthrow government forces, and there's also a handful that is fighting with al-Qaeda affiliated groups. It is this group that is causing us real concern, most of whom are still in Syria.²⁷⁸

The ICRC²⁷⁹ has expressed concern about the conflation of IHL and States' counter-terrorism laws and the potential criminalization of a range of humanitarian action undertaken by the ICRC in accordance with the Geneva Conventions:-

The ICRC is permitted and must in practice be free to offer its services for the benefit of civilians and other persons affected by an armed conflict who find themselves in the power of or in the area of control of the non-state party... The principle of neutrality means that the ICRC "may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature"... The ICRC could not abide, or be seen to be abiding by this principle if they were directed, as a result of anti-terrorist legislation or other measures, to carry out their activities for the benefit only of persons on one side of the divide in an armed conflict or other situation of violence.²⁸⁰

Australia's counter-terrorism laws criminalize the provision of funds and assets, support and training to terrorist organisations and may arguably bring within their ambit humanitarian activity involving contact with individuals or entities associated with terrorism. As there is no humanitarian aid exception, these laws potentially criminalize the work carried out by ICRC personnel in accordance with the ICRC's mandate under IHL.

Common Art 3 of the Geneva Conventions specifically allows the ICRC to offer its services to the parties to a non-international armed conflict, including the non-state party to the

²⁷⁸ AFP Submission to the INSLM, 14th October 2013

²⁷⁹ The ICRC is an independent humanitarian organisation which promotes IHL and provides humanitarian assistance in accordance with its mandate. The work of the ICRC is mandated by States through the four Geneva Conventions and their Additional Protocols which confer on the ICRC a mandate to act in the event of international armed conflict (including the right to visit prisoners of war and civilian internees). The Conventions also give the ICRC a broad right of initiative in non-international armed conflicts (with a right of humanitarian initiative recognized by the international community and enshrined in Art 3 common to the four Geneva Conventions). All States are bound by the four Geneva Conventions which, in times of armed conflict, protect wounded, sick and shipwrecked members of the armed forces, prisoners of war and civilians.

²⁸⁰ International Committee of the Red Cross, *International Law And The Challenges Of Contemporary Armed Conflicts*, ICRC Report presented at the 31st International Conference of the Red Cross and Red Crescent, Geneva (2011) 31IC/11/5.1.2, p52

conflict who may be proscribed as a terrorist organisation under Australian law. The current prohibition in Australia's counter-terrorism laws against support, training and the provision of funds or any type of assets criminalizes the core work of the ICRC in a non-international armed conflict. The ICRC gives the following examples of humanitarian activity within its mandate which may be captured by Australia's counter-terrorism legislation:-

The provision of material assistance to detainees suspected of or condemned for being members of terrorist organisations; first aid training; war surgery seminars; IHL dissemination to members of armed opposition groups included in terrorist lists; assistance to provide for the basic needs of civil population in areas controlled by armed groups associated with terrorism; and large-scale assistance activities to internally displaced persons, where individuals associated with terrorism may be among the beneficiaries.²⁸¹

Recommendation V/2: Section 21 of the UN Charter Act, sec 9 of the *Charter of the United Nations (Sanctions-the Taliban) Regulation 2013* (Cth), reg 10 of the *Charter of the United Nations (Sanctions-Al-Qaida) Regulations 2008* (Cth)²⁸² and secs 102.5, 102.6, 102.7 and 102.8²⁸³ of the Criminal Code should be amended to include an exception for activities that are humanitarian in character and are conducted by or in association with the ICRC, the UN or its agencies, or (perhaps) agencies of like character designated by a Minister.²⁸⁴

²⁸¹ International Committee of the Red Cross, *International Law And The Challenges Of Contemporary Armed Conflicts*, ICRC Report presented at the 31st International Conference of the Red Cross and Red Crescent, Geneva (2011) 31IC/11/5.1.2, p52

²⁸² The *Charter of the United Nations (Sanctions-the Taliban) Regulation 2013* (Cth) and the *Charter of the United Nations (Sanctions-Al-Qaida) Regulations 2008* (Cth) being related laws for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

²⁸³ Thus the existing exception in para 102.8(4)(c) should be amended by an appropriate qualification.

²⁸⁴ eg Médecins Sans Frontières

CHAPTER VI

IMPORTANCE AND EFFICACY OF AUSTRALIA'S TERRORISM FINANCING LEGISLATION

VI.1 Importance of Australia's terrorism financing laws internationally

Australia is required by its counter-terrorism international obligations to have laws against terrorism financing. Australia is obliged to enact and administer laws which permit the authorities to identify and prevent the flow of funds to terrorists and terrorist organisations and to punish by criminal sanction those who finance terrorism.²⁸⁵

If the existence and administration of such laws were to bring about the successful disruption of terrorism funding flows, that ideal outcome would create “a hostile environment for terrorism, constraining overall capabilities of terrorists and helping frustrate their ability to execute attacks”.²⁸⁶ As recognized by the first Special Rapporteur on the Promotion and Protection of Human Rights while Countering Terrorism, Martin Scheinin, “the need for preventive action is an important aspect of the fight against terrorism and the freezing of funds collected or used for terrorist purposes is an important aspect of these measures”.²⁸⁷

Australia is not free from terrorism financing activities. Prosecutions to date and investigations by agencies show there are individuals and organisations in Australia who would seek to finance terrorism both in Australia and abroad. Terrorism financing offences are investigated by the Australian Federal Police Terrorism Financing. Investigations Unit, a multi-agency team created in 2011 to focus specifically on all aspects of terrorism financing. ASIO investigates terrorism financing activity of security concern in accordance with its functions.

²⁸⁵ See eg 1373, 1267 and the Terrorism Financing Convention

²⁸⁶ FATE, *Terrorist Financing*, 29 February 2008, p4

²⁸⁷ Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights while countering terrorism*, 16 August 2006 (A/61/267), para 30

The conflict in Syria is a particular area of current concern in relation to terrorism financing. Australian Government agencies have expressed their concerns to the INSLM about the terrorism financing activities of members of the Australian community in relation to the conflict in Syria. ASIO submitted:-

Within Australia, numerous individuals are supporting the conflict in Syria. The type of support varies from fundraising to facilitation for individuals seeking to travel to Syria, as well as involvement in violence and harassment related to the conflict. Fundraising in support of the conflict has been particularly notable.²⁸⁸

The international flow of funds to terrorists and terrorist organisations is a key concern of the international community, with the Terrorism Financing Convention and UN Security Council decisions requiring parties to the Convention and Member States respectively to take actions to counter terrorism financing.

In its 2008 review of the United Kingdom's terrorism financing measures, the European Union Committee of the House of Lords recognized that the financing of terrorism more often than not takes place in an international context and requires an international strategy for measures to be effective. The Committee quoted the EU Council of Ministers acceptance that "measures adopted solely at national or even Community level, without taking account of international coordination and cooperation, would have very limited effects".²⁸⁹ The INSLM agrees with this position.

A 2012 European Commission review of the information sharing arrangements for terrorist financing data between the European Union and United States (the Terrorist Financing Tracking Program ("TFTP")) highlighted the value of coordinated global efforts to counter terrorism financing. The review found that in the Breivik case²⁹⁰:-

TFTP based information helped Norwegian and other European investigators including Europol to identify within hours the channels through which Breivik collected and moved the funds that he used for the preparation of his brutal attacks.

²⁸⁸ ASIO Submission to the INSLM's Review of Terrorism Financing Legislation. The AFP expressed similar concerns to the INSLM.

²⁸⁹ House of Lords European Union Committee, *Money Laundering and the Financing of Terrorism Report*, HL Paper 132-I (22 July 2009), quoting Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (the third money laundering Directive), OJ L309 of 25 November 2005, recital 5.

²⁹⁰ Anders Behring Breivik was sentenced to 21 years imprisonment for violations of the Norwegian penal code §147 (terrorism), §148 (fatal explosion), and §233 (murder). On 22nd July 2011, Breivik bombed the Oslo Government headquarters with a fertilizer bomb killing eight and then shot dead 69 others at a youth camp.

The more knowledge is gained on the financial patterns of such terrorists (“lone wolves”), the better are law enforcement and other authorities prepared to understand the thinking of such individuals and ultimately to prevent similar attacks. Based on the TFTP data collected in [the] context of the Breivik case, the Finnish authorities were able to arrest a person pursuing similar terrorist objectives before that person was able to put them in practice.²⁹¹

For Australia’s terrorism financing laws to be effective, and to comply with international obligations, they must apply to the financing of terrorism wherever it occurs, regardless of where the terrorists or terrorist organisations are located, or where the putative terrorist act has occurred or is to occur. Currently, offences under the UN Charter Act require a closer connexion to Australia, meaning the terrorist asset freezing régime is somewhat less comprehensive in its effect on individuals and entities outside Australia.

As illustrated by the international statements noted in **Appendix K**, the position is not unambiguous in relation to the intended breadth of jurisdiction for the criminal laws required by international obligation to be enacted by Australia and other countries owing those obligations. On the one hand, there are clear descriptions of such laws with an explicit territorial nexus. On the other hand, there are equally clear references to the phenomenon of terrorism and its financing occurring regardless of national boundaries, this being the rationale for international agreement in order to combat that evil.

The INSLM recognizes that these materials can fairly be seen to justify any one of the extended geographical jurisdiction provisions in the Criminal Code²⁹² being used for Australia’s terrorism financing offences. A virtue of category D, being the widest and least qualified, is the removal of the possibility of any nexus complication impeding the prosecution of universally condemned conduct that has been investigated and is in the course of being prosecuted by Australian authorities. Its attachment to the Criminal Code terrorism financing offences was and remains appropriate and can be seen as promoting those laws’ efficacy. It can readily be conceded, of course, that the choice of category A (the narrowest extension) for the UN Charter Act terrorism financing offences’ extended geographical jurisdiction is unexceptionable in terms of Australia’s international obligations, and plainly wide enough in its effect to be appropriate.

²⁹¹ European Commission, *Report on the second joint review of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program* (October 2012) 2.1.7

²⁹² secs 15.1-15.4 of the Criminal Code

However, this is to say that the available choice did not throw up a uniquely correct outcome or an obviously preferable outcome among categories A and D. The question of a consistency of approach applying to all of Australia's terrorism financing offences is different – it is plainly preferable that the approach be consistent in the absence of any reason for a different approach. There are no such reasons. The simplicity of category D should therefore be attached to all of Australia's terrorism financing offences' extended geographical jurisdiction.²⁹³

This approach chimes with the capacity to proscribe an organisation under the Criminal Code or a person, entity or asset under the UN Charter Act without any connexion to Australia. The absence of a traditional jurisdictional connexion to Australia cannot be a reason for failing to list. To put it another way, the international project to counter terrorism, and its financing, connects everyone including the State actors in the international community. The legislative bases for proscription under both the Criminal Code and UN Charter Act do not require a connection to Australia, although information indicating links to Australia or threats to Australian interests may properly tend to prioritize consideration by ASIO of proscribing a particular group as a terrorist organisation under the Criminal Code.²⁹⁴

VI.2 Efficacy of Australia's terrorism financing laws

The intended effect of Australia's terrorism financing laws is to enable the freezing of terrorist assets and to stop funds getting to terrorists and terrorist organisations, and to impose criminal penalties on those who seek to finance terrorism. However, the INSLM's review this year of the terrorism financing laws has shown the difficulty if not impossibility of demonstrating whether the practical application of the laws has produced this result.

The INSLM's review found the effectiveness of the laws, especially with regard to their preventive and deterrent purpose, to be compromised by the difficulties of proof associated with prosecuting terrorism financing offences. The relatively light sentences imposed in the few cases where the offences have been successfully prosecuted have not assisted in this regard. The lack of enforcement action taken under the asset freezing régime also makes the efficacy of the asset freezing laws as a counter-terrorism measure, at least so far as actual freezing of funds are concerned, doubtful.

There has been only one prosecution for terrorism financing offences under the UN Charter Act (this case involved funds and electronic components being sent to the LTTE and is

²⁹³ See Recommendation III/14 in Chapter III that category D extended geographical jurisdiction should be applied to all offences under Australia's terrorism financing laws.

²⁹⁴ *Protocol for listing terrorist organisations under the Criminal Code*, Attorney-General's Department

discussed in Chapter III).²⁹⁵ There have been three individuals successfully prosecuted for attempting to fund a terrorist organisation under sec 102.6 of the Criminal Code. There have been no prosecutions for the terrorism financing offences under Div 103 of the Criminal Code.²⁹⁶

As with other preparatory offences, the terrorism financing laws are intended to have a preventive effect by enabling authorities to take action before a terrorist act occurs and providing for the imposition of heavy penalties (from 10 years to life imprisonment) for those involved in dealing with terrorist assets, financing terrorist organisations or financing terrorist acts.

The INSLM sought information on the application of the freezing and injunction powers under the UN Charter Act and the Autonomous Sanctions Act from the AFP and DFAT.²⁹⁷ In relation to terrorist assets frozen, the INSLM's enquiries revealed only one instance of terrorist asset freezing. This was pursuant to Part 4 of the UN Charter Act and was in relation to an entity proscribed by the Minister under sec 15 of the UN Charter Act.

The INSLM was not made aware of any terrorist assets frozen under Part 3 of the UN Charter Act or the Autonomous Sanctions Act. The INSLM was not made aware of any injunctions sought for conduct contravening the UN Charter Act or the Autonomous Sanctions Act. The INSLM was not made aware of any criminal forfeiture of any property in relation to terrorism financing offences.

Of course, this may not reflect a deficiency in the legislation or its application and may simply reflect the reality that terrorist assets are not held by financial institutions within Australia's jurisdiction. Of the 2,500 plus proscribed entities and individuals on DFAT's Consolidated List,²⁹⁸ none is listed as being Australian citizens or permanent residents, none is listed as

²⁹⁵ There have been no prosecutions for offences under Part 3 of the UN Charter Act or the Autonomous Sanctions Act.

²⁹⁶ For a list of all persons charged as well as those prosecuted for terrorism financing offences under the Criminal Code and UN Charter Act see **Appendix J**.

²⁹⁷ DFAT administers the UN Charter Act and Autonomous sanctions régimes, and the AFP investigates terrorism financing offences and must be notified of freezable assets. Under reg 24 of the *Autonomous Sanctions Regulations 2011* (Cth) and reg 42 of the *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Cth), a person holding a controlled asset is required to notify the AFP as soon as is practicable after forming an opinion that the asset is a controlled asset (that is, the asset is controlled by a proscribed person or entity, or is a listed asset).

²⁹⁸ Which includes all those persons, entities and assets subject to Australian sanctions under Parts 3 and 4 of the UN Charter Act and the Autonomous Sanctions Act.

being located in Australia and none is listed as being incorporated in Australia.²⁹⁹ While it is not a condition of proscription that an individual or entity has any assets within Australia's jurisdiction, if there are no or few assets within the jurisdiction, this will impact the amount of assets capable of being frozen.³⁰⁰

In assessing the deterrent and disruptive effect of the UK's terrorist asset freezing régime, David Anderson QC, the UK Independent Reviewer of Terrorism Legislation, noted the UK Treasury's submission to his Review that the centrality of London as an international financial centre coupled with the interconnectedness of global finance mean that an asset freeze in the UK is of more value than it might be elsewhere. However, the UK Independent Reviewer went on to find that the application of the UK's asset freezing régime has shown a "remarkably small" amount of assets frozen. As in the Australian experience, this is consistent with the possibility that many of the individuals and entities proscribed have few if any assets within the jurisdiction.³⁰¹ The UK Reviewer further noted that there are currently no assets frozen in relation to Northern Ireland based terrorism.³⁰²

The fact that terrorists may not have assets in Australia does not relieve Australia of its international obligations to ensure Australia is not a safe haven for terrorist financiers. The international effort to prevent terrorism financing requires all States to "prevent and counteract movements of funds suspected to be intended for terrorist purposes".³⁰³ As the UK Independent Reviewer has noted "designation of a known terrorist organisation with a history of fundraising in the United Kingdom may be assumed to have useful disruptive effects, even if the group's activities are chiefly directed abroad".³⁰⁴ The LTTE case shows the application of Australia's terrorist asset freezing laws to further fundraising by the Tamil diaspora in Australia for the Sri-Lankan based LTTE.

²⁹⁹ The Consolidated List includes such information for the majority of listings (date of birth, citizenship, address, last known location, place of incorporation etc are all details usually provided). Only one individual is listed as having assets in Australia (a property in Victoria), however, that individual is proscribed pursuant to sanctions in relation to Liberia (UN Security Council Resolution 1521) and is not proscribed for any association with terrorism.

³⁰⁰ Similarly, all of the 18 organisations proscribed by regulation as a "terrorist organisation" under the Criminal Code are based overseas.

³⁰¹ David Anderson QC, Independent Reviewer of Terrorism Legislation, *First Report on the Operation of the Terrorist Asset-Freezing Etc. Act 2010* (December 2011) para 2.11

³⁰² David Anderson QC, Independent Reviewer of Terrorism Legislation, *First Report on the Operation of the Terrorist Asset-Freezing Etc. Act 2010* (December 2011) para 5.29

³⁰³ Terrorism Financing Convention, preambular clause

³⁰⁴ David Anderson QC, Independent Reviewer of Terrorism Legislation, *First Report on the Operation of the Terrorist Asset-Freezing Etc. Act 2010* (December 2011) para 2.11

An unsolved problem for the INSLM is how to gauge the efficacy of the laws creating terrorism financing offences. In the abstract, one would measure the extent of terrorism financing before the laws came into effect and compare it with the extent thereafter. The empirical data able to be provided by the relevant agencies to the INSLM do not begin to render that exercise concrete. It is true that we know the numbers of charges, investigations and involved persons after enactment of these offences has been very small. We know the sums or values frozen after enactment of these laws are very small. We do not know the comparable measures before enactment of these laws.

In particular, there are virtually no data on terrorism financing involving conduct in Australia or by Australians, such as to enable an estimate of the material support for terrorism which is being provided by such conduct or citizens, against which these laws are targeted.

It follows from these unknown measures that it is not possible for the INSLM to report that the terrorism financing offences have been efficacious laws. We do not know whether their existence or rather rare enforcement has deterred anyone from doing anything.

VI.3 Overlap between offences

There have been ten individuals charged with terrorism financing offences under Div 102 of the Criminal Code³⁰⁵ with three individuals successfully prosecuted, one acquitted and the charges against three others withdrawn.³⁰⁶ There have been three individuals charged, and successfully prosecuted, for offences under Part 4 of the UN Charter Act.³⁰⁷ There have been no prosecutions for the terrorism financing offences under Div 103 of the Criminal Code. The prosecution of individuals for terrorism offences in Australia has shown that in addition to the

³⁰⁵ Ezzit Raad, Ahmed Raad, Aimen Joud, Bassam Raad, Hany Taha and Shoue Hammoud were charged with attempting to intentionally make funds available to a terrorist organisation (subsec 102.6(1) and 11.1(1) of the Criminal Code). Joseph Thomas was charged with intentionally receiving funds from a terrorist organisation (subsec 102.6(1) of the Criminal Code). Aruran Vinayagamoorthy, Sivarajah Yathavan and Arumugam Rajeevan were charged with intentionally making funds available to a terrorist organisation (subsec 102.6(1) of the Criminal Code).

³⁰⁶ Ezzit Raad, Ahmed Raad and Aimen Joud were convicted of attempting to intentionally make funds available to a terrorist organisation (subsec 102.6(1) and 11.1(1) of the Criminal Code) and were sentenced to 4 years, 5 years and 5 years imprisonment respectively. The maximum penalty for this offence is 25 imprisonment. The charges against Aruran Vinayagamoorthy, Sivarajah Yathavan and Arumugam Rajeevan for intentionally making funds available to a terrorist organisation (subsec 102.6(1) of the Criminal Code) were not proceeded with due to the difficulty of proving the LTTE was a terrorist organisation within the meaning of the Criminal Code, as it was not proscribed by regulation. Joseph Thomas was acquitted of the charge of intentionally receiving funds from a terrorist organisation (subsec 102.6(1) of the Criminal Code).

³⁰⁷ Aruran Vinayagamoorthy was charged with two counts of intentionally making an asset available to a proscribed entity (subsec 21(1) of the UN Charter Act), Sivarajah Yathavan and Arumugam Rajeevan were each charged with one count of intentionally making an asset available to a proscribed entity (subsec 21(1) of the UN Charter Act). The three men pleaded guilty to the offences. Aruran Vinayagamoorthy received a 2 year suspended sentence while Sivarajah Yathavan and Arumugam Rajeevan each received a 1 year suspended sentence.

terrorism financing offences, other terrorism offences under Part 5.3 of the Criminal Code and offences under the Foreign Incursions Act may apply to terrorism financing activities, or may be committed in conjunction with terrorism financing activities.

The conduct involved in getting funds to, from or for a terrorist organisation (sec 102.6 of the Criminal Code) or financing terrorism (secs 103.1 and 103.2 of the Criminal Code) could also plausibly involve one or more of the following terrorism offences under the Criminal Code:-

- *Possessing things connected with terrorist acts* (sec 101.4): punishable by 15 years imprisonment where the person knows of the connection and 10 years where the person is reckless as to the connection
- *Doing an act in preparation for, or planning, terrorist acts* (sec 101.6): punishable by life imprisonment
- *membership of a terrorist organisation* (sec 102.3): punishable by 10 years imprisonment
- *training with a terrorist organisation* (sec 102.5): punishable by 25 years imprisonment
- *providing support to a terrorist organisation*³⁰⁸ (sec 102.7): punishable by 25 years imprisonment where the person knows the organisation is a terrorist organisation and 15 years where they are reckless as to that fact
- *associating with a terrorist organisation* (sec 102.8): punishable by 3 years imprisonment

In addition to these Criminal Code offences, terrorism financing activity may involve conduct falling within the Foreign Incursions Act. The Foreign Incursions Act targets the activities of Australian citizens and persons ordinarily resident in Australia who seek to engage in certain foreign hostile acts. The offences are designed to prevent Australians from becoming involved in armed conflict overseas.

Pursuant to subsec 6(1), it is an offence for an Australian citizen or resident to enter a foreign State with intent to engage in a hostile activity within that State. Pursuant to subsec 6(2), it is

³⁰⁸ The offences for providing support to a terrorist organisation under the Criminal Code require that “the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation”: paras 102.7(1)(a) and (2)(a) of the Criminal Code. “Support or resources” would include financial support and resources.

an offence for an Australian citizen or resident to engage in a hostile activity in a foreign State. The maximum penalty for the offence is 20 years imprisonment.

Pursuant to sec 7 of the Foreign Incursions Act, it is an offence to make preparations for incursions into foreign States for the purpose of engaging in hostile activities, including by accumulating weapons, participating in training or drills or giving money or goods to any person with the intention of supporting the commission of an offence under sec 6. The maximum penalty for the offence is 10 years imprisonment.

The terrorism prosecutions in Australia have highlighted the overlap between conduct that would fit within the terrorism financing offences and other offences under the Criminal Code and Foreign Incursions Act. In all terrorism prosecutions in Australia (not just those involving charges under the terrorism financing laws) the prosecution has led evidence of individual and group financial activities in support of the terrorism and foreign incursions charges.

The INSLM has not been provided with any real or imagined example of conduct which could be characterized as terrorism financing for the purposes of the terrorism financing offences but which could not be captured by any other terrorism offence under the Criminal Code (acts in preparation for a terrorist act, providing support to a terrorist organisation etc). Notwithstanding the importance of having terrorism financing laws, in assessing their efficacy it is necessary to recognize that the difficulties in proving the terrorism financing offences means such charges will probably never be the first choice of charge for a prosecutor or investigator.³⁰⁹ It is most likely that terrorism financing offences will always be a secondary charge to other Criminal Code offences, as was the case in the Operation Pendennis (Melbourne) prosecution. Or terrorism financing offences will not be charged at all, as was the case in Operation Pendennis (Sydney) and Operation Neath.

VI.4 Operation Pendennis (Melbourne)

A number of the accused in the Operation Pendennis (Melbourne) trial were charged, and a number convicted of, terrorism financing offences (funding a terrorist organisation) in addition to other terrorist organisation offences.³¹⁰ Ezzit Raad was convicted of attempting to

³⁰⁹ These difficulties of proof are discussed in Chapters III and IV.

³¹⁰ Six men associated with the Operation Pendennis (Melbourne) group (Ezzit Raad, Ahmed Raad, Aimen Joud, Bassam Raad, Hany Taha and Shoue Hammoud) were charged with attempting to make funds available to a terrorist organisation (subsec 102.6(1) and 11.1(1) of the Criminal Code). Bassam Raad, Shoe Hammoud and Hany Taha were acquitted of all terrorism charges.

make funds available to a terrorist organisation (subsec 102.6(1) and 11.1(1) of the Criminal Code) and being a member of a terrorist organisation (sec 102.3 of the Criminal Code). Ahmed Raad was convicted of attempting to make funds available to a terrorist organisation (subsec 102.6(1) and 11.1(1) of the Criminal Code), providing resources to a terrorist organisation (subsec 102.7(1) of the Criminal Code) and being a member of a terrorist organisation (sec 102.3 of the Criminal Code). Aimen Joud was convicted of attempting to make funds available to a terrorist organisation (subsec 102.6(1) and 11.1(1) of the Criminal Code), providing resources to a terrorist organisation (subsec 102.7(1) of the Criminal Code) and being a member of a terrorist organisation (sec 102.3 of the Criminal Code). Bongiorno J described the terrorism financing activities of members of the terrorist organisation:-

The jemaah [ie the relevant group] was not proved by the Crown to have had any formal structure as to meetings, records or the like, although, in common with many Islamic organisations, it had a sandoq (literally “a box”) to which the members made financial contributions. Although it appeared that it was intended that such contributions would be made regularly, there was evidence that not all of the members of the jemaah were diligent in making such contributions and some may have made no contributions at all.

There was much dispute during the trial as to what the sandoq was used for, or was intended to be used for, by the jemaah. It was contended on behalf of some of the prisoners that it was purely for charitable or other benign purposes, and this might have been, at least partly, true. However, it is an inescapable inference from the whole of the evidence that it was also either used or intended to be used to finance the activities of the jemaah, including those activities which made it a terrorist organisation. Of particular significance in this regard was the evidence of a conversation in the prisoner Ezzit Raad’s garage on 10 September 2004 when he, Ahmed Raad and Aimen Joud were discussing the necessity to steal “in Allah’s cause” for the purpose of obtaining weapons. This conversation occurred in the context of Ezzit Raad having to store a stolen car which they had acquired and which they intended would be stripped and the parts sold to provide funds for the jemaah. It is unclear as to what total sum of money was involved in the sandoq over the whole indictment period — probably, at most, something in the order of about seven thousand dollars.

The sandoq was kept by Ahmed Raad, under Benbrika’s direction. He sought to collect contributions for the sandoq on a regular basis, with mixed success. A number of the intercepted conversations relate to this topic. Various sums were disbursed by Raad although it appears he generally made such disbursements only after receiving approval

from Benbrika. Most of the disbursed funds were used for purposes associated with the jemaah, such as hiring cars for trips which were taken and, probably, accommodation and expenses on those trips. The Crown did not prove that any funds from the sandooq were ever used for the purchase of weapons, explosives or the like.³¹¹

While the Crown did not prove that any funds were ever used for the purchase of weapons, explosives etc one of the accused (Izzydeen Atik) gave evidence before the court that Abdul Nacer Benbrika had told him that “the group had intended to carry out a terrorist attack at the Melbourne Cricket Ground during the then forthcoming Australian Football League Grand Final but that the plan had been postponed for security reasons and because of funding difficulties”³¹².

During the Operation Pendennis (Melbourne) trial, evidence was led by the Crown that the Melbourne Pendennis group had agreed to assist the Sydney Pendennis group in carrying out acts in preparation for a terrorist act.³¹³ The Melbourne accused had discussed paying from the *sandooq* (the group’s common funds) the \$3,000 necessary for the Sydney Pendennis group to purchase laboratory equipment for the processing of chemicals to manufacture explosive devices, however, Benbrika [the group leader] refused to authorize this payment and the plan to obtain the items was abandoned. The Sydney group subsequently purchased laboratory equipment through a NSW supplier.

VI.5 Operation Pendennis (Sydney)

While none of the Operation Pendennis (Sydney) accused were charged with terrorism financing offences, the activity described by Justice Whealy which formed the basis of the offending conduct for charges of acts in preparation for, and possessing a thing connected with the preparation for a terrorist act, would probably come within the terrorism financing offences under the Criminal Code.³¹⁴ His Honour found the accused:-

³¹¹ *R v Benbrika* [2009] VSC 21 at [16-18], his Honour’s citations omitted

³¹² *R v Benbrika* [2009] VSC 21 at [39] although his Honour warned the jury of the danger of relying on Atik’s evidence not only because he was an accomplice who had turned Queen’s evidence but also because of his significant deficiencies as a witness.

³¹³ The acts with which the accused agreed to assist were intended to equip the co-conspirators with laboratory or similar equipment to assist the co-conspirators to manufacture, or cause to be manufactured, improvised explosive devices. See *R v Benbrika & Ors (Ruling No 1)* [2011] VSC 76 (11 March 2011).

³¹⁴ Namely, providing funds to, or receiving funds from, a terrorist organisation (sec 102.6), financing terrorism (sec 103.1) or financing a terrorist (sec 103.2).

...had purchased one lot of 10,000 rounds of ammunition, there were 12 different firearms located at the premises of Elomar, there were significant purchases of other rounds of ammunition, being 8,000 on one occasion, of which some of this was not located, there was purchase of laboratory equipment and many attempts to obtain laboratory equipment, together with chemicals that were capable of being used to create bombs. There were recipes for the construction of bombs, using the actual chemicals purchased by members of the group, using the laboratory equipment that was in fact purchased and ordered. There were also instructions on how to manufacture explosives, using rounds of ammunition. The group took camping trips together into remote parts of New South Wales, where there was shooting done by some members, at least, of the group. A number of the chemicals that had been ordered and purchased were not located by the police and clearly were hidden by the group, having formed the view they were under suspicion they purchased particular goods to enable them to hide the various items that they had, including chemicals, weapons and matters of that nature.³¹⁵

Whealy J, in sentencing the Operation Pendennis (Sydney) accused, summarized the facts relied on by the Crown in support of the proof of its case as to the scope and nature of the criminal conspiracy in preparation for a terrorist act. Whealy J stated: "This material is important for an understanding of the state of mind of the offenders and, particularly, the states of mind which supported their individual actions in furtherance of the conspiracy. It also gives a particularly compelling insight into the nature and scope of the conspiracy."³¹⁶ The evidence which showed the individual actions in furtherance of the conspiracy also showed conduct the nature of which would fit squarely within the Criminal Code terrorism financing offences (either sec 102.6 or Div 103). These facts demonstrate that the Crown had a significant amount of evidence (largely from surveillance) which showed the accused were involved in conduct the nature of which would fit squarely within the Criminal Code terrorism financing offences (either sec 102.6 or Div 103).

In addition to the conspiracy charge, certain of the accused (Khaled Sharrouf, Mazan Touma, Omar Baladjam and Mirsad Mulahalilovic) were charged, and pled guilty to, possessing a thing connected with preparation for a terrorist act (subsec 101.4(1) of the Criminal Code). Touma and Baladjam were also charged, and pled guilty to, doing an act in preparation for a terrorist act (subsec 101.6(1) of the Criminal Code). The facts which demonstrated these offences also demonstrated potential terrorism financing offences. For example, Touma

³¹⁵ *R v Fattal & Ors* [2011] VSC 681 (16 December 2011) per King J at [94] describing his Honour's findings about the Sydney Pendennis conspiracy in *R v Elomar* [2010] NSWSC 10

³¹⁶ *R v Elomar* [2010] NSWSC 10 per Whealy J at [37]

acquired substantial quantities of firearm ammunition, in preparation for a terrorist act (contrary to subsec 101.4(1) of the Criminal Code) and possessed firearm ammunition, connected with preparation for a terrorist act, or acts, knowing of that connection(contrary to subsec 101.6(1) of the Criminal Code).³¹⁷ In sentencing the Sydney Pendennis accused, Whealy J found the following:-

Purchase of ammunition

- [17] On 27 January 2005, Elomar paid \$2,100 deposit for the purchase of 10,000 rounds of 7.62 x .39 ammunition. I am satisfied beyond reasonable doubt that this ammunition, when it was acquired, was to be used in connection with the conspiracy. 1,000 rounds of the ammunition were collected by Elomar from the Horsley Park Gun Shop on 30 March 2005.
- [18] ...another of the men connected with the enterprise, Mazen Touma, had been involved in the purchase of a large quantity of 7.62 x .39 ammunition. For example, on 1 April Touma arranged for the purchase of some 8,000 rounds of the ammunition.

Attempt to purchase lab equipment and purchase of telephone for terrorist organisation members to communicate

- [20] On 26 February 2005, a false name telephone service (the Eviki Soto Telephone Service) was activated. A handset used by Hasan was associated with this service. The false name details of Eviki Soto corresponded with Hasan's birth date. This phone was used to communicate with the man Aimen after 23 February 2005. It was also to be used in connection with a camping trip to be held in a remote location in New South Wales ("Curranyalpa").
- [21] ...faxed through to the company an order for laboratory equipment. On 2 June 2005, a faxed order was sent from a fax machine at Sayers Road Pharmacy, Hopper's Crossing, Victoria.

Purchase of lab equipment

³¹⁷ *R v Touma* [2008] NSWSC 1475 (24 October 2008)

[23] On 26 July 2005, one Khalid Vetter and another man (alleged by the Crown to be Hasan) attended the New Directions store at Marrickville. The men were involved in the purchase of laboratory equipment. It was a reasonably substantial order and the equipment was taken away at the conclusion of the transaction.

Purchase of chemicals

[30] Between 28 September 2005 and 5 November 2005, Hasan and, to a lesser extent, Jamal, were involved in the ordering of chemicals. On 28 September 2005, Hasan and Jamal attended Auto King and placed orders for battery acid and distilled water. They left two false name phone services. One of the latter services had been activated on that day. It appears to have been created as a dedicated phone service for the purchase of chemicals. Hasan paid \$200.00 deposit in cash. Later in the day there was an attendance at Chemical Cleaning Solutions at Campsie. The person ordering chemicals at that location used the name “George” and gave the false name phone number “George Markis” for contact purposes. The person who placed this order was, however, Jamal. On the same day, Hasan attended Peter’s Hardware at Greenacre and ordered 60 litres of acetone. He paid a deposit in cash and gave his name as “Adam”.

[31] On 13 October 2005, Jamal and another unidentified man attended Auto King and collected the distilled water which had been ordered on 28 September 2005. Jamal and the other man then went to Autoquip to collect the sulphuric acid which had been ordered on 28 September 2005.

[32] Hasan continued with his endeavours to purchase chemicals. During the week of 17 October 2005, Hasan attended Padstow Station Hardware and enquired about placing an order for methylated spirits and acetone. He provided the name “Adam” and gave a phone number that was close to the number of the “George Markis” service. Once again, a deposit was paid in cash. On 22 October 2005, Hasan collected the 16 litres of acetone from Peter’s Hardware. On 1 November 2005, Hasan returned to Padstow Station Hardware and paid \$670 cash for a chemical order (acid/acetone) and made arrangements to collect it on 5 November 2005.³¹⁸

³¹⁸ *R v Elomar* [2010] NSWSC 10 per Whealy J

VI.6 Operation Neath

Saney Aweys was convicted of conspiring to do acts in preparation for, or planning, a terrorist act between 1 February 2009 and 4 August 2009 (sec 11.5 and 101.6(1) of the Criminal Code). The acts in preparation or planning, if carried out, would have been for the purpose of an armed attack on the Holsworthy army base. Aweys sought a fatwa (religious ruling) from sheikhs in Somalia seeking approval for the proposed action. While Aweys was not charged with any terrorism financing offences, during the period of the conspiracy, Aweys also “sought and collected money to be sent to Al Shabaab in Somalia and had numerous conversations with Walid Mohamed about his training in respect of fighting in Somalia.”³¹⁹ Walid Mohamad travelled to Somalia to fight on behalf of Al Shabaab and Aweys had supported Mohamad in a number of ways during Mohamad’s time in Somalia.³²⁰ In relation to this conduct, Aweys was charged with aiding, abetting, counselling or procuring a hostile act in a foreign state (sec 11.2 of the Criminal Code and subsec 6(1) of the Foreign Incursions Act).³²¹

In addition to Foreign Incursions Act offences, this conduct could have fallen within the Somalia sanctions under Part 3 of the UN Charter Act in force at the time of the conduct which prohibited the direct or indirect provision to Somalia of (amongst other things) financial or other assistance, related to military activities.³²² The conduct could also have fallen with the terrorism financing offences under the Criminal Code (funding a terrorist organisation (sec 102.6)³²³, financing terrorism (sec 103.1) and financing a terrorist (103.2)).

VI.7 The nature and threat of terrorism financing

Despite the central rôle of countering terrorism financing in international efforts against terrorism, there has been very little analysis of the nature, scale and threat of terrorism

³¹⁹ *R v Fattal & Ors* [2011] VSC 681 (16 December 2011) per King J at [12]

³²⁰ *R v Fattal & Ors* [2011] VSC 681 (16 December 2011) per King J at [9]

³²¹ A separate trial for this charge has been ordered but not yet listed for trial.

³²² sec 7 of the *Charter of the United Nations (Sanctions - Somalia) Regulations 2008* (Cth) which came into effect on 16th May 2009. At the time of the conduct, Al Shabaab was not listed by the Minister for Foreign Affairs under Part 4 of the UN Charter Act (this occurred on 21st August 2009) and therefore no offence could have been committed against the UN Charter Act terrorist asset freezing régime. Al Shabaab was also not listed at the time by the UNSC 751 Committee (which applies sanctions related to Somalia), therefore Al Shabaab was not a designated entity for the purposes of sec 6A of the Somalia Regulations (prohibiting the direct or indirect provision to a designated person or entity of financial or other assistance related to military activities etc). The UNSC 751 Committee listed Al Shabaab on 2nd April 2010.

³²³ Al Shabaab was not proscribed by regulation under the Criminal Code until 22nd August 2009. This lack of proscription through regulation would have required the prosecution to prove Al Shabaab was a terrorist organisation within the meaning of the Criminal Code. The difficulties of proof associated with proving an organisation based overseas is a “terrorist organisation” for the purposes of the Criminal Code are discussed in Chapter IV.

financing globally and the effectiveness of measures to counter terrorism financing adopted by States in purported compliance with international obligations.³²⁴

In determining the threat of terrorism financing,³²⁵ including the scale and nature of the threat, the INSLM has been hindered by the lack of data on the flow of funds for terrorism financing domestically (that is, to or from Australia) or globally. While the overall amount of terrorism funding flows cannot be identified, an assessment of the nature and threat of terrorism financing can be informed from other available information.

Data on global illicit capital flows and money laundering are available. The UN Office of Drugs and Crime (“UNODC”) has stated “the issue of illicit capital flows has emerged as one that is central to the mandate of UNODC: garnered through the proceeds of illicit trafficking and other forms of organized profit-motivated crime, dirty money promotes bribery and corruption, finances insurgency and, in some cases, terrorist activities”.³²⁶

The UNODC estimated money laundering to have amounted to US\$0.9 trillion over the 2002-2005 period, that is, between 2% and 2.6% of global GDP for these years. Money laundering related to criminal activities was estimated at US\$0.2 trillion, suggesting that between a fifth and a quarter of all money laundering was linked to proceeds of crime. Drug trafficking was identified as the single largest crime category (about a third), followed by smuggling (about a fifth). The amounts of money laundered related to terrorism were comparatively small (less than 0.3%). The US\$193 billion of crime-related money laundering in 2002 was estimated to have been as follows: drugs (\$66 billion), smuggling (\$37 billion), other crime (\$90 billion) and terrorism (\$0.5 billion).³²⁷

There are estimates on the annual budgets of certain terrorist organisations and of the costs of terrorist attacks.³²⁸ There is evidence from Australian³²⁹ and foreign³³⁰ criminal trials as to the amount of funds raised by terrorists and for terrorist organisations, as well as the purchases

³²⁴ See Arabinda Acharya, *Targeting Terrorist Financing: International cooperation and new régimes* (2009), pp119-134

³²⁵ It is a function of the INSLM to consider whether the laws remain proportionate to the threat of terrorism or threat to national security, or both (subpara 6(1)(b)(ii) of the INSLM Act).

³²⁶ UN Office of Drugs and Crime Report, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes Research report* (October 2011) p9

³²⁷ UN Office of Drugs and Crime Report, *Estimating illicit financial flows resulting from drug trafficking and other transnational organized crimes Research report* (October 2011) pp32-34. UNODC report estimates the amounts of illicit flows affecting developing countries and countries in transition to have between USD\$0.5 and USD\$0.8 trillion over the 2000-2005 period (half of the global total).

³²⁸ Discussed at VI.8

³²⁹ Discussed at VI.4-5

³³⁰ Discussed at VI.8

made in preparation for terrorist attacks.³³¹ These trials also provide evidence of the means by which such funding occurred. There is also evidence on the amount of terrorist assets frozen globally³³² and by individual countries such as the United States³³³ and the United Kingdom.³³⁴

While there are no statistics on the amount of illicit money flows from Australia to finance terrorism abroad, Australians are transferring large sums of money to countries which have high levels of terrorism activity (eg Al-Shabaab in Somalia, Al-Nusrah in Syria, Al-Qa'ida in Pakistan and Afghanistan). A large proportion of those funds are transferred through the alternative remittance sector, recognised internationally as a sector that involves higher risk. While the alternative remittance sector is recognized as high risk, the formal banking sector may also be vulnerable to terrorism financing activities.

³³¹ Discussed at VI.4-5

³³² The US Department of State estimates less than \$US170 million of funds used to finance terrorism through the formal financial sector have been blocked globally. <http://www.state.gov/j/inl/c/crime/c44634.htm>

³³³ *The Twenty-first Annual Report to the Congress on Assets in the United States Relating to Terrorist Countries and International Terrorism Program Designees*, Office of Foreign Assets Control, U.S. Department of the Treasury (2013) provides data on terrorist asset freezing in the United States for the year ending December 31, 2012. This information relates to international terrorist organisations and state sponsors of terrorism.

International terrorist organisations: The Report states that the “[i]mplementation of programs targeting international terrorist organisations has resulted in the blocking in the United States of more than \$21 million [in funds] in which there exists an interest of an international terrorist organisation or other related designated party.” This figure excludes the value of real or tangible property (assets) of international terrorist organisations and related parties inside the United States that is blocked. The \$21 million of funds blocked were in relation to nine terrorist organisations (and their related designated parties) with the five largest amounts blocked belonging to: 1) Al-Qaida \$13,161,630 (an increase from \$12,991,696 in 2011) 2) Hizballah \$6,762,636 (an increase from \$4,882,893 in 2011) 3) Hamas \$1,203,578 (a 50% decrease from \$2,445,535 in 2011) 4) LTTE \$599,224 (a decrease from \$601,724 in 2011) and 5) Palestinian Islamic Jihad \$83,818 (an increase from \$63,802 in 2011). See pp2-8

State sponsored terrorism: Of the \$2.4 billion in assets relating to four designated state sponsors of terrorism (Cuba, Iran, Syria and Sudan) identified as located within the United States, approximately \$2.3 billion is blocked pursuant to economic sanctions imposed by the United States. The remaining balance of \$125 million in assets represents non-blocked assets of individuals and entities located in Iran and Syria. See pp2-14

³³⁴ Mr David Anderson QC, the UK Independent Reviewer of Terrorism Legislation, in his Report on the Terrorism Acts in 2012 (quoting from the Written Ministerial Statement of 14 February 2013, *Operation of the UK's Counter-Terrorist Asset-Freezing Regime, 1 October 2012 to 31 December 2012*) found that “The available figures, though incomplete, suggest once again that infrequent and declining use is being made of the power to prosecute for terrorist funding offences. This corresponds to the very modest use now being made of the asset-freezing provisions in TAFE 2010 [the *Terrorist Asset-Freezing etc Act 2010* (UK) which implements 1373]: the total quantity of assets frozen in accounts designated by the Treasury under TAFE 2010 – none of them linked to Northern Ireland-related terrorism – fell to a new low of £26,000 at the end of 2012”. *Report of the Independent Reviewer on the Operation of the Terrorism Act 2000 and Part 1 of the Terrorism Act 2006* (July 2013) para 6.9

In the six months since the UK Independent Reviewer's report, the total quantity of assets frozen in accounts designated by the Treasury under TAFE 2010 increased to £91,000 (Written Ministerial Statement of 16 July 2013, *Operation of the UK's Counter-Terrorist Asset-Freezing Regime 1 April 2013 to 30 June 2013*). While this represents a significant increase in the 6 months since the end of 2012 it is still a relatively small overall amount. The Ministerial Statement also covers the UK implementation of the UN Al-Qaida asset freezing régime (1267) and the operation of the EU asset freezing régime in the UK under EU Regulation (EC) 2580/2001 which implements 1373. As at 30 June 2013, the total quantity of assets frozen in UK accounts pursuant to the UN Al-Qaida asset freezing régime was £73,000 and £11,000 was frozen pursuant to the EU asset freezing régime.

In 2012-13, Australians transferred funds through money transmitters and banks, valued at over AUD\$490 million to Pakistan, AUD\$54 million to Afghanistan, AUD\$21 million to Syria and AUD\$17 million to Somalia. The Statement of Reasons for listing Al-Qa'ida as a terrorist organisation under the Criminal Code states that the "organisation's core leadership is located in the border regions in Afghanistan and Pakistan" and "Al-Qa'ida maintains core support networks and operations in the Afghanistan and Pakistan border region." Operation Neath (discussed at VI.6) demonstrates that Australians are seeking to finance terrorism in Somalia and ASIO investigations show the same is true in relation to Syria (see ASIO's submission to the INSLM at VI.1).

While it cannot be said how much of the funds being transferred from Australia are for legitimate purposes and how much may be intended for illicit purposes, the fact that Australians are sending funds to countries where terrorism financing is a real risk shows the need for terrorism financing laws (especially given the relatively low cost of a terrorist attack). Even if a small percentage of those funds was going towards terrorism financing it would be sufficient to fund terrorist organisations and terrorist attacks.

VI.8 The terrorist requirement for funds

FATF is an inter-governmental body responsible for developing policies to combat money laundering and terrorist financing, setting international standards for anti-money laundering and counter-terrorism financing ("AML/CTF").³³⁵ FATF has issued forty recommendations on anti-money laundering and an additional nine special recommendations on countering terrorism financing.³³⁶ These additional recommendations are aimed at complementing the anti-money laundering recommendations. FATF has described the terrorist requirement for funds as:-

The costs associated not only with conducting terrorist attacks but also with developing and maintaining a terrorist organisation and its ideology are significant. Funds are required to promote a militant ideology, pay operatives and their families, arrange for travel, train new members, forge documents, pay bribes, acquire weapons, and stage attacks. Often, a variety of higher-cost services, including propaganda and ostensibly

³³⁵ FATF recommendations are not binding. It has been observed that they are "extremely persuasive soft law with effect not only for OECD member states, but also for non-members." Ilias Bantekas, 'The International Law of Terrorist Financing', *American Journal of International Law* (2003) 97, 319.

³³⁶ See **Appendix L** for a list of FATF special recommendations.

legitimate social or charitable activities are needed to provide a veil of legitimacy for organisations that promote their objectives through terrorism.³³⁷

The terrorist requirement for funds falls into two areas, the first of which is funding specific terrorist attacks (eg the direct costs of terrorist attacks). The direct costs of terrorist attacks (improvised bomb-making components, maps, surveillance equipment, vehicles etc) are often very low comparative to the harm they cause. Even large scale attacks that kill hundreds of people can be funded with relatively small amounts of money.³³⁸

Terrorist attacks may be entirely self-funded. The 7th July 2005 attack on the London transport system was entirely self-funded with the official government report into the attack finding the following about the group responsible for the attack:-

59. ..[It] appears the bombs were homemade, and that the ingredients used were all readily commercially available and not particularly expensive. Each device appears to have consisted of around 2-5 kg of home made explosive.

...

63. Current indications are that the group was self-financed. There is no evidence of external sources of income. Our best estimate is that the overall cost is less than £8,000. The overseas trips, bomb making equipment, rent, car hire and UK travel being the main cost elements.

64. The group appears to have raised the necessary cash by methods that would be extremely difficult to identify as related to terrorism or other serious criminality. Khan appears to have provided most of the funding. Having been in full-time employment for 3 years since University, he had a reasonable credit rating, multiple bank accounts (each with just a small sum deposited for a protracted period), credit cards and a £10,000 personal loan. He had 2 periods of intensive activity – firstly in October 2004 and then

³³⁷ FATF, *Terrorist Financing*, 29 February 2008, p7

³³⁸ The estimated cost of the Bali bombings of 12th October 2002 which killed 202 people (including 88 Australians) is USD \$50,000, the Madrid train bombings of 11th March 2004 which killed 191 people is USD \$10,000 and the London transport system bombings of 7th July 2005 which killed 52 people is £8000. For further details of the estimated direct costs of terrorist attacks see Financial Action Task Force, *Terrorist Financing*, 29 February 2008, p7. It is estimated that the bombs used in the Boston Marathon bombings of 15th April 2013, which killed 3 people and injured 264 others, would cost less than USD \$100 per bomb (manufacturing six bombs from pressure cookers, elbow pipes, nails, firecrackers and glue). <http://usnews.nbcnews.com/news/2013/04/30/17975443-adding-up-the-financial-costs-of-the-boston-bombings?lite>

from March 2005 onwards. He defaulted on his personal loan repayments and was overdrawn on his accounts. Jermaine Lindsay made a number of purchases with cheques (which subsequently bounced) in the weeks before 7 July. Bank investigators visited his house on the day after the bombings.³³⁹

Direct costs represent a small proportion of the overall costs of financing terrorism compared to the second category of costs which can be described as the broader organisational costs of terrorist organisations. It is this latter category which requires the largest amount of financing. As FATF has recognized, “although individual terrorist attacks can yield great damage at low financial cost, a significant infrastructure (even if loosely organised) is required to sustain international terrorist networks and promote their goals over time”³⁴⁰

The National Commission on Terrorist Attacks upon the United States (“**9/11 Commission**”) estimates that Al-Qa’ida spent USD\$30 million per year prior to the September 11 attacks on funding operations, maintaining its training and military apparatus, contributing to the Taliban and other related terrorist organisations:-

The 9/11 attacks cost somewhere between \$400,000 and \$500,000 to execute. The operatives spent more than \$270,000 in the United States. Additional expenses included travel to obtain passports and visas, travel to the United States, expenses incurred by the plot leader and facilitators outside the United States, and expenses incurred by the people selected to be hijackers who ultimately did not participate.

The conspiracy made extensive use of banks in the United States. The hijackers opened accounts in their own names, using passports and other identification documents. Their transactions were unremarkable and essentially invisible amid the billions of dollars flowing around the world every day...Al Qaeda had many sources of funding and a pre-9/11 annual budget estimated at \$20 million. If a particular source of funds had dried up, al Qaeda could easily have found enough money elsewhere to fund the attack.³⁴¹

Those involved in carrying out the September 11 attacks were found to have received “significant operational funding from overseas...subsequent investigations allowed for

³³⁹ *Report of the Official Account of the Bombings in London on 7th July 2005*, HC 1087

³⁴⁰ FATF, *Terrorist Financing*, 29 February 2008, p10

³⁴¹ *Final Report of the National Commission on Terrorist Attacks upon the United States*, National Commission on Terrorist Attacks upon the United States, Executive Summary, p14

tracking of the source of those funds and established critical links to other members of the terrorist infrastructure worldwide”³⁴²

The broader organisational costs are to develop and maintain a terrorist organisation’s infrastructure (eg train members, acquire weapons) and to promote the ideology of the organisation (eg through propaganda or ostensibly charitable activities).³⁴³ FATF has reported:-

Financially maintaining a terrorist network – or a specific cell – to provide for recruitment, planning and procurement between attacks represents the most significant drain on resources. Beyond the funds needed to finance terrorist attacks and provide direct operational support, terrorist organisations require funding to develop a supporting infrastructure, recruit members and promote their ideology. In addition, this infrastructure spending may go to charitable organisations and media owned or controlled by the terrorist organisation.³⁴⁴

These non-direct costs of terrorist attacks include day to day expenses of the individuals involved, training, travel and logistics as well as the costs of communicating where the attack is being planned by a group. FATF has reported:-

The financial facilitation of training [both in terms of practical skills and ideology] and travel, which can include the procurement of false documentation, represents an important cost for many terrorist networks. Even in recent attacks where terrorist operatives were “home grown” and largely operationally independent of any overarching leadership structure, many operatives still travelled to receive training or other forms of indoctrination prior to the operational phase of a plot.³⁴⁵

The 9/11 Commission Report described these non-direct funding requirements of international terrorist organisations. The Report found that terrorist organisations need a logistics network able to securely manage the travel of operatives, move money and transport resources (like explosives) where they need to go, reliable communications between coordinators and operatives, and the ability to “recruit, train and select operatives with the

³⁴² *Report of the Government of the United States called for under Security Council resolution 1455 (2003)*, 17 April 2003, (S/AC/37/2003/(1455)/26) p3

³⁴³ FATF, *Terrorist Financing*, 29 February 2008, p7

³⁴⁴ FATF, *Terrorist Financing*, 29 February 2008, p8

³⁴⁵ FATF, *Terrorist Financing*, 29 February 2008, p8

needed skills and dedication, providing the time and structure required to socialize them into the terrorist cause, judge their trust-worthiness, and hone their skills”.³⁴⁶

VI.9 Assessing the effectiveness of terrorism financing laws

The INSLM agrees with the observation that “[t]here is no quantitative method to assess the effectiveness of the measures against terrorist financing. It is also difficult to determine if a particular terrorist group changed its funding methods because of a particular regime”.³⁴⁷ Equally, an increase in the number of attacks since the September 11 attacks on the United States and the subsequent global effort to implement and enforce terrorism financing measures (pursuant to 1267, 1373 and the Terrorism Financing Convention etc), does not suggest the measures have been ineffective.

It is argued that the impact of such measures can be judged with respect to the changes in the nature of the threat and group dynamics (including impact on recruitment, training and terrorist attacks); amount of money confiscated; reduction in the general level of willingness of donors to give money; and impact on other aspects of financial crime. While these proposed indicators may theoretically provide a means of measuring effectiveness, finding evidence of such indicators remains a difficult, if not impossible, task.

The Analytical Support and Sanctions Monitoring Team which provides support to the UN Security Council 1267 Committee conducted a review of the 1267 listing régime and reported to the 1267 Committee on the deficiencies of that system.³⁴⁸ The findings of the review raised issues going to the effectiveness of the sanctions régime which can be said to apply to terrorism financing measures more broadly:-

- Financiers sit at the most visible end of terrorist networks and because they travel and have money and other assets they are the most susceptible to the impact of sanctions measures, however, the impact on listed financiers is also likely to deter others;
- While States do implement sanctions measures where they can, at least 30 Al-Qa’ida individuals and many listed Taliban individuals reside or operate in areas that are outside complete government control so that the preventative objective of the measures is largely unachieved;

³⁴⁶ *Final Report of the National Commission on Terrorist Attacks upon the United States*, National Commission on Terrorist Attacks upon the United States, pp365-366.

³⁴⁷ Arabinda Acharya, *Targeting Terrorist Financing: International cooperation and new régimes* (2009), p119

³⁴⁸ General concerns about the 1267 listing process are discussed at Appendix F.

- While States recognize that sanctions have limited use when applied to individuals detained in prison, States see the value of listing as much in the symbolic and awareness raising aspects of the régime as in its restrictive effect;
- Sanctions measures have little impact on the key tool of those who serve as propagandists for terrorist organisations: the ability to communicate and persuade via the internet. Their websites, writings, and speeches remain readily available and widely distributed despite the individuals themselves being subject to sanctions;³⁴⁹
- While the listing of non-government organisations acting as charities has been controversial, most incorporated entities subjected to sanctions measures have closed down. However, the impact of these measures has suffered from the creation of successor organisations which are often not subject to sanctions measures by the States in which they are located until the Committee adds their name to the 1267 List;³⁵⁰
- Sanctions measures often lack identifiers and are too ambiguous for law enforcement and regulatory agencies to take effective action in response to the listing. This was found to be the case even though there is a requirement for a narrative summary of the reasons for listing; and
- The implementation of the sanctions régime has been undermined by the lack of effective legislation, a lack of capacity or lack of priority but the most corrosive issue has been a lack of perceived fairness expressed by national and regional courts, politicians and governments as well as the public.³⁵¹

³⁴⁹ In UN Security Council Res 1904 (2009) para 4, the UN Security Council confirmed that States should apply the assets freeze to resources used to provide internet hosting or related services, but the Monitoring Team reported that the legal, ethical and technical issues with this are beyond the power of the sanctions régime to resolve.

³⁵⁰ Many States lack legal authority to regulate charities or are not willing to do so. There is concern that control of activities of these organisations may encroach on freedom of expression and association and may stifle philanthropy among donors. The Government of Denmark has reported to the UN Security Council that the Constitution of Denmark prevents public authorities from compelling charities to disclose information. The Government of France has reported that in France, freedom of association generally prevents any administrative control over charities and protects the anonymity of donors. Many States in the Middle East and Southeast Asia refuse to impose controls on charities, seeing charitable giving as the business of the donor, not the State. As many charities, particularly those designated, operate internationally with funds donated in one State then distributed to beneficiaries in another, the uneven regulation and financial oversight of charities and NGOs is particularly problematic. See Arabinda Acharya, *Targeting Terrorist Financing: International cooperation and new régimes* (2009), p130

³⁵¹ See discussion of the preventive effect of terrorism financing measures in *Report of the Analytical Support and Sanctions Monitoring Team on the outcome of the review described in paragraph 25 of resolution 1822(2008) submitted pursuant to paragraph 30 of resolution 1904 (2009)*, 29 September 2010, (S/2010/497) paras 60-69.

As the 9/11 Commission concluded, “public designation of terrorist financiers and organisations is still part of the fight, but it is not the primary weapon. Designations are instead a form of diplomacy, as government’s join together to identify named individuals and groups as terrorists”.³⁵²

There is no evidence that the threat of terrorism, and the likelihood of terrorist attacks, has decreased as a result of countering terrorism financing efforts. While there are frequent calls for donations and claims to be unable to launch terrorist attacks by terrorist organisations such as Al-Qa’ida these groups continue to exist and carry out terrorist acts.³⁵³ There is no proof that access to funding has become significantly more difficult, or that funding to terrorist organisations has significantly decreased as a result of terrorism financing measures (either internationally or at the individual State level).

It has been argued that measures against terrorism financing have altered the way terrorists raise funds. It is argued that these measures have dissuaded supporters, including charitable organisations, from providing money as openly as they used to.³⁵⁴ It is also argued that greater scrutiny of traditional financial transactions and targeted sanctions (asset freezing) régimes mean that terrorists and terrorist organisations can no longer use traditional financial systems to move funds. This argument posits that terrorist financing must now be done through informal means of funds transfer (such as the use of alternative remittance providers)

³⁵² *Final Report of the National Commission on Terrorist Attacks upon the United States*, National Commission on Terrorist Attacks upon the United States, p382

³⁵³ *Report of the Analytical Support and Sanctions Monitoring Team on the outcome of the review described in paragraph 25 of resolution 1822(2008) submitted pursuant to paragraph 30 of resolution 1904 (2009) 29 September 2010, (S/2010/497) para 60*

³⁵⁴ Charities are believed to play a significant rôle in facilitating the flow of funds to terrorist organisations. UN Security Council, S/2003/1070, *Second report of the Monitoring Group established pursuant to resolution 1363 (2001) and extended by resolutions 1390 (2002) and 1455 (2003) on sanctions against Al-Qaida, the Taliban and individuals and entities associated with them*, paras 34-36. “From its inception Al-Qaida has relied heavily on charities and donations from its sympathizers to finance its activities. Charities provide Al-Qaida with a very useful international channel for soliciting, collecting, transferring and distributing the funds it needs for indoctrination, recruitment, training, and logistical and operational support. These funds are often merged with and hidden among funds used for other legitimate humanitarian or social programmes. Al-Qaida supporters and financiers have also established front charity networks whose main purpose is to raise and deliver funds to Al-Qaida. Today, Al-Qaida continues to rely heavily on those charities to facilitate and mask the collection and movement of its funds. Activities range from collection boxes at mosques and Islamic centres to direct fund-raising and solicitations, the merging of funds for both legitimate relief purposes and terrorism, the misuse or embezzlement of legitimate charitable funds, and the creation of front charities to channel funds from community collections or deep-pocket supporters. Al-Qaida has also benefited from, and relies heavily on, the activities of legitimate charities that support the propagation and teaching of more radical forms of Muslim fundamentalism. Controlling charities that are used, or abused, for purposes of supporting terrorism is proving extremely difficult”. See also the 9/11 Commission Report which noted the effect of terrorism financing measures on the prevention of open fundraising, although noting the limitations of the ability of such measures to have a meaningful and long lasting effect on fundraising (p382-383).

or through cash couriers.³⁵⁵ As a result, terrorism financing is said to have become riskier, more costly and more time-consuming with the burden of operating more covertly eroding the ability of individuals and groups to conduct attacks and finance terrorist organisation infrastructure.³⁵⁶

Of course, the fact that a person chooses to use an informal money transfer network (alternative remittance provider or *hawala* dealer) to send funds overseas does not expose that person as a terrorist. Alternative remittance systems are an important and less costly means of transferring money and may be the only means of getting funds to certain countries, or rural areas within those countries, which are not serviced by banks.

The same countries that could be considered high risk destinations for terrorism financing (Somalia, Syria etc) are also the countries where formal banking systems have collapsed. In order to send funds to these countries, the only option may be to use an informal money transfer network.

There are unique problems with regulating alternative remittance systems, the most significant of which is the generally “poor adherence to internationally accepted standards of record-keeping, accounting and other internal controls. Controls are also ineffective as such networks work on the basis of trust and are rooted in different socio-economic, political and cultural contexts.”³⁵⁷

The 9/11 Commission Report noted the public perception, shared by countries including the United States as well as the United Nations (see eg Security Council resolutions requiring terrorist asset freezing and the Terrorism Financing Convention), that attacks on terrorist

³⁵⁵ These are not new means of financing terrorist or criminal activities, as the United States Department of State argues “[a]lthough international institutions argue that terrorist financiers are employing “new modalities”, in fact, the opposite is true. Terrorist financiers are reverting to traditional ways such as hawala, trade based money-laundering, and cash couriers, particularly in countries with non-existent or weak national anti-money laundering systems to move their funds to finance their terrorist activities”. www.state.gov/j/inl/c/crime/c44634.htm
The United States reported to the UN Security Council that terrorists and terrorist organisations “now know of our capability to track and monitor financial activity. Terrorists are therefore more likely to utilize alternative remittance systems and other means of money movement for operational funding to avoid detection by law enforcement and regulatory agencies both before and after planned attacks”. *Report of the Government of the United States called for under Security Council resolution 1455 (2003)*, 17 April 2003, (S/AC/37/2003/(1455)/26) p3

³⁵⁶ Steve Kiser, *Financing Terror: An Analysis and Simulation for Affecting Al Qaeda's Financial Infrastructure*, RAND Corporation (2005)

³⁵⁷ See Arabinda Acharya, *Targeting Terrorist Financing: International cooperation and new régimes* (2009) p131 (citations omitted)

finances are a way to “starve the terrorists of money.” The Commission, however, reported that actions to designate terrorist financiers and freeze their assets “appeared to have little effect”.³⁵⁸

There is certainly no suggestion that terrorist organisations have been starved of funds and unable to continue to exist or carry out attacks as a result of such measures. Critics of the effectiveness of terrorism financing measures argue that terrorists and terrorist organisations have responded by rapidly adapting their financing methods to overcome increased regulation of the traditional finance sector. Just as the use of shell banks and off shore banking, the comingling of legitimate and illegitimate funds and cash smuggling are all strategies employed by organized criminal groups to avoid anti-money laundering regulations, such strategies are open to terrorists to use to avoid terrorism financing regulations.³⁵⁹

As discussed above, terrorists can use alternatives to the traditional finance sector to get funds to and from terrorist organisations. They may use a combination of traditional and non-traditional means to transfer funds. For example, the traditional finance system, which is now heavily regulated in all major finance centres through AML/CTF legislation, may be used as a means to send funds to one country which is only a transit point with the funds withdrawn then physically carried over a border by cash couriers to a third country where the terrorist recipient is located.³⁶⁰ The threat of such methods being used by Australians is real despite our geographical isolation - in 2012-13, funds valued at over AUD\$492 million were transferred from Australia to Pakistan (which has land borders with Iran and Afghanistan).

³⁵⁸ *Final Report of the National Commission on Terrorist Attacks upon the United States*, National Commission on Terrorist Attacks upon the United States, p381

³⁵⁹ UN Security Council, S/2003/1070, *Second report of the Monitoring Group established pursuant to resolution 1363 (2001) and extended by resolutions 1390 (2002) and 1455 (2003) on sanctions against Al-Qaida, the Taliban and individuals and entities associated with them* “The use of shell companies and offshore trusts to hide the identity of individuals or entities engaged in the financing of terrorism is also a difficult problem. Such arrangements serve to mask potential terrorist-financing activities, and make it difficult to locate and deal with terrorist-related financial assets other than bank accounts. The issue is complicated further by a reluctance on the part of States to freeze tangible assets such as business or property. The Group has looked closely at the activities of two designated individuals... and concluded that shell companies, offshore trusts and other beneficial ownership arrangements have allowed them to circumvent the full application of the measures set out in the resolutions”. p4
The 9/11 Commission also found that terrorists have shown considerable creativity in their methods of moving money (9/11 Commission Report, p383).

³⁶⁰ The importance of border controls on cash movements was highlighted in the *European Commission Action Paper in response to the Terrorist Attacks on Madrid* (March 18, 2004) MEMO/04/66, p5. The Action Paper noted that one impact of anti-money laundering and terrorism financing measures was that “terrorists are likely to turn to cash as an easier way of moving funds around” and recommended the introduction of customs controls on cash movements. While there is no limit to the amount of currency a person can bring in or out of Australia, amounts of AUD\$10,000 or more in Australian or foreign currency must be declared and this information is provided to AUSTRAC. Failure to report movements of physical currency is an offence under secs 53 and 55 of the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) with penalties including imprisonment and/or a fine.

Statistics on cross-border currency movements are unavailable, as many States do not require or enforce currency declarations. In some areas, where it is common for most transactions to be conducted in cash, the movement of large amounts of currency is commonplace and attracts little attention from authorities. This problem is exacerbated by the lack of effective border controls in many States, such as Afghanistan, Iraq and Somalia. This allows individuals (including those designated) to move freely, in some cases without leaving any record of where they have travelled.³⁶¹ The AFP submitted to the INSLM in relation to the current conflict in Syria:-

While authorities from bordering countries to Syria are assisting the AFP in regards to Australians travelling there, it is difficult to keep tabs on every person who travels to Syria as some have dual passports and others enter the country away from designated border crossings.³⁶²

There is also evidence that terrorists have shifted their financial activities from highly regulated countries to areas of the world that are less regulated.³⁶³

The impact of terrorism financing measures, such as asset freezing, will also depend on the type of terrorist organisation. The 9/11 Commission Report predicted that if Al-Qa'ida is replaced by smaller decentralized terrorist groups, or operatives acting without a support network, then the traditional efforts to counter terrorism financing (designations of large international organisations and associated individuals and the tracking of transactions through financial institutions) may become out dated as terrorist operations become self-funded either through legitimate employment or low level criminal activity.³⁶⁴

³⁶¹ See Arabinda Acharya, *Targeting Terrorist Financing: International cooperation and new régimes* (2009) pp128-129 and UNSC, *Second report of the Monitoring Group established pursuant to resolution 1363 (2001) and extended by resolutions 1390 (2002) and 1455 (2003) on sanctions against Al-Qaida, the Taliban and individuals and entities associated with them.*

³⁶² *AFP Submission to the INSLM*, 14th October 2013

³⁶³ UN Security Council, *Second report of the Monitoring Group established pursuant to resolution 1363 (2001) and extended by resolutions 1390 (2002) and 1455 (2003) on sanctions against Al-Qaida, the Taliban and individuals and entities associated with them*, "Important progress has been made towards cutting off Al-Qaida financing. A large part of its funds have been located and frozen, and many of the key financial managers have been incarcerated. The international financial community is devoting significantly increased resources to this effort. Yet many Al-Qaida sources of funding have not been uncovered, and Al-Qaida continues to receive funds it needs from charities, deep-pocket donors, and business and criminal activities, including the drug trade. Extensive use is still being made of alternative remittance systems, and Al-Qaida has shifted much of its financial activity to areas in Africa, the Middle East and South-East Asia where the authorities lack the resources or the resolve to closely regulate such activity". p4

³⁶⁴ *Final Report of the National Commission on Terrorist Attacks upon the United States*, National Commission on Terrorist Attacks upon the United States, p383

We have regrettably seen such a trend with a rise in self-funded terrorist organisations that act autonomously without any connection to formal international terrorist organisations like Al-Qa'ida (see eg the Melbourne and Sydney conspiracies discussed below). There has also been a rise in self-funded individuals committing terrorist attacks (including those on transport systems in Madrid and London).

The costs for small, self-financed groups like the groups involved in the conspiracies in Melbourne and Sydney, are significantly lower than for large organized groups such as Al-Qa'ida. These smaller, self-funded groups operate on an autonomous basis with their own planning and timetable, largely against local targets of their own choosing and use limited resources. Such groups typically have “almost no connection to financiers of more organized groups such as al-Qaeda and rely more on money gathered through family and friends, their own income from jobs [or social security benefits], through legitimate businesses or from petty crimes. This autonomy has also eliminated the need both to store and move large amounts of funds. Attacks are now cheaper, money for the same being raised and used locally.”³⁶⁵

VI.10 The value of financial information

In assessing the efficacy of Australia's terrorism financing laws, the INSLM has considered the value of gathering financial information and investigating the financial activity of those suspected of involvement in terrorism, including the financing of terrorist acts and terrorist organisations.³⁶⁶ The value of financial information in counter-terrorist investigations (by both police and security agencies) cannot be overstated:-

Financial information has come to be one of the most powerful investigative and intelligence tools available. As money moves through the financial system, it leaves a verifiable trail that can in many cases indicate illicit activity, identify those responsible, and locate the proceeds of criminality that can then be recovered.³⁶⁷

Financial information has been used as part of the evidential case against all individuals prosecuted for terrorism offences in Australia, even where there was no terrorism financing offence charged. This is because all acts of terrorism cost money, and all terrorist

³⁶⁵ Arabinda Acharya, *Targeting Terrorist Financing: International cooperation and new régimes* (2009) pp121-122.

³⁶⁶ See discussion at VI.1 above on the use of financial information in the Breivik case.

³⁶⁷ FATF, *Terrorist Financing*, 29 February 2008, p31

organisations, even small informal ones such as those implicated in domestic plots to date, need money to function and exist as an organisation.

As well as its evidentiary value, financial information has a key intelligence rôle. Terrorism financing activity not only forms the basis of terrorism financing investigations but the intelligence gained from financial information assists law enforcement and security agencies to detect plans to commit terrorist acts, including conspirational planning.³⁶⁸ Financial information is “relatively unambiguous, can be processed easily using technology, and easily accessed with little intrusion on the provider...[e]xploiting the ‘financial footprint’ left behind by terrorists often gives investigators details of how, when and where terrorist attacks were conceived, planned, and executed”.³⁶⁹

Financial information provides police and security agencies with an understanding of a) the infrastructure of terrorist organisations (how they raise, receive, disburse and spend their funds) and b) the warning signs of terrorist activity in preparation. Financial information also enables police and security agencies to a) identify those involved in conspiracies to commit terrorist acts and b) identify and freeze terrorist funds and recover terrorist assets (such as chemical precursors for explosive devices or ammunition purchased for planned terrorist attacks).

In order to understand and evaluate the threats from activities being investigated in relation to politically motivated violence, including terrorism, ASIO attempts to understand the intent and capability of individuals and groups. A strong intent to conduct an act of terrorism, and an existing or readily obtained capability, represents a significant threat. ASIO prioritizes matters with a funding element when there is a nexus to terrorist attacks, attack planning, capability development or facilitation. As ASIO submitted to the INSLM:-

Terrorism financing is one element of our investigative activity in determining whether an individual or group pose a threat to security. In some cases, the provision of funds to a terrorist group, or the gathering of funds by suspected terrorists in Australia could assist ASIO in determining whether those individuals or groups have the capacity to

³⁶⁸ The United States Government has acknowledged the rôle of intelligence in proving terrorism financing activity in prosecutions for offences against the US material support laws (which make it a criminal offence to knowingly provide, or attempt to provide, “material support or resources” to terrorist organisations). The United States reported to the UN Security Council that “these cases have relied on foreign intelligence and counterintelligence developed by the U.S. intelligence community [and shared with law enforcement for the purposes of investigation and prosecution]”. *Report of the Government of the United States called for under Security Council resolution 1455 (2003)*, 17 April 2003 (S/AC/37/2003/(1455)/26) p5

³⁶⁹ FATE, *Terrorist Financing*, 29 February 2008, p32

pose a threat. In other instances, an individual providing or gathering funds might be an indicator that the individual has a more general terrorist intent. It is the potential for this intent to result in violent acts that would be the critical focus for ASIO.³⁷⁰

The 9/11 Commission report recognized the difficulty of establishing a comprehensive asset freezing régime to counter terrorism, and of prosecuting individuals for financing terrorism. The 9/11 Commission reported that experience had shown:-

Even if the intelligence community might “link” someone to a terrorist group through acquaintances or communications, the task of tracing the money from that individual to the terrorist group, or otherwise showing complicity, was far more difficult. It was harder still to do so without disclosing secrets.³⁷¹

The 9/11 Commission Report recognized that these difficulties meant that little money is actually frozen, and where money is frozen “worldwide asset freezes have not been adequately enforced and have been easily circumvented, often within weeks, by simple methods”.³⁷² While the Commission described trying to starve the terrorists of money as being “like trying to catch one kind of fish by draining the ocean”, the Committee recommended that:-

Vigorous efforts to track terrorist financing remain front and center in U.S. counterterrorism efforts. The Government has recognized that information about terrorist money helps us to understand their networks, search them out, and disrupt their operations.³⁷³

Investigations of those suspected of involvement in terrorism, including the finances of those individuals and groups, is rightly a high priority for Australia’s law enforcement and security

³⁷⁰ ASIO Submission to the INSLM’s Review of Terrorism Financing Legislation

³⁷¹ *Final Report of the National Commission on Terrorist Attacks upon the United States*, National Commission on Terrorist Attacks upon the United States, p382. The difficulty of protecting national security information has been raised by States in reporting to the UN Security Council on their compliance with the terrorist asset freezing requirements of 1267. The UK Government reported to the UN Security Council that the UK will only submit names of persons and entities associated with Al-Qaida or the Taliban who are not already included on the 1267 List “when able to do so without compromising ongoing investigations or prosecutions”. The UK also reported that it would only provide additional information on those persons already on the list if “able to do so”. The difficulties faced by the UK in proposing names for inclusion on the 1267 List are even more acute in relation to the UK’s domestic terrorist asset freezing regime implementing 1373 (TFA 2010). *Report of the United Kingdom pursuant to paragraphs 6 and 12 of resolution 1455 (2003)* (April 17, 2003), paras 5-7 (S/AC.37/2003/(1455)/19)

³⁷² *Final Report of the National Commission on Terrorist Attacks upon the United States*, National Commission on Terrorist Attacks upon the United States, p382. While global awareness and implementation of counter terrorism financing measures by States has increased since the writing of this Report, there is nothing to suggest any of these difficulties have been (or could be) overcome.

³⁷³ *Final Report of the National Commission on Terrorist Attacks upon the United States*, National Commission on Terrorist Attacks upon the United States, p382

agencies. Terrorism financing information provides valuable intelligence, for both law enforcement and security agencies, on how terrorists and terrorist organisations raise, move and spend their money. This information assists in identifying preparations for terrorist acts, enabling prevention and where possible, prosecution.

The *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (“**AML/CTF Act**”) sets out Australia’s anti-money laundering and counter-terrorism financing framework and is aimed at protecting Australia’s financial system from criminal exploitation, with mandatory reporting obligations enabling the collection of financial intelligence on terrorism financing.³⁷⁴

The AML/CTF Act requires reporting entities³⁷⁵ to provide AUSTRAC with Suspicious Matter Reports. These require financial institutions to report matters identified by them as suspicious for terrorism financing purposes. Reporting entities must also provide AUSTRAC with Threshold Transaction Reports where a transaction involves the transfer of AUD\$10,000 or more in currency. Reporting entities must also provide AUSTRAC with International Funds Transfer Instruction reports where the entity sends or receives an instruction to or from a foreign country for a transfer of money or property - either electronically or under a remittance arrangement.³⁷⁶

While the AML/CTF Act represents a commendable effort to trace the movement of funds and assets for counter-terrorism financing purposes, the lack of identifiable models for terrorism financing activity presents a major challenge for AUSTRAC in producing financial intelligence on terrorism financing and for those conducting security or police investigations into terrorism financing. It also presents a major challenge for financial institutions exercising due diligence to identify activity that is suspicious for terrorism financing reasons. As ASIO submitted to the INSLM:-

In examples of attack planning in Australia and worldwide, ASIO has seen funds raised through a range of legitimate and illegitimate means. There is no set model for this activity and the reasons for choosing a particular method may be simply familiarity

³⁷⁴ The Criminal Code contains offences for money laundering (dealing with proceeds of crime)

³⁷⁵ A “reporting entity” is an individual, company or other entity that provides a “designated service” as defined in the AML/CTF Act. Reporting entities include banks, non-bank financial services, remittance (money transfer) services.

³⁷⁶ Reporting entities are required to report such transfers regardless of whether they are part of the established banking system and send or receive instructions electronically, or they are remitting money or property under a “designated remittance arrangement”.

with that method of transfer, or be entirely dependent on what is available to them in the country to where the money is being sent.³⁷⁷

As noted above at VI.8, there was nothing about the financial activity of any members of the group responsible for the 7th July bombing of the London transport system that would have led to the suspicion that they were involved in financing terrorism. The same can be said of those involved in Australia's foiled terrorist plots. It is unlikely that terrorist plots will be uncovered by financial reporting/finances alone. It will be a combination of the investigation of persons of interest along with their finances that will provide police and intelligence agencies with the information they need to both prevent the plot and prosecute those involved.

While finances, and more specifically purchases, may provide vital information or in some cases evidence of terrorist activity, it is unlikely that financial reporting alone, or anything about a person's finances without further information, will raise a suspicion of terrorist financing. This is particularly so in relation to self-funded plots (which is the method by which terrorists have financed their domestic plots in Australia and in relation to the London bombing). In these cases, there was nothing about the finances alone that showed any link to possible terrorist activities.

VI.11 The impact of the laws on charitable and benevolent giving

As reported in Chapters III and V, the INSLM has considered the impact of terrorism financing laws on the giving of money to charities and remittances from diaspora communities. The INSLM is satisfied that Australia's terrorism financing laws, with the mental element required, do not unduly impose on charitable or benevolent giving.

Only those charities who meet the threshold for listing under the UN Charter Act will be subject to the asset freezing régime, similarly, that Act only criminalizes funding those listed entities. As previously stated, in order for an entity to be listed, the Minister for Foreign Affairs must be satisfied on reasonable grounds that the entity comes within para 1(c) of 1373, that is, someone is involved in terrorism.

Similarly, Australia's terrorism financing laws under the Criminal Code only criminalize funding to those charities which meet the definition of "terrorist organisation" under the Criminal Code (either because the organisation comes within the definition of "terrorist

³⁷⁷ ASIO Submission to the INSLM's Review of Terrorism Financing Legislation

organisation in para (a) of the definition in subsec 102.1(1) or because they have been listed as such by regulation).

The decision to proscribe under both the UN Charter Act and the Criminal Code is subject to administrative and judicial review. If a charity is not proscribed under the Criminal Code or UN Charter Act then the offences under these Acts for funding a terrorist organisation will not apply. For an individual to be guilty of financing terrorism under Div 103 of the Criminal Code, the person must know or be reckless that the funds will be used to facilitate or engage in a terrorist act.

Given the nature of Australia's listing process and the structure of the terrorism financing offences, it cannot be said that Australia's terrorism financing laws prohibit charitable giving to organisations who are often involved in activities and projects that enhance the enjoyment of human rights.

Martin Scheinin, the first UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, reported on the impact of counter terrorism financing measures on economic, social and cultural rights with particular reference to the impact on charity work.³⁷⁸ The first Special Rapporteur noted the negative impact of these measures on charity work has been felt mostly by Muslim charities, which are led by Muslims and or working for Muslim communities.³⁷⁹ The first Special Rapporteur found many Muslims were afraid to give their money to charity groups in case they were suspected of providing matériel support to terrorism.³⁸⁰ The first Special Rapporteur reported that some Muslim organisations requested from the US authorities a "safe" list of charities to which it would be acceptable to donate.³⁸¹ The INSLM heard similar concerns from the Victorian Kurdish community who had asked the AFP for guidance on what charities they could legitimately donate to without breaching Australia's terrorism financing laws.³⁸²

The first Special Rapporteur expressed concerns about the chilling effect on charity work, as potential donors and charity administrators fear that their actions will be classified as terrorism

³⁷⁸ See Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 21 November 2007, A/HRC/6/17, paras 42-50

³⁷⁹ These views were formed by the first Special Rapporteur during a country mission to the United States. The first Special Rapporteur was critical of actions taken by the United States authorities in designating charities without evidence and without prosecutions. A/HRC/6/17, para 42

³⁸⁰ It is an offence under the US Code to provide "material support".

³⁸¹ The United States authorities refused to provide such a list allegedly out of fear that any list of "safe" charities could potentially be abused for the financing of terrorism. A/HRC/6/17 at para 42

³⁸² See the transcript of the INSLM's public hearing, 24th April 2013 available at www.dmpc.gov.au/inslm

financing.³⁸³ The first Special Rapporteur also expressed concern about the effect of terrorism financing sanctions on the ability of members of diaspora communities to send genuinely charitable or benevolent remittances back to their families, friends and communities.³⁸⁴

Remittances from diaspora communities play a huge rôle in supporting developing countries such as Somalia.³⁸⁵

In considering ways to appropriately ease the prosecution burden in proving Australia's terrorism financing offences, the INSLM was concerned to ensure the laws do not have a disproportionate and oppressive effect on legitimate money flows. In assessing the proportionality of Australia's terrorism financing laws, the INSLM has considered the social costs of restricting the sending of money to families and communities overseas, whether by remittance or otherwise.³⁸⁶ The INSLM does not consider the laws in their current form or with the amendments proposed in this Report, are an unjustifiable, or in ICCPR terms disproportionate, intrusion on individual rights.

³⁸³ The first Special Rapporteur reported: "Charities are often involved in activities and projects that enhance the enjoyment of economic, social and cultural rights. Hence, obstacles on charity work may often have a direct negative impact on the enjoyment of these and other human rights". A/HRC/6/17, para 43.

³⁸⁴ The first Special Rapporteur described how the US Government imposed terrorist financing sanctions against Al Barakaat, the main organisation for money transfers into Somalia and also the country's largest private sector company which had become essential for the delivery of remittances sent from family members living abroad. It was run by many brokers who lived in different parts of the United States and in other countries where people of the Somali diaspora had settled. In 2002, the United Nations Development Programme stated that the closure of Al Barakaat had had a destabilizing effect on the economy of Somalia and a great humanitarian impact on the population of Somalia, who were unable to receive money from their relatives. A/HRC/6/17, para 48

³⁸⁵ The World Bank estimates that remittances to developing countries were over \$400 billion in 2012, three times the size of official development assistance. Although the World Bank cautions that "the true size of remittance flows, including unrecorded flows through formal and informal channels, is believed to be significantly larger." (World Bank, *Migration and Development Brief No 19* (November 2012), pp1-2.

A report by the UN Food and Agriculture Organisation's food security and nutrition analysis unit estimates annual remittances to Somalia to be at least \$1.2 billion. That is more than the international aid the country receives, which averaged \$834 million a year between 2007 and 2011. Most of the remittances are channelled through *hawala* or small money transfer businesses with the money used by families to cover basic expenses such as food, clothing, education and medical care. Most remittances come from Europe and the US (it is estimated that US \$100 million in remittances goes to Somalia from the US every year) yet most banks in the US have stopped processing remittances to Somalia because of the risk of violating government rules designed to block the funding of terrorist groups. Citing concern over regulations against money laundering, UK based Barclays has announced it will no longer be providing banking services for Somali remittance companies including Dahabshiil, the largest money-transfer firm in Somalia. Oxfam America has described how, the actions of these banks in seeking to comply with anti-money laundering and terrorism financing laws could have the effect of promoting terrorism: "A remittance channel closure is among the most worrisome of the possible and foreseeable catastrophes that could befall Somalia in the future; even a partial shutdown could cause tremendous economic and social trauma, pushing money transfers toward informality and threatening the country's progress towards peace, security and sustainable development". <http://www.theguardian.com/global-development/2013/aug/07/somalia-remittance-bank-barclays>; http://www.theguardian.com/global-development/2012/jan/04/aid-us-remittance-money-somalia?CMP=tw_t_gu and <http://policy-practice.oxfam.org.uk/publications/keeping-the-lifeline-open-remittances-and-markets-in-somalia-297149>

³⁸⁶ For a discussion of the social costs of terrorism financing laws, see Kevin E. David 'The Financial War on Terrorism' in *Global Anti-Terrorism Law and Policy* (2nd ed) (2012), Victor V. Ramraj et al (eds), pp198-199

CHAPTER VII

NATIONAL SECURITY INFORMATION

VII.1 Introduction

The importance of the NSI Act was noted in Chapter IX of the INSLM's First Annual Report³⁸⁷. The concerns of the INSLM with this legislation have focussed on its accommodation of the conflicting aspects of public interest that dominate the CT field. The primary aspect is to protect the public from terrorism. The tension comes from the imperative not to destroy common law rights or devalue internationally recognized human rights, in doing so.

The investigations of resort to the NSI Act have not revealed any deficiency in practice so far as concerns its capacity to protect the secrecy of information which ought not to be disclosed because of the public interest in maintaining national security. That is not to say that other means of protecting the secrecy of information were unavailable before the NSI Act: public interest immunity ("PII"), some aspects of which used to be called "Crown privilege", remains as the constant proper comparison with the NSI Act.

It is the other side of the requisite balance that has required the more detailed attention. That is, are provisions of the NSI Act, and the manner in which they have been applied in actual cases, compatible with Australia's international obligations such as human rights stipulations governing fair trial process? Even if compatible, should the provisions of the NSI Act be changed so as to improve their operation from a fair trial perspective?

The investigations of the INSLM and consideration of the material gathered and submissions received produce, overall, a conclusion, so far, that the NSI Act has not detracted from fair trial values in terrorism criminal proceedings to date. But the paucity of occasions in actual criminal proceedings when the NSI Act has been argued in a fully contested fashion renders this conclusion provisional, in the nature of a progress report only.

³⁸⁷ 16th December 2011

The merits of the NSI Act can be assessed as a matter of human rights, constitutional and legal principle. They are also open to evaluation in terms of policy objectives such as efficacy in enabling prosecution of terrorist offences, and the conduct of possible civil litigation in relation to other CT powers.

In summary, the NSI Act is not inappropriate as part of the CT Laws, viewed in these ways.

That is not to say that its rather elaborate drafting should be seen as best practice, let alone the only way reasonably available to secure the desirable outcomes to which the NSI Act is directed. However, there are only relatively minor aspects in which, in the INSLM's view, some improvements should be made.

An observation of general application to this topic of investigation by the INSLM is the striking shortage of concrete cases in which the NSI Act has been applied in a fully contested manner.

As explained below, another remarkable feature revealed in the course of the INSLM's investigation of the NSI Act is that it has not been seen on the part of governmental officials to be a means by which secret evidence can be used against accused persons without their knowing its content. That is, what once in prospect may have been the most problematic implication of the NSI Act has never come to pass in practice and is, apparently, not considered to be in prospect any further.

There may be room for doubt concerning some of these positions, raising questions of constitutional and human rights importance dealt with below.

VII.2 Objects, purpose and central definitions of NSI Act

The long title of the NSI Act speaks of “the protection of certain information from disclosure ...”, rather than the admission of certain evidence without affected parties knowing its content. The object of the NSI Act “is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice”.³⁸⁸ That object is a mandatory consideration in judicial application of the NSI Act.³⁸⁹

³⁸⁸ subsec 3(1) of the NSI Act

³⁸⁹ subsec 3(2) of the NSI Act

The information in question is national security information, which means information that “relates to” national security or the disclosure of which “may affect” national security.³⁹⁰ That expression itself means Australia’s defence, security, international relations or law enforcement interests.³⁹¹ The expression “security” has the same meaning as provided by sec 4 of the ASIO Act,³⁹² as follows:-

“**security**” means:

- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
 - (i) espionage;
 - (ii) sabotage;
 - (iii) politically motivated violence;
 - (iv) promotion of communal violence;
 - (v) attacks on Australia’s defence system; or
 - (vi) acts of foreign interference;whether directed from, or committed within, Australia or not; and
- (aa) the protection of Australia’s territorial and border integrity from serious threats; and
- (b) the carrying out of Australia’s responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a) or the matter mentioned in paragraph (aa).

Relevant components of the meanings of “international relations” and “law enforcement interests” include political relations with foreign governments and international organisations³⁹³ and avoiding disruption to national and international efforts relating to criminal intelligence, foreign intelligence and security intelligence.³⁹⁴

Thus, the NSI Act is centrally aimed at the forensic handling of information concerning terrorism (including counter-terrorism) and this explicitly extends to Australia’s dealings and arrangements with bodies such as the United Nations and other nations such as the United States of America and the United Kingdom of Great Britain and Northern Ireland, in relation to these subject matters.

³⁹⁰ sec 7 of the NSI Act

³⁹¹ sec 8 of the NSI Act

³⁹² sec 9 of the NSI Act

³⁹³ sec 10 of the NSI Act

³⁹⁴ sec 11 of the NSI Act

It is to be noted that the NSI Act is certainly not confined to counter-terrorism that culminates in terrorism trials. As the definitions of critical concepts used in the NSI Act noted above show, at least two other topics of great public importance are sought to be addressed by the NSI Act – first, espionage and foreign interference, and second, international relations. It may be that counter-terrorism in fact overlaps with the first of these, and it certainly does with the second.

The significance of the NSI Act being concerned with a great deal more than counter-terrorism is that evaluation of its effectiveness and appropriateness by the INSLM must take account of the very high public importance of safeguarding the national interest that is obviously involved in both those other topics.

The NSI Act is by no means a radical novel departure in the law, as these statutory aims and purposes, together with the means by which the provisions of the NSI Act attempt to meet and serve them, fit comfortably within previous (and continuing) common law notions of the public interest. Provisions of State legislation addressed to the problem of organized crime have already largely survived challenges to their constitutional validity (about which further comment is made below) and provide useful comparisons for aspects of the NSI Act. The principal focus of the exercise of placing the NSI Act in its common law and comparative legislative context is the compatibility of such provisions with common law and international human rights requirements for a fair trial.

VII.3 Triggering NSI process by notification and advice

For the purposes of the NSI Act, the category of a “criminal proceeding” is broadly defined, importantly so as to include the disclosure etc of “intended evidence, documents or reports”.³⁹⁵

The most often used, and in some senses the most important, provision in the NSI Act is sec 22, which contemplates an arrangement between the Attorney-General, the prosecutor and the defendant “about the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information”.

A significant pattern is set by the very next provision in the NSI Act, which provides that prescribed ways of storing, handling, destroying or accessing national security information

³⁹⁵ subsec 13(2) of the NSI Act

do not apply if the information is the subject of orders under sec 22.³⁹⁶ The significance of that means of avoiding prescribed regulation is highlighted by the somewhat formidable régime involving substantial executive discretion which has been prescribed under sec 23: the incentive thus presented to reach a sec 22 arrangement is real and considerable.

Application of the NSI Act, as a whole, in a relevant proceeding is triggered by a prosecutor's, Attorney-General's, or substitute minister's written notice to that effect.³⁹⁷ That executive choice is thereby critical, but raises no difficulties of principle or policy, as the INSLM sees it.

At the outset of the process governed by the NSI Act is a set of obligations imposed on each participant in the proceedings – ie every party and legal professional – to notify the Attorney-General when he or she knows or believes that he or she, or a witness intended to be called by him or her, or the return to a subpoena applied for by him or her, “will” disclose national security information in a federal criminal proceeding.³⁹⁸ It is important to note that the definition of “national security information” includes “information ... the disclosure of which may affect national security”³⁹⁹ (emphasis added).⁴⁰⁰ The obligation may thus be paraphrased as being to notify the Attorney-General as and when one knows or believes that one's relevant conduct will disclose information that does or may relate to national security.

The information expected to be disclosed, notified to the Attorney-General under subsec 24(1), must also be described in advising of that notification, being advice to the court and the other relevant participants in the proceedings,⁴⁰¹ subject to the defence being dispensed from describing the information in its advice to the prosecutor.⁴⁰²

³⁹⁶ sec 23 of the NSI Act. For the purposes of paras 23(1)(a) and (b) of the NSI Act, national security information must be stored, handled, destroyed, accessed and prepared in accordance with the *Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings* (the Requirements are given effect by regs 4A(1) and 4C(1) of the *National Security Information (Criminal and Civil Proceedings) Regulations 2005* (Cth), made under the NSI Act). The Requirements are now out-dated as a result of changes to the Commonwealth Protective Security Policy Framework and require updating. The Attorney-General's Department has advised the INSLM that it is working on developing revised Regulations to replace the current Regulations and Requirements.

³⁹⁷ secs 6, 6A of the NSI Act

³⁹⁸ subsec 24(1) of the NSI Act

³⁹⁹ sec 7 of the NSI Act

⁴⁰⁰ cf the definition of “sensitive material” to mean “material the disclosure of which would be damaging to the interests of national security” (emphasis added) in the *Justice and Security Act 2013* (UK).

⁴⁰¹ subsec 24(3) of the NSI Act

⁴⁰² subsec 24(4) of the NSI Act

VII.4 Limited confidentiality of defence position

This last provision is presumably to be read as implying that it would be improper for the prosecution thus to be informed in advance of some part of the defence case or tactics. That implication generally accords with the practical manifestation of the presumption of innocence and prosecution burden of proof. It would be fairly safe to read subsec 24(4) as implying that the court, that must receive a description of the relevant information from the defence, must not reveal that description to the prosecution – otherwise, the point of the defence not being obliged to give the description to the prosecution directly would be lost. The function of judges to ensure fair trial process can therefore be understood to preclude a case management or trial judge informing the prosecution of the description of the relevant information received by the court from the defence, except on the application or with the consent of the defence.

The Attorney-General, of course, always receives a description of the relevant information in cases where the defence is obliged to notify.⁴⁰³ The Attorney-General is not in form or substance the prosecutor and is thus not a participant in the proceedings in the sense of being a party (except to NSI applications). As First Law Officer, the Attorney-General has a manifest duty and interest to promote the fairness of criminal trials, but this is a political and administrative function rather than the direct and immediate rôle carried out by a case management or trial judge. Nonetheless, to avoid mishaps that could cause a trial to miscarry or the professional representation of a prosecution to be disrupted during a trial, it would be as well to spell out the implication that the Attorney-General must not reveal to the prosecution anything that the defence is dispensed under subsec 24(4) from describing to the prosecution.

The implication is not so straightforward or reassuring in the case of an intended witness or recipient of a subpoena, to whom advice is required, including its “description”, of all information expected to be disclosed of which the defence is obliged to notify the Attorney-General. The defence should not have to face the uncertainty of a risk that these persons, who may hold no official position, may reveal those descriptions to the prosecution, and the prosecution should not bear the risk of disrupting its representation upon any such revelation. The statute should be clarified accordingly.

Recommendation VII/1: The Attorney-General in case of a defence notice and persons advised that a defence notice has been given to the Attorney-General under sec 24 of the NSI Act should be prevented, except with leave of the court, or consent of the defence, from

⁴⁰³ para 24(2)(b) of the NSI Act

disclosing the description of the national security information referred to in the notice, to the prosecution, directly or indirectly.⁴⁰⁴

The intent of these provisions protecting the defence from revelation of its forensic plan to the prosecution, whether amended or not in accordance with the recommendation above, is really quite limited in its practical scope. As the provisions presently operate, they afford that protection during the period required for the Attorney-General's consideration⁴⁰⁵ whether or not to issue a criminal non-disclosure or witness exclusion certificate.⁴⁰⁶ If the Attorney-General decides not to issue such a certificate, the defence position will be kept from the prosecution unless and until the defence decides for itself to carry out the intention or to make real the possibility upon the basis on which the defence had notified and advised the Attorney-General in the first place.

In this eventuality, the provisions in question reflect a fair if rather elaborate approach to the effect that national security secrecy considerations may have or threaten in an accusatorial criminal trial. But the eventuality of the Attorney-General deciding not to issue any such certificate cannot be expected to be usual, judging from experience to date – quite the contrary.

The question therefore arises whether in the event the Attorney-General triggers a sec 31 hearing by issuing such a certificate, the provisions fairly balance competing considerations, by requiring the prosecution to be involved in the sec 31 argument.⁴⁰⁷ It seems to the INSLM that the only alternative to the procedure required by these provisions, in the interests of protecting the defence from revelation of its forensic plans to the prosecution, would be to exclude the prosecution from the sec 31 hearing, leaving it to the Attorney-General to carry the burden of justifying his or her certificate (and arguing in relation to other possibilities within the court's power to order). The idea, it may be supposed, would be that the Attorney-General is institutionally best placed, including by comparison with the prosecutor, to present argument in the public interest concerning national security – a proposition not open to serious dispute. But the idea, again one supposes, would go on to contemplate the Attorney-General, being the First Law Officer, whose functions historically although no longer extended to the official conduct or superintendence of all prosecutions, as also an appropriate (if not the most

⁴⁰⁴ Hence subsec 24(3) of the NSI Act should be amended or supplemented to impose such restrictions on the Attorney-General and persons mentioned in paras 24(1)(b) and (c). The further question may arise of sanctions for non-compliance, as for which see VII.14 below.

⁴⁰⁵ subsec 24(5) of the NSI Act

⁴⁰⁶ secs 26 and 28 of the NSI Act. See **Appendix M** for the number of criminal non-disclosure and witness exclusion certificates issued under secs 26 and 28 of the NSI Act.

⁴⁰⁷ para 29(2)(c), subsec 29(4), subpara 29(5)(c)(ii) and para 32(1)(b) of the NSI Act

appropriate) personage to evaluate and if so advised to argue the critical fair trial elements of those involved in a sec 31 hearing.⁴⁰⁸

In the INSLM's opinion, although this is not impossible as a scheme that could work in practice, it is clearly not to be preferred to the scheme as it exists. The present requirement for the prosecutor to participate in a sec 31 hearing enables the court to benefit from the disinterested and professional exercise of the prosecutor's duties as an advocate in the administration of criminal justice. Those duties, in general terms, explicitly involve considerations of fairness – emphatically, it is not the prosecutor's duty simply to seek to win a conviction. In practice as well as theory, this core professional ethic of prosecutors is necessary for the effective administration of justice. Time and time again, in actual cases so frequent as to be justifiably regarded as common place, prosecutors take steps that could be seen as favourable (in one crude sense at least) to the defence. The essence of the capacity for prosecutors to act in this ordinary and high minded fashion is the individual professional's knowledge of and responsibility for the prosecution case.

This cannot realistically be adequately substituted by the ad-hoc engagement of the Attorney-General, however capable, his or her counsel may be. It is unthinkable that terrorism trials should routinely involve the maintenance of an independent Attorney-General's team as involved with the prosecution as the prosecution itself.

Further, much of the value, such as it is, of the Attorney-General being involved in sec 31 hearings would be at risk of dissipation if the Attorney-General were required, in effect, to adopt the stance of the prosecution in a particular case.

Conversely, the preservation of the important capacity of a professional prosecutor to put fair trial submissions at odds with submissions by the Attorney-General in relation to national security secrecy is of great importance, in the view of the INSLM, for the principled conduct of these problematical aspects of terrorist trials.

For all these reasons, the fact that in many cases that can be imagined some part of the defence's forensic plans may be revealed to the prosecution by dint of a sec 31 hearing should be seen as a reasonably acceptable qualification of the general approach inherent in accusatorial criminal process that the defence may wait until conclusion of the prosecution case before showing the defence's hand. In any event, that general approach should not nowadays be seen as anything like a rule of law let alone an absolute one. The century or so of

⁴⁰⁸ para 31(7)(b) of the NSI Act

experience with statutory requirements to give advance notice of such potentially surprising defences as alibi, and the more recent requirement for timely notification of proposed expert evidence, are striking demonstrations that there is no such rule. Such requirements, which are well accepted and more or less efficiently practised in Australian courts, should not be seen as dubious preference for expediency over fairness. Rather, they reflect a constant need for a balanced and pragmatic approach to the orderly administration of justice – just as important for the defence in our accusatorial criminal trial process as for the public interest in effective prosecution of crime.

VII.5 Possible disruption of proceedings by NSI Act process

A key aspect of the concern shown by Parliament for the protection of national security information is the mandatory adjournment of the proceeding sufficient to ensure it is not disclosed, following notice under subsec 24(1).⁴⁰⁹

This requirement obviously has potential to disrupt and delay criminal proceedings, as noted by Whealy J in 2007.⁴¹⁰ However, the mandatory opportunity for the Executive to consider its position in relation to important matters raised in litigation, even to the extent of compelling adjournment of proceedings, is an established and, in the INSLM's view, unexceptionable approach: the well known notices under sec 78B of the *Judiciary Act 1903* (Cth) in matters arising under the Constitution or involving its interpretation may sometimes be irksome but are, obviously, in the public interest. If anything, it is even more so in the case of an opportunity for the Attorney-General to marshal the position of the Commonwealth in relation to national security information.

A similar procedure applies during proceedings, when the participants know or believe that information to be disclosed by a witness's answer to a question in evidence, is national security information.⁴¹¹ A special feature of sec 25 is the rôle of the Attorney-General's representative other than the Attorney-General's legal representative, as a person whose advice binds a prosecutor to give the Attorney-General a triggering notice.⁴¹² (The absence of sanction of the Attorney-General's representative for this obligation is the subject of comment further below.)

On the face of the statute, the potential for this procedure to impede ordinary expectations for the efficient presentation of testimony at a criminal trial is obvious and large. Too much

⁴⁰⁹ subsecs 24(5) and (6) of the NSI Act

⁴¹⁰ See the INSLM's First Annual Report at pp 61-63

⁴¹¹ sec 25 of the NSI Act

⁴¹² subsec 25(5) of the NSI Act

should not be made of this concern, however, given the paucity of practical experience of these particular provisions. An available view to the opposite effect would be that the undesirable inconvenience presented by the prospect of observance of sec 25 has played a part in rendering sec 22 arrangements all the more attractive. Both secs 24 and 25 explicitly do not apply when relevant sec 22 orders are in force.⁴¹³

Nonetheless, because national security information disclosed on the run, so to speak, during live evidence could be every bit as damaging to the public interest as such information disclosed in a document produced before any hearing has been held, in principle and as a matter of policy the compulsory affording to the Executive of an opportunity to deal with such threatened disclosure is not unreasonable. In the INSLM's view, the disruptive effect on a particular trial should be seen as an unfortunate but necessary consequence of the general public interest being engaged.⁴¹⁴

VII.6 Attorney-General's certificates

The purpose of the provisions for notice to the Attorney-General is to enable consideration to be given by the Attorney-General to giving a non-disclosure certificate or a witness exclusion certificate.⁴¹⁵ These are important steps in and out of court. In court, they set in train the closed hearing procedures explained below.⁴¹⁶ Out of court, they are the foundation for specific criminal offences, which may be committed by legal professionals as well as parties.⁴¹⁷ But the conclusive effect of a non-disclosure certificate is tailored to expire upon consideration commencing by the court of the merits of a claim for non-disclosure.⁴¹⁸

A corollary of this effect of certificates on proceedings, being effectively adjournment until the court has dealt with the national security information issues,⁴¹⁹ is that the adjournment of the main proceedings for that purpose should be no longer than the currency of that purpose. Hence the provisions requiring such adjournments and any national security information hearings, on the *voire dire*, to “end” if the Attorney-General revokes a certificate meantime.⁴²⁰ There is no difficulty in a literal application of the requirement to end such a hearing

⁴¹³ subparas 24(1A)(b)(ii) and (c)(ii), 25(2A)(c)(ii), para 25(7)(b) of the NSI Act

⁴¹⁴ The same may be said of the mandatory adjournments for considering and making appeals under sec 36 of the NSI Act.

⁴¹⁵ secs 27 and 28 of the NSI Act

⁴¹⁶ subsecs 27(3) and 28(5), and Div 3 of Part 3 of the NSI Act

⁴¹⁷ secs 43 and 44 of the NSI Act

⁴¹⁸ subsec 27(1) of the NSI Act, and see subsecs 26(5) and 28(4)

⁴¹⁹ subsecs 27(3) and 28(5) of the Act NSI Act

⁴²⁰ subsecs 27(4) and 28(8) of the NSI Act

forthwith. There may be some awkwardness in immediate resumption of the main proceeding upon this kind of ending to an adjournment, given the typical gearing up necessary to resume an important trial on indictment – reassembling the jury, arranging for witnesses in proper order, etc. Probably, any such practical difficulty in literal compliance would be met by one adjournment ending and another being sought and granted: the first being on NSI grounds, the second on ordinary logistical and procedural fairness grounds.

In the case of both kinds of certificate, the Attorney-General is empowered to issue it only if he or she considers that the disclosure is “likely to prejudice national security”.⁴²¹ That expression is defined to mean the position where “there is a real, and not merely a remote, possibility that the disclosure will prejudice national security”.⁴²² This is not an unexpected explanation of the concept conveyed by the word “likely” in such a protective context. It is not much different, if at all, from how the courts would probably construe the expression even without this statutory stipulation. As a matter of policy, it is clearly a reasonable precautionary threshold approach.

Importantly, the NSI Act gives the Executive, through the Attorney-General, a discretion whether to require the judiciary to determine whether evidence should not be disclosed or a witness not called: conveyed by the word “may” in the certification provisions.⁴²³ Further, the certification provisions also require advice by the Attorney-General to relevant participants including the court if he or she decides not to issue a certificate.⁴²⁴ The absence of an express time stipulation for the Attorney-General to make a decision is not, in the scheme of things, any real deficiency in the NSI Act. First, there is no reason in experience to expect dilatory attention by the First Law Officer in such important matters. Second, most likely an implied stipulation for decision within a reasonable time is the law. Third, the court would not lack the means by which the Attorney-General could be informed in open and pointed fashion of any concerns for the administration of justice in the particular case that the court considered may come to exist in the event of any delay in making such decisions.

VII.7 Certificate hearings

These are hearings triggered by Attorney-General’s certificates, that may be thought of as passing to the judicial power the task of deciding what to do about the claim advanced by the Attorney-General in such a certificate.

⁴²¹ paras 26(1)(c) and 28(1)(b) of the Act NSI Act

⁴²² secs 7 and 17 of the NSI Act

⁴²³ subsecs 26(2) and (3), 27(2) of the NSI Act

⁴²⁴ subsecs 26(7) and 28(10) of the NSI Act

The powers of the court under sec 31 of the NSI Act are, as a matter of formal structure, at the heart of the attempt by the legislation to improve on the common law position under the doctrine of PII. (As discussed below, the heart of the NSI Act in practice may really be consensual sec 22 arrangements, which are truly alternative to sec 31 orders.) It is in the powers of the court under sec 31 that the potential for strains on the limits of fairness, if any, would be seen.

The complicated wording of sec 31 amounts to giving the court the power to permit disclosure of information or calling of a witness sought to be prevented by an Attorney-General's certificate, as one possibility.⁴²⁵ Another possibility is for the court to prohibit, by order, the disclosure of such information, "except in permitted circumstances".⁴²⁶ The other possible outcome is for the court to order in effect a conditional or limited form of disclosure, under which "except in permitted circumstances" documentary information may be permitted with relevant information deleted, or with an attached summary of deleted information as ordered, or with "a statement of facts ... that the information would, or would be likely to, prove" as ordered.⁴²⁷

The court is in no way bound by the existence or content of an Attorney-General's certificate, which in one sense by this stage of proceedings is no more than one of the previous steps that produce the jurisdiction of the court under sec 31 itself. The constitutionally appropriate independence of the court from the Executive in this regard is clear to demonstration from the power of the court to permit disclosure; but is explicitly if redundantly emphasized by words in parentheses governing the power to order deletion, summary or statement of facts – "(which disclosure may or may not be the same as was permitted in the Attorney-General's certificate)".⁴²⁸

Furthermore, this independent power of the court is not, in the opinion of the INSLM, in the nature of non-merits judicial review, but is rather the full power to consider all relevant evidence, weigh all relevant considerations and exercise judicial discretion as to the appropriate outcome. It is not an inquiry into whether the Attorney-General was justified or not in giving a certificate, but rather an inquiry into whether there should be disclosure or not, and if so on what if any restricted basis. This rôle for the judicial power in relation to national security information under the NSI Act can, actually, be seen as a paradigm of good policy. It denies the possibility of unfair Executive influence.

⁴²⁵ subsec 31(5) and para 31(6)(b) of the NSI Act

⁴²⁶ subsec 31(4) of the NSI Act

⁴²⁷ subsec 31(2) esp paras (d), (e) and (f) of the NSI Act

⁴²⁸ subsec 31(2) of the NSI Act

The power to order disclosure on a restricted basis, with deletions, summaries and statements of facts, closely resembles the various practices in Europe including the UK that have become known, in the jargon, as “redacting” and “gisting”.⁴²⁹ Experience shows that at common law PII claims could be compromised by consensual arrangements, usually requiring approval by the court but not always formally so, that effectively brought about deletions or redactions and sometimes involved summaries akin to gisting. But these were not, or at best only very doubtfully, within the power of a court to compel. The NSI Act represents a serious and valuable law reform in granting to the court a power to modify disclosure so as to protect national security information while vindicating open and fair, or at least fair, justice.

VII.8 Section 31 discretionary factors

The mandatory considerations for a court deciding what order to make under sec 31, in a certificate hearing, may be summarized as focussed on “a risk of prejudice to national security” and any “substantial adverse effect on the defendant’s right to receive a fair hearing”. The legislation⁴³⁰ is unremarkable in so providing – it is difficult to conceive of any matters more obviously fundamental to the assessment required under sec 31 than these two. For good measure, the legislation continues⁴³¹ to compel the court to consider as well any other matter it considers relevant (a logically correct but somewhat disconcerting admonition to do something the court must have already determined to do).

There is a somewhat troubling intrusion in the text of these provisions on the substantive evaluative assessment to be undertaken by the court. In relation to the risk of prejudice to national security, the mandatory consideration is stipulated to be one “having regard to the Attorney-General’s certificate”.⁴³² This is a trifle peculiar, given that a sec 31 hearing, as the tag “certificate hearing” indicates, is had only because the Attorney-General has issued a certificate. In the sense of grounding jurisdiction and thereby setting the rules for its exercise, a court could hardly not have regard to the Attorney-General’s certificate.

A more sinister possibility is that this phrase is intended to represent something of a thumb on the scales, perhaps even to give some evidentiary or authoritative status to the statements contained in the Attorney-General’s certificate. It should be enough to state these propositions in order to reject them. In the INSLM’s view, it will suffice to predict that no court would ever venture in that direction. Would there be some kind of presumptive weighting of the

⁴²⁹ eg *Home Secretary v MB* [2008] 1 AC 440 at 489 per Baroness Hale of Richmond

⁴³⁰ paras 31(7)(a) and (b) of the NSI Act

⁴³¹ para 31(7)(c) of the NSI Act

⁴³² para 31(7)(a) of the NSI Act

certificated statements? Does the opinion of the Attorney-General, as such, weigh more than other or different arguments from other sources? It is to be hoped that these are rhetorical questions, negative answers only being available. The constitutional considerations noted under VII.7 above militate against any irrational favouring of an Executive view so as to skew what would otherwise have been the judge's own view in light of the evidence and argument. That is not to say that an appropriate judicial "regard", or as the Americans term it deference, should not be paid by a judicial officer to the governmental position taken by the Attorney-General.⁴³³

The current state of the law is, with respect, cogently stated by Whealy J,⁴³⁴ holding that the obligation to have regard to the Attorney-General's certificate conveyed "no suggestion... that the certificate is conclusive or determinative of the issue", his Honour concluding that, providing possible prejudice to national security is given "the appropriate weight, the court is free to form a view that is entirely contrary to the tenour of the certificate". Nonetheless, this awkward and unnecessary phrase should be omitted from the legislation.

Recommendation VII/2: The phrase "having regard to the Attorney-General's certificate" should be omitted from the opening lines of subsec 31(7) of the NSI Act.

The other matter of concern to the INSLM in these provisions of the NSI Act arises from the puzzling words of subsec 31(8), which requires that, "In making its decision, the court must give greatest weight to the matter mentioned in paragraph (7)(a)", ie whether there would be a risk of prejudice to national security. These words also are in danger of appearing to convey some illegitimate tipping of the scales contrary to or different from how the judge would otherwise on the merits and in accordance with the balance inherent in these concepts have determined the issue. Fortunately, that danger has been averted by the NSW Court of Criminal Appeal upholding the reasoning and decision of Whealy J against that reading.

In *R v Lodhi* (2006)⁴³⁵ Whealy J adopted the approach, called "grammatical", of effectively reading down these words so as to prevent any artificial or inappropriate (or unjust) weighting of national security considerations against fair trial values. While his Honour considered subsec 31(8) of the NSI Act made a difference between the NSI régime "and that customarily

⁴³³ For a spirited vindication of judges' generalist skills as appropriate to evaluate national security claims, see Prof Stephen Schulhofer, "Oversight of national security secrecy in the United States", *Secrecy, National Security and the Vindication of Constitutional Law* (eds) David Cole, Federico Fabbrini & Arianna Vedeschi (2013), pp22-43 at 39-40.

⁴³⁴ *R v Lodhi* (2006) 163 A Crim R 448 at 468 [105]

⁴³⁵ 163 A Crim R 448 at 469 [108], [109]

employed in the resolution of public interest immunity claimed”, he did not consider it rendered this legislative requirement impermissible as a matter of constitutional law.

Importantly, Whealy J regarded the “greatest weight” expression as one that did not do more than “give the court guidance as to the comparative weight it is to give one factor when considering it alongside a number of others”. His Honour continued:-

Yet the discretion remains intact...it seems to me that there is no warrant for supposing other than that, in a proper case, the court will order disclosure or a form of disclosure other than that preferred by the Attorney-General. The legislation does not intrude upon the customary vigilance of the trial judge in a criminal trial. One of the court’s tasks is to ensure that the accused is not dealt with unfairly. This has extended traditionally into the area of public interest immunity claims. I see no reason why the same degree of vigilance, perhaps even at a higher level would not apply to the court’s scrutiny of the Attorney’s certificate in a s 31 hearing. (emphasis added)

The Court of Criminal Appeal upheld Whealy J.⁴³⁶ For the purposes of the INSLM’s review of these laws, it is unnecessary to dwell on the constitutionality of the laws as found by Spigelman CJ.⁴³⁷ There should be no doubt that in this context and for these laws the Chapter III fair trial values observed in these decisions well and truly meet the international obligations owed by Australia under Art 14 of ICCPR.

The approach of Spigelman CJ accepted that subsec 31(8) was a tilting or thumb on the scales approach, but insisted that it “does not involve the formulation of a rule which determines the outcome in the process. Although the provision of guidance, or an indication of weight, will affect the balancing exercise, it does not change the nature of the exercise”.⁴³⁸ Importantly, his Honour analogized the statutory scheme of the NSI Act to the balancing in the case of a claim for PII “of the public interest in non-disclosure against the public interest in the administration of justice, reflecting the cognate private interest to ensure disclosure of all facts which may directly or indirectly be relevant to a trial”.⁴³⁹

This salutary judicial insistence that the legislation may provide guidance but must not dictate the outcome of a judicial evaluative assessment proceeds on the basis that comparative weighting of this kind is constitutionally unexceptionable. The, with respect, frank discussion

⁴³⁶ *Lodhi v R* (2007) 179 A Crim R 470, special leave refused [2008] HCA Trans 225

⁴³⁷ Barr J concurring at 179 A Crim R 500 [121], Price J concurring at 179 A Crim R 528 [215]

⁴³⁸ 179 A Crim R 484-485 [41], [45]; see also 179 A Crim R 487 [66], 488 [72],[73]

⁴³⁹ 179 A Crim R 488 [68]

by Spigelman CJ of the notion of judicial balancing of incommensurables (not to mention imponderables) is illuminating in this regard. But in the specific context of the NSI Act deployed in terrorism trials, the question does arise whether these statutory expressions are appropriate to remain in statute law. In favour of them remaining is that they have now obtained binding judicial explanation, particularly as to what they do not mean or dictate. Against them remaining is the unattractive appearance they give of an officious and importunate attempt to achieve results which would not otherwise have ensued from an impartial and informed judicial evaluative assessment.

On balance, it would be better if subsec 31(8) did not appear at all. As explained by the judges, it does not mean that any risk to national security must outweigh any detriment to fair trial. In the view of the INSLM, it is therefore little more than an otiose reminder to judges that national security is every bit as important as the words “national security” ordinarily convey, even before reading the statutory definition. There is no warrant whatever in history to regard Australian judges as disinclined to value national security: what could fairly be called the provision of deference to executive assessment displayed on many occasions in PII adjudications should be enough to dispel any such idea.⁴⁴⁰

For the reasons developed below, what subsec 31(8) terms “the defendant’s right to receive a fair hearing” ultimately has a constitutional footing with consequential constitutional limits on the capacity of legislation to affect its existence or enjoyment. While subsec 31(8) itself has survived constitutional challenge, if its tilting or placing a thumb on the scales produces no perceptible benefit in the public interest, it would be better if it were omitted altogether.

There is virtue, after all, in rendering all or any legislation less verbose, if that can be achieved without diminution of its beneficial effect.

Recommendation VII/3: Subsection 31(8) of the NSI Act should be repealed.

⁴⁴⁰ Indeed, one available view is that this kind of judicial deference to an executive position can be, and has been, overdone on occasion. For example, in *R v Lappas & Dowling* [2001] ACTSC 115 at [26] Gray J said of evidence concerning governmental apprehensions in the event of further disclosure of the information in question – “If that is the view taken by the appropriate government representative, I have no reason to go behind it. I certainly do not arrogate to myself a decision as to whether the claimed possible consequences of any greater publication of the document than the claimant would permit would, in fact, not take place”. Some of this language could, with respect, be regarded as excessively giving place to the executive over the ultimate judicial assessment of facts in issue, including future or hypothetical consequences. That is not to say, again with respect, that the result reached by his Honour’s ruling would have differed had a more sceptical approach been taken.

VII.9 Use of NSI evidence against an accused

The NSI Act, simply, is not a legislative system to permit and regulate the use of secret evidence in a criminal trial – ie evidence adverse to an accused, that the accused is not allowed to know.⁴⁴¹ This position was correctly maintained in evidence before the INSLM from officers of the Commonwealth Director of Public Prosecutions and the Attorney-General's Department. Its importance is central to the conclusion of the INSLM that the NSI Act is, in general terms, an appropriate response, consistent with Australia's international counter-terrorism and human rights obligations, to the inevitable problem of prosecuting fairly while relying on sensitive evidence.

On the other hand, the NSI Act does render admissible evidentiary material produced by deletions, summaries and statements of fact affecting the form of a document that would otherwise have been disclosable in criminal proceedings, such as a terrorism trial.⁴⁴² The question posed by these provisions, making consideration of fair trial values as a matter of general principle relevant to the INSLM's task, is whether the nature and extent of such deletion, summarizing or stating of facts “would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence”.⁴⁴³

The use of the NSI Act in terrorism trials is significantly different from provisions for the use *ex parte* of criminal intelligence evidence such as those considered by the High Court in *Condon v Pompano*.⁴⁴⁴ The *Criminal Organisation Act 2009* (Qld) allows for the substantive deployment against parties of evidence held in an anterior procedural hearing (itself also *ex parte*) to be criminal intelligence not appropriate to be disclosed as a matter of public interest (roughly paraphrased). The present relevance of the holdings in the three sets of reasons, concurring in the result, in *Pompano* lies in their being the most recent articulations in the High Court of the constitutionally protected requirement for judicial power to be exercised judicially, involving fair trial values, as it applies to laws purporting to permit adverse evidence to be used against a person sought to be affected by judicial process without that evidence being made known to the person.

⁴⁴¹ For the purposes of general principle, the distinction between an accused and his or her counsel and solicitors is not material. On the other hand, it may be critical in more specific contexts, as noted below.

⁴⁴² subsec 31(2) of the NSI Act

⁴⁴³ para 31(7)(b) of the NSI Act

⁴⁴⁴ [2013] HCA 7, (2013) 87 ALJR 458. I was senior counsel for Pompano Pty Ltd in the High Court proceedings.

The Chief Justice canvassed a deal of comparative law and jurisprudence, amongst which his Honour noted an approach repeatedly enunciated in the House of Lords of considering in an individual case “whether the party excluded from the hearing had been offered ‘a substantial measure of procedural justice’”.⁴⁴⁵ As French CJ noted, European and British jurisprudence explicitly invokes a balancing or proportional approach to these issues. In particular, for Australian courts that must meet the requirements of Chapter III of the Constitution, his Honour held in favour of the Queensland legislation’s validity that the Supreme Court “retains its decisional independence and the powers necessary to mitigate the extent of the unfairness to the respondent in the circumstances of the particular case”, including its power “to control its own proceedings in order to avoid unfairness”, being a power that “suggests that it would have a discretion to refuse to act upon criminal intelligence where to do so would give rise to a degree of unfairness in the circumstances of the particular case which could not have been contemplated at the time that the criminal intelligence declaration was made” [being an occasion when the legislation required fairness to be considered].⁴⁴⁶

The plurality reasons in *Pompano* (Hayne, Crennan, Kiefel and Bell JJ) similarly held that the proper test of the validity of novel procedures departing from the general rule “that opposing parties will know *what* case an opposite party seeks to make and *how* that party seeks to make it” is posed by answering “the question...whether, taken as a whole, the court’s procedures for resolving the dispute accord both parties procedural fairness and avoid ‘practical injustice’”.⁴⁴⁷ Among those procedures and judicial methods, the plurality noted the possibility of the weight of secret evidence being diminished (by application) by reason of the fact that it “had not been and could not be challenged directly”.⁴⁴⁸

The differently expressed reasons of Gageler J for upholding the validity of the legislation in *Pompano* turned on “the capacity of the Supreme Court of Queensland to stay a substantive application in the exercise of inherent jurisdiction in a case where practical unfairness becomes manifest”.⁴⁴⁹ (The difference between his Honour and the plurality in relation to the Supreme Court determining the weight to be given to declared criminal intelligence if tendered *ex parte* need not be discussed for present purposes. The critical commonality is that all the Justices place practical unfairness beyond the constitutional competence of a State parliament to require as the outcome of its Supreme Court exercising judicial power.)

⁴⁴⁵ [2013] HCA 7 [61], fn 103

⁴⁴⁶ [2013] HCA 7 [88]

⁴⁴⁷ [2013] HCA 7 [157], quoting Gleeson CJ in *Re MIMIA; Ex parte Lam* [2013] 214 CLR 1 at [37]

⁴⁴⁸ [2013] HCA 7 [166], see also [167], [168]

⁴⁴⁹ [2013] HCA 7 [178], see also [212]

In the opinion of the INSLM, wording of para 31(7)(b) of the NSI Act thoroughly encompasses these up-to-date restatements of the constitutional need for courts to be able to proceed fairly. The phrase “a substantial adverse effect” appropriately stipulates against practical unfairness.

It is true that subsec 31(7) is not explicitly framed as a provision that limits the power of the court to render admissible, say, a document with NSI information deleted, summarized or the subject of a statement of facts. However, given the entire subject matter of the NSI Act as a whole being the administration of justice, and the constitutional setting provided by Chapter III of the Constitution, a proper adaptation of the approach taken in *Pompano* to the State legislation there considered, to the Commonwealth legislation comprising the NSI Act, produces a meaning of the NSI Act in this regard which is not only constitutionally compliant but is also in accordance with fair trial values to which Australia is bound, eg by Art 14 of ICCPR.

The proper administration of justice, and Art 14 of ICCPR, require that an accused know the case against them, that is, no evidence presented to the jury to support the prosecution’s case must be kept from the accused. The UK Supreme Court recognized this principle in *Al Rawi*:-

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.⁴⁵⁰

This statement of the common law in England and Wales, influenced as it is now by European Convention jurisprudence, is closely related (including for historical reasons) with the requirements in Art 14 of ICCPR that imply adequate knowledge of the case against an accused.⁴⁵¹ It was made in the course of deciding the extent of a common law court’s power to devise – without statutory provision – procedures in the nature of a closed material hearing. Nonetheless, it seems to the INSLM that, at least as a cardinal general rule, it represents a powerful aspiration. Pragmatic considerations should not be permitted to render it, in its robust simplicity, inaccurate. At the end of the day (or many days in the case of terrorism trials), an accused simply should not be at peril of conviction of imprisonment (perhaps for life) if any material part of the case against him or her has not been fully exposed to accused and counsel and solicitors. If the material in question could make the difference between

⁴⁵⁰ *Al Rawi v Security Services* [2012] 1 AC 531 at [12], quoting *Kanda v Government of Malaya* [1962] AC 322, 337

⁴⁵¹ eg Art 14(3) of ICCPR

the jury's satisfaction beyond reasonable doubt or not, it is not only material but critical. An inability based on ignorance to address and answer such material, is, it seems to the INSLM, always and by definition unfair. The NSI Act should not permit of such a possibility.

For the reasons set out above, there is a very respectable argument that the NSI Act does no such thing. On balance, the INSLM considers that the reference to “the conduct of his or her defence” in para 31(7)(b) of the NSI Act suffices to protect against such unfairness. This is not to say that governmental consideration should not be given to rendering that protection explicit, beyond dispute.

The approach taken above is clearly more in accordance with the minority view of Gageler J in *Pompano*⁴⁵² than with the plurality view.⁴⁵³ But the task of the INSLM is not the otiose assessment that the NSI Act is constitutionally valid, but rather to report on its effectiveness, appropriateness and necessity. Against those measures, and particularly the second, in light of international obligations, in the view of the INSLM the NSI Act, properly understood, passes muster.

VII.10 Admissibility under the *Evidence Act 1995* (Cth)

An important parallel with the possible effect of orders under sec 31 of the NSI Act is to be seen in sec 130 (and sec 134) of the *Evidence Act 1995* (Cth) (“**Evidence Act**”). The “matters of state” in relation to which “the public interest” may be engaged⁴⁵⁴ include those in which adducing the material in question “would...prejudice the security, defence or international relations of Australia”.⁴⁵⁵ Without doubt, this encompasses all counter-terrorism matters.

One difference between these Evidence Act provisions and the NSI Act is that, in the limited respect discussed above, the NSI Act not merely prevents but in certain circumstances would permit the admission (without full disclosure) of material adverse to an accused.⁴⁵⁶

A similarity as a matter of principle between these Evidence Act provisions and the NSI Act is that each explicitly refers to the constitutionally necessary capacity of the court in question to act to secure a fair trial. In relation to sec 130 of the Evidence Act, which is concerned only

⁴⁵² [2013] HCA 7 at [209]

⁴⁵³ eg [2013] HCA 7 at [166]

⁴⁵⁴ subsec 130(1) of the Evidence Act

⁴⁵⁵ para 130(4)(a) of the Evidence Act

⁴⁵⁶ cf *Pompano* [2013] HCA 7 at [148], [204]

with the possibility that impliedly otherwise relevant evidence “not be adduced as evidence”,⁴⁵⁷ this recommendation is found in para 130(5)(f) raising the question whether a direction that material not be adduced as evidence “is to be made subject to the condition that the prosecution be stayed”. In the opinion of the INSLM the concurrent operation of the NSI Act and these Evidence Act provisions in terrorism trials, both being quite specifically addressed to proceedings and fair trial values, it can be expected that the appropriateness of a stay of a prosecution will also be raised by, say, a decision under subsec 31(2) of the NSI Act prohibiting disclosure (including by tender) of certain information.

This expectation is supported by the approach taken under sec 130 of the Evidence Act in *Lappas*.⁴⁵⁸

VII.11 Flexible response to threatened unfairness

The all or nothing choice that, in some cases, may result from consideration of threatened unfairness from the adducing of secret evidence is, on any reasonable view, a most unfortunate position in the administration of criminal justice. As noted above, a strength or virtue of the NSI Act is its attempt to improve the position from an invidious governmental choice between conviction and punishment of a wrongdoer and damage to the public interest by revelation of properly secret information. It is in the nature of offences involving national security, including those where evidence of guilt has been obtained by methods and connexions which must remain secret in the public interest, that some such choice cannot be eliminated in all cases. It remains true that the attempt by the NSI Act to reduce the number of those cases is in the public interest.

For the reasons discussed above, certain rulings under the NSI Act could result in the prosecution or the trial court of its own motion regarding continuation of the case unfair, so that charges are withdrawn or proceedings are stayed. That is, undoubtedly, in the public interest and in accordance with fundamental tenets governing the professional and ethical administration of criminal justice. Is it, however, too blunt an instrument?

The terms, if not in all respects the application, of the United States *Classified Information Procedures Act* may be usefully instructive as to means by which greater flexibility could be employed to reduce the occasions when the undesirable need to stay otherwise well justified prosecutions of serious wrongdoing may arise. In particular, the provisions quoted below

⁴⁵⁷ subsec 130(1) of the Evidence Act

⁴⁵⁸ [2001] ACTSC 115

suggest a possibility of improving the NSI Act by increasing the armoury of trial judges to make orders that both permit prosecutions of alleged terrorists to continue to a conclusion and also observe fair trial values.

The “classified information” addressed by this American legislation largely includes material which would fall within the NSI Act.⁴⁵⁹ The terms of and assumptions underlying the American legislation reflect an accusatorial criminal trial process very similar to Australia’s, sharing as it does the same distant historical roots. Such divergence as more recently appears between the different national systems, to a degree explicable by federal constitutional differences, are not such as to reduce the attractiveness of the methods designed to achieve a fair trial manifest in the American provisions (ie a fair trial, in preference to fairness requiring there be no trial).

It could be that an appropriate criterion to judge in Australian terms, whether an order under the NSI Act would have “a substantial adverse effect on the defendant’s right to receive a fair hearing” could be supplied by an added phrase borrowed from the American legislation, as highlighted below:-

Section 6

...

(c) Alternative Procedure for Disclosure of Classified Information.—

- (1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—
 - (A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or
 - (B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. The court shall hold a hearing on any motion under this section. Any such hearing shall be held in camera at the request of the Attorney General.

⁴⁵⁹ sec 1 of the *Classified Information Procedures Act*

(2) The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

In the opinion of the INSLM, the American legislation is markedly superior to the NSI Act in the power it provides to a court to refrain from halting criminal proceedings, if something less drastic than that course can accommodate the duty of fairness and the public interest of prosecuting serious crimes. Thus:-

Section 6

(e) Prohibition on Disclosure of Classified Information by Defendant, Relief for Defendant When United States Opposes Disclosure.—

- (1) Whenever the court denies a motion by the United States that it issue an order under subsection (c) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.
- (2) Whenever a defendant is prevented by an order under paragraph (1) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to—
 - (A) dismissing specified counts of the indictment or information;
 - (B) finding against the United States on any issue as to which the excluded classified information relates; or
 - (C) striking or precluding all or part of the testimony of a witness.

An order under this paragraph shall not take effect until the court has afforded the United States an opportunity to appeal such order under section 7, and thereafter to withdraw its objection to the disclosure of the classified information at issue.

It is also instructive to observe the American explicitness in requiring what may be called equality of arms considerations by reference to “the interests of fairness”. Thus:-

Section 6

- (f) **Reciprocity.**— Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

Other provisions of the American legislation grant the court, in the opinion of the INSLM, power to shape procedures going beyond those available under the NSI Act, for the beneficial purpose of delaying the point at which a prosecution must be abandoned in the interests of fairness. Thus:-

Section 8

- (a) **Classification Status.**— Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.
- (b) **Precautions by Court.**— The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein, unless the whole ought in fairness be considered.
- (c) **Taking of Testimony.**— During the examination of a witness in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the United States to provide

the court with a proffer of the witness' response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

Recommendation VII/4: Consideration should be given to supplementing sec 31 of the NSI Act by explicitly providing the court with power to make orders adapting prosecution proceedings so as to accommodate fairness without effectively requiring abandonment of the prosecution, along the lines of the particular provisions of the US *Classified Information Procedures Act* discussed in Chapter VII of this Report.

VII.12 Gisting

European, Canadian and United States jurisprudence provide that fair trial and due process rights⁴⁶⁰ require that an individual must be given a meaningful opportunity to participate in their own defence where the interest at stake is the deprivation of their liberty. Further, any intrusion on the right to a fair trial must be minimal and where fairness to the accused can be improved without jeopardizing the State's interests in security, the courts will require all steps to be taken to implement such improvements.⁴⁶¹ This approach, described as the "least restrictive", means analysis and "proportionality balancing".⁴⁶² As noted above, in effect this approach is adopted under the NSI Act.

While limits can be placed on the right to a fair trial, the State cannot take measures that deny the fundamental right to a fair hearing. The NSI Act recognizes this (as does PII).⁴⁶³ Where national security information cannot be disclosed in a way that accords sufficient fairness to

⁴⁶⁰ Interpreting the European Convention on Human Rights, Canadian Charter of Rights and Freedoms, and the Due Process Clause of the Fifth Amendment and the Confrontation Clause in the Sixth Amendment to the US Constitution. These provide useful comparators for the INSLM in assessing the NSI Act's compliance with Art 14 of ICCPR.

⁴⁶¹ see eg *A v UK* (2009) 49 EHRR 29, *Secretary of State v AF (No 3)* [2009] UKHL 28, *Al Rawi v Security Service* [2011] UKSC 34, *Charkaoui v Canada* [2007] 1 S.C.R. 350, *Mathews v Eldridge*, 424 US 319 (1976), *Wilkinson v Austin* 545 US 209 (2005)

⁴⁶² see Profs David Cole and Stephen I. Vladeck "Comparative advantages: secret evidence and 'cleared counsel' in the United States, the United Kingdom and Canada" *Secrecy, National Security and the Vindication of Constitutional Law* (eds) David Cole, Federico Fabbrini & Arianna Vidaschi (2013), pp173-192, esp 182-187

⁴⁶³ sec 130 of the *Evidence Act 1995* (Cth), which codifies the common law PII, directs a court to consider whether, on deciding to direct that information not be adduced as evidence on public interest grounds, the direction should be made subject to the condition that the prosecution be stayed. Under the *Justice and Security Act 2013* (UK), a court cannot compel disclosure of national security sensitive information to a party's special advocate or lawyer, however, where a court has not given permission to the relevant person to withhold national security sensitive material, or has ordered that person to serve a summary of the material, and the relevant person fails to serve the material or summary, the court may make such orders as it sees fit where the material or anything required to be summarized might adversely affect the relevant person's case or support the case of another party to the proceedings, including ordering that the material cannot be relied on in the proceedings (see secs 6 and 8). See also, *Civil Procedure (Amendment No. 5) Rules 2013* (UK) subsec 82.14(9)

the accused, the court retains its discretion to order a stay of proceedings (either permanently or until such time as the secret evidence could be made available to the accused, in the event this was a realistic prospect – which would be unlikely given the nature of such evidence).⁴⁶⁴

The concept of “gisting” requires that a person be given at least the gist of the case against him or her so as to enable him or her to give effective instructions to his or her lawyers.⁴⁶⁵ This concept was developed in the immigration and civil context, not the criminal context. What may be sufficient to enable a fair hearing in these contexts could well be different from what is required in criminal proceedings. As noted above, in a criminal prosecution the accused really should be able to respond to all evidence led by the prosecution. As David Anderson QC, the UK Independent Reviewer of Terrorism Legislation, has concluded in relation to the control order and TPIM régimes, while the requirements of “gisting” and the appointment of special advocates has provided “a substantial degree of fairness to the controlled person...no procedure can be wholly fair in which a participant is enabled neither to hear nor to rebut the detailed evidence against him”.⁴⁶⁶

The INSLM accepts the appropriateness of “gisting” and the related concept of “redaction” of material in criminal proceedings in appropriate circumstances. This is not a novel concept, given the established possibility that in PII proceedings classified information can be redacted to enable disclosure of information. Generally speaking all relevant material information must be disclosed to the accused and the accused’s lawyers.⁴⁶⁷ This is recognized by the Commonwealth Director of Public Prosecutions:-

It is an important part of the criminal justice system that prosecutions be conducted fairly, transparently, and according to the highest ethical standards. It is a long standing tenet of the Australian criminal justice system that an accused person is entitled to

⁴⁶⁴ sec 19 of the NSI Act preserves the general powers of a court. See also the decisions in *Lappas* (where a permanent stay of proceedings was ordered on the grounds material evidence couldn’t be shown to the accused) and *Pompano* (for a discussion of the use of secret evidence and Chapter III issues).

⁴⁶⁵ The use of “gisting” techniques has been adopted in the immigration context by a number of countries (Canada, UK, NZ), in relation to control orders and TPIMs in the UK and now in relation to civil proceedings generally in the UK under the *Justice and Security Act 2013* (UK).

⁴⁶⁶ David Anderson QC, Independent Reviewer of Terrorism Legislation, *Final Report of the Independent Reviewer on the Prevention of Terrorism Act 2005* (March 2012) p6

⁴⁶⁷ See *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1 where the Court recognized at [60] that the fundamental aspect of the right to a fair trial requires that criminal proceedings, including procedural requirements in those proceedings, “should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition Article 6(1) requires...that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused”.

know the case that is to be made against him or her, so that accused person is able to properly defend the charges, an accused person is entitled to know the evidence that is to be brought in support of the charges as part of the Crown case, and also whether there is any other material which may be relevant to the defence of the charges.⁴⁶⁸

However, the courts have recognized that “circumstances may arise in which material held by the prosecution and tending to undermine the prosecution or assist the defence cannot be disclosed to the defence, fully or even at all, without the risk of serious prejudice to an important public interest.”⁴⁶⁹ It is for the court to determine whether non-disclosure of the material evidence (or disclosure in a redacted or summary form) would cause a forensic disadvantage to the accused.

VII.13 Special advocates

The INSLM has given consideration to whether special advocates would improve the fairness of the NSI Act. The question of whether special advocates should be introduced as a component of the NSI Act régime arises most acutely in relation to closed hearings required by subsecs 27(3) or 28(5).⁴⁷⁰ These hearings are voir dire hearings to determine whether or not information must be disclosed (and if so, in what form) or why a witness should not be called to give evidence. While the defendant and their lawyers must be given the opportunity to make submissions to the court about the prosecutor’s non-disclosure argument⁴⁷¹ their ability to be meaningfully heard on why the information sought to be redacted or summarized should be put to the jury is hindered by subsec 29(3) of the NSI Act. This provides that the court may order that the defendant or their lawyers must not be present during any part of the hearing in which the prosecutor or Attorney-General’s representative gives details of the

⁴⁶⁸ *Introduction to the Commonwealth Director of Public Prosecutions Statement on Prosecution Disclosure*. The Statement sets out the CDPP’s disclosure obligations, detailing the prosecution’s duty to disclose to the defence not only material which the prosecution intends to use to prove its case, but also disclosure of any other material gathered in the course of the investigation which may be of assistance to the defence. The Statement specifically notes that there are exceptions to the disclosure rules, including where material is immune from disclosure on public interest grounds (where a successful PII claim has been made) or where the prosecution must comply with the NSI Act in disclosing national security information.

⁴⁶⁹ *R v H and C* [2004] UKHL 3 (5 February 2004) per Lord Bingham of Cornhill, Lord Woolf, Lord Hope of Craighead, Lord Walker of Gestingthorpe and Lord Carswell at [18]. The Court found that something less than full disclosure “may be justified but such derogation must always be the minimum derogation necessary to protect the public interest in question and must never imperil the overall fairness of the trial.” [18]

⁴⁷⁰ The INSLM respectfully disagrees with his Honour’s findings in *Lodhi* that subsec 29(2) is drafted sufficiently broadly so as to allow a special defence counsel (special advocate) to take part in a hearing required under subsec 27(3) or 28(5). The INSLM does not consider that such special counsel could be considered “any legal representative of the defendant” within the meaning of para 29(2)(e) and therefore would not be a person who may be present at such a hearing. The introduction of special advocates for these hearings would require legislative amendment to the list of permitted persons who may be present.

⁴⁷¹ subsec 29(4) of the NSI Act

information or gives information in arguing why the information should not be disclosed or the witness should not be called to give evidence.⁴⁷²

It is important to note that this discretionary power to exclude defendants and their lawyers only applies where the information will be disclosed and the disclosure would be likely to prejudice national security. PII claims have a long tradition of being successfully argued (in both open and closed court) with defence lawyers present. In this context, lawyers for both sides and the court have adopted measures to avoid the disclosure of the secret information without the need to prevent lawyers' access to the PII hearing altogether. The INSLM sees no reason why such a practical approach would not continue to be applied to proceedings under the NSI Act as a way of preventing the information from being disclosed during the hearing and thus satisfying the court that the information would not be disclosed to the defendant or uncleared lawyer, obviating the need to order they not be present during the hearing.

On the appointment of special counsel, the INSLM agrees with the observations of Lord Bingham in *R v H and C*:-

Such an appointment does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. While not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done. The appointment is also likely to cause practical problems: of delay, while the special counsel familiarises himself with the detail of what is likely to be a complex case; of expense, since the introduction of an additional, high-quality advocate must add significantly to the cost of the case; and of continuing review, since it will not be easy for a special counsel to assist the court in its continuing duty to review disclosure, unless the special counsel is present throughout or is instructed from time to time when need arises. Defendants facing serious charges frequently have little inclination to co-operate in a process likely to culminate in their conviction, and any new procedure can offer opportunities capable of exploitation to obstruct and delay. None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should

⁴⁷² The court may order this where information, the subject of a non-disclosure or witness exclusion order, would be disclosed to the defendant, or any legal representative of the defendant who doesn't hold the required level of security clearance, and that the disclosure would be likely to prejudice national security.

not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant.⁴⁷³

Discussions with the Attorney-General's Department and portfolio agencies revealed little appetite for special advocates, primarily due to the strength of the NSI Act processes for providing access to secret information compared to the immigration and civil contexts in which special advocates are used internationally.⁴⁷⁴

It is a fallacy to suggest a special advocate could represent the accused. The special advocate would be there to assist the court in determining issues related to the disclosure of national security information, specifically, whether the information should be disclosed and in what form (presenting arguments for example that the information is unlikely to prejudice national security or on its importance to the defence). However, the INSLM does not believe that a special advocate can provide the court with assistance to an extent that would remedy the fair trial issues that would arise where a defendant's lawyer was excluded from the court during argument over whether potentially critical and exculpatory evidence should be adduced in a criminal proceeding.⁴⁷⁵ Seen in light of the safeguards in the NSI Act, and given the fundamental problems associated with using special advocates to overcome fair trial deficiencies in criminal proceedings, the INSLM does not recommend the introduction of special advocates to the NSI Act régime.

Not least because of the COAG Report recommendation to opposite effect, the INSLM certainly does not suggest some expedient or technique of the kind attempted by the appointment of special advocates should not remain of active interest to those minded to improve the NSI Act. To the contrary, rather, the position so far as the INSLM sees it at present is that there does not appear to be sufficient improvement to the NSI Act, understood

⁴⁷³ [2004] UKHL 3 at [22].

⁴⁷⁴ *Attorney-General's Department Response to Question on Notice from the INSLM*, 12th September 2013

⁴⁷⁵ In *Harkat* (2004) 125 C.R.R. (2d) 319, the Federal Court of Canada held that a judge had sufficient power and flexibility to protect the rights of a person when reviewing the reasonableness of an immigration security certificate (affecting their right to remain in Canada) without the need to appoint an amicus. The court held that while the appointment of an officer to appear before the judge and point out possible weaknesses or inadequacies in the certificate had merit, the court held that on balance it would not be advisable to adopt such a mechanism. Central to the court's reasoning was that the adversarial element afforded by such a procedure may be rather artificial and would make the whole process of reviewing security certificates unduly complex. The court didn't consider the appointment of an amicus to be necessary to ensure a fair hearing and the court could properly exercise its jurisdiction without the appointment of an amicus. The court held that an experienced judge is capable of giving consideration to all relevant matters without the assistance of an amicus.

as discussed above, by imposing one or other of the current special advocate models available by examples in other jurisdictions.⁴⁷⁶

A not unimportant factor, in a country with a population as small as Australia's, notwithstanding our generous self-endowment with lawyers, is that a cadre of skilled special advocates would represent not only an expense to the public purse but, more importantly for the administration of criminal justice, a likely diminution in the availability of counsel for both prosecution and defence in terrorist proceedings.

Whether the defendant's lawyers are present at the hearing or not, and regardless whether there are special advocates, it is and would remain the rôle of the prosecution to assist the court on issues of fairness arising under subsec 31(7) of the NSI Act. Reassuringly, officers of the Commonwealth Director of Public Prosecutions confirmed that this has been done in the past and will continue to be done in the future.

VII.14 Sanctioning of non-compliance

It is slightly disconcerting to observe that non-compliance by the Attorney-General's representative with one of the steps in the elaborate notification and advice system under the NSI Act uniquely attracts no criminal penalty. Other participants, including prosecutors, commit an offence by relevant non-compliance. Indeed, the prosecution is specifically liable for an offence under sec 42 of the NSI Act for breach of subsec 25(6) (requiring notice to the court and the Attorney-General of a witness's disclosure of NSI), whereas non-compliance by the Attorney-General's representative (not being a legal representative) with an identical obligation attracts no criminal sanction.

The INSLM is not troubled by the absence of a criminal sanction in itself, but does find the disparate treatment to be unjustified.

It is, as a matter of general policy, a very dubious proposition that the public interest requires a criminal sanction on legal professionals or officers of the Commonwealth, all of whom are subject to stringent disciplinary governance, in cases of simple non-compliance with these

⁴⁷⁶ cf the views expressed in *Pompano*. Hayne, Crennan, Kiefel & Bell JJ at [110]-[112] expressed doubts about the significance of a special advocate (in this case, a Criminal Organisation Public Interest Monitor or "COPIM") from the point of view of procedural fairness. French CJ was cautiously optimistic about the ability of the COPIM to provide some degree of procedural fairness [65], [77] and Gageler J noted that a special advocate may assist from a fairness point of view, although "it cannot cure a want of procedural fairness" [208].

notification and advice provisions of the NSI Act. This is particularly so given the elements of judgement involved in the imposition of these statutory obligations, in the first place.

Recommendation VII/5: The criminal sanctions under Div 2 of Part 3 of the NSI Act should be rendered consistently applicable to all participants including the Attorney-General's representatives, or consistently non-applicable.

VII.15 Australia's secrecy obligations under treaties

As noted above, the salient feature of the NSI Act in actual operation has been the resort by participants in terrorist trials to the making of sec 22 agreements. As also noted above, this approach effectively avoids the application of onerous prescriptions concerning the protection of NSI, as well as the disruption and discretions involved in a sec 31 hearing. And it is proper to observe, again, that the experience and investigations of the INSLM strongly indicate the practical efficacy of sec 22 agreements in achieving workable reconciliation of justified secrecy and requisite fairness.

Unfortunately, particularly given the lack of security clearance of many of the legal practitioners party to, or affected by, these sec 22 agreements, there is a real possibility that (no doubt unwittingly) Australian authorities have dealt with some material pursuant to sec 22 agreements that required to be treated quite differently under applicable treaty obligations owed by Australia, principally to the US.

The INSLM's functions do include reporting on Australia's observance of its applicable treaty obligations in relation to this aspect of the CT Laws. However, in context and as a matter of due proportion, it is not considered necessary for chapter and verse to be set out as to these possible (not proved) breaches.

The significance of the matter lies in the demonstrated need for these treaty obligations explicitly to be regarded when making and implementing the terms of sec 22 agreements.⁴⁷⁷ Provisions of applicable treaties are illustrated in **Appendix N**.

VII.16 Broader application of the NSI Act

The INSLM's review of the NSI Act has naturally focussed on its deployment in counter-terrorism. The NSI Act, of course, has broader application than the national security concerns and the related criminal law which constitute counter-terrorism.

Counter-terrorism is, notoriously, not an exclusive province of Commonwealth legislative power (subject to the operation of sec 109 of the Constitution). Counter-terrorism activities in Australia are obviously and beneficially conducted with liaison between Commonwealth, State and Territory authorities and agencies. And, tellingly, the "autochthonous expedient" enlists State courts in the prosecution of Commonwealth terrorist offences.

There is further overlap than these institutional aspects. All the conduct, or virtually so, criminalized by terrorist offences would be punishable, and often seriously so, as offences against what might be called ordinary criminal legislation of the States (or Territories). It follows that the prosecution of a State offence can readily be imagined to involve the possible disclosure of, or tender of, material of the kind sought to be regulated as to its disclosure by the NSI Act.

A similar overlap, but within the same polity, occurs with the non-judicial tribunals of the Commonwealth some of whom already are explicitly regulated concerning their dealing with material of the kind covered by the NSI Act.⁴⁷⁸

⁴⁷⁷ The Attorney-General's Department agreed that the operation of the NSI Act will not relieve Australia of its obligations under information sharing treaties to protect information received from another country in accordance with the terms of the relevant treaty. The Attorney-General's Department agreed that Australia's treaty with the US (*Agreement between the Government of Australia and the Government of the United States of America Concerning Security Measures for the Protection of Classified Information*, [2002] ATS 25, entry into force 7th November 2002), prohibits Australia from using classified information received from the US for a purpose other than that for which it was provided unless prior written authorization has been received from the US (Art 4(C)) and that Art 4 also prohibits Australia from granting access to the classified information to anyone who does not hold a security clearance. *Attorney-General's Department Response to Question on Notice from the INSLM*, 12th September 2013. If the NSI Act is applied in a manner consistent with the requirements of the treaty, Australia will not breach its treaty obligations, however, this is not guaranteed. For example, sec 22 agreements can remove the need for a security clearance for those persons accessing classified information and there is no requirement for permission to be granted from the US before decisions affecting the disclosure of national security information under the NSI Act are made.

⁴⁷⁸ eg Div 4 (Hearings and evidence) of the *Administrative Appeals Tribunal Act 1975* (Cth)

If, as suggested by the overall assessment of the INSLM, the NSI Act is an appropriate approach to the important matters it deals with, of their nature they should be regulated by its terms in all relevant forums. Particularly, the NSI Act provisions should be made to apply to State criminal proceedings where information of the national significance covered by the NSI Act is involved. (Constitutional power for the Commonwealth Parliament so to provide is not likely to be deficient.) All Commonwealth tribunals, not only those exercising judicial power in federal criminal proceedings or civil proceedings (ie courts), should be part of a scheme with the NSI Act as the framework.

Recommendation VII/6: The NSI Act should be amended so to apply its provisions, with appropriate adaptations (including in relation to appeals), to proceedings in all courts, and in all Commonwealth tribunals. Consideration should be given to special provision in this regard for State coronial proceedings.

APPENDIX A

LIST OF RECOMMENDATIONS

CHAPTER III

Recommendation III/1: Part 4 of the UN Charter Act should be amended to include a specific offence of supplying arms or related matériel to a designated person or entity.

Recommendation III/2: Section 14 of the UN Charter Act should be amended to include persons listed under 1267 and its successor Resolutions in the definition of “proscribed person or entity”. Alternatively, sec 15 should be amended so that the Minister is not required to list a person or entity if that person or entity is already listed under 1267 and its successor Resolutions and regulations implementing sanctions under Part 3 of the UN Charter Act are in force in relation to that person or entity.

Recommendation III/3: Because Australia will continue to perform its Charter obligation to implement UN Security Council sanctions regulations, there should also be a continued responsibility to promote real improvement in the listing and de-listing processes of the 1267 Committee.

Recommendation III/4: The definition of “terrorist act” under sec 100.1 of the Criminal Code should be improved as recommended in the INSLM’s Second Annual Report.¹ Once that is done, it should be adapted to provide the definition of terrorism in the UN Charter Act.

Recommendation III/5: Subsection 15(3) of the UN Charter Act and Regulation 20(2) of the *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Cth) should be amended to provide that the Minister must list an asset or class of asset if satisfied on reasonable grounds of the prescribed matters.²

¹ Recommendations VI/1, VI/2 and VI/3

² By replacing the word “may” with “must” in both the Act and Regulations.

Recommendation III/6: DFAT office procedures should be corrected to enable retrieval and examination of administrative dealings concerning applications to review the listing of persons, entities and assets under the UN Charter Act – in accordance with usual and proper standards of official record keeping.

Recommendation III/7: Where the Minister for Foreign Affairs and Trade declines to revoke a listing in response to an application made under sec 17 of the UN Charter Act, he or she should provide an applicant with an unclassified statement of reasons for the decision.³

Recommendation III/8: The maximum period of imprisonment for offences under subsec 20(1) (dealing with freezable assets) and subsec 21(1) (giving an asset to a proscribed person or entity) of the UN Charter Act should be increased to 15 years.

Recommendation III/9: Section 20 (dealing with freezable assets) and sec 21 (giving an asset to a proscribed person or entity) of the UN Charter Act should be amended to include an offence with the mental element of knowledge that the person, entity or asset is listed. The maximum period of imprisonment for each of these offences should be 25 years. (As noted above, for the sake of schematic order, a corresponding amendment should be considered for sec 27 of the UN Charter Act (contravening a UN sanction enforcement law)).

Recommendation III/10: Sections 20 and 21 (and sec 27, for the sake of schematic order) of the UN Charter Act should be amended to stipulate that the mental element for the asset being freezable, the person or entity being proscribed or the conduct contravening a UN sanction enforcement law is in each case recklessness notwithstanding sec 9.4 of the Criminal Code.

Recommendation III/11: The Minister's discretionary power under subsec 16(1) of the UN Charter Act to revoke a listing where the statutory basis for listing is no longer satisfied should

³ This would be required to be provided by the Minister where a person sought judicial review of a Minister's listing decision under sec 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Where a person is entitled to make an application under sec 5 in relation to the decision they may, by notice in writing given to the Minister, request him or her to furnish a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision (subsec 13(1)). The Minister must provide this statement within 28 days (subsec 13(2)). While there are some classes of decisions under Schedule 2 that are not decisions to which sec 13 applies, decisions under Part 4 of the UN Charter Act are not such a class.

be repealed and replaced with a mandatory requirement that the Minister revoke a listing where the statutory basis for listing is no longer satisfied.⁴

Recommendation III/12: Subsection 17(1) of the UN Charter Act should be amended to provide open standing for any person to apply to the Minister to have a listing revoked.⁵

Recommendation III/13: Subsection 17(3) of the UN Charter Act should be repealed and replaced with a provision that where subsequent revocation applications are made by the same person or entity, the Minister need only consider any relevant new material in support of the applicant's grounds that there is no basis for the Minister to be satisfied of the listing decision.⁶

⁴ It is unclear why this is expressed as a discretionary power, rather than a mandatory requirement to revoke a listing where the statutory basis for listing is no longer satisfied. A listing can only be made where the Minister is satisfied on reasonable grounds of the prescribed matters (subsecs 15(1) and (3) of the UN Charter Act). Subsection 15(5) of the UN Charter Act provides that a matter must not be prescribed unless the prescription of that matter would give effect to a decision of the UN Security Council (a decision which forms the basis for a revocation of listing under subsec 16(1) of the UN Charter Act). It would seem open to challenge the validity of a listing that has not been revoked in circumstances where the Minister is satisfied that it is no longer required to give effect to a UN Security Council decision.

This de-listing process contrasts with the approach taken for de-listing terrorist organisations under the Criminal Code. Before the Governor-General can make a regulation specifying an organisation for the purposes of para (b) of the definition of "terrorist organisation" under subsec 102.1(1) of the Criminal Code, the Attorney-General must, in accordance with subsec 102.1(2), 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)". If an organisation is specified by regulations made under sec 102.1 and the Attorney-General ceases to be satisfied of the prerequisite grounds for making the regulations set out in subsec 102.1(2), then the Attorney-General must make a written declaration that effect and the regulations specifying the organisation as a terrorist organisation cease to have effect when the declaration is made (subsec 102.1(4)).

⁵ The restriction of standing to listed persons or entities is more restrictive than the de-listing provisions under the Criminal Code. Subsection 102.1(17) of the Criminal Code provides open standing for an individual or organisation (which may or may not be the listed terrorist organisation) to make a de-listing application to the Attorney-General on the grounds that there is no basis for the Attorney-General to be satisfied of the prerequisite grounds for making the regulations set out in subsec 102.1(2) of the Criminal Code. The Attorney-General is required to consider all de-listing applications (subsec 102.1(17) of the Criminal Code).

⁶ Pursuant to subsec 17(3) of the UN Charter Act, the Minister is not required to consider more than one application from a listed person or entity per year. This is more restrictive than the de-listing process under the Criminal Code which requires the Attorney-General to consider all de-listing applications, regardless of how recently an application for de-listing was made by that individual or organisation (subsec 102.1(17) of the Criminal Code). The Attorney-General must consider the de-listing application (subsec 102.1(17)). There is no limit to the amount of applications that can be made each year. There is no evidence that this provision is being used in a manner inconsistent with its purpose, that is, it is not being misused through the making of multiple applications which do not contain relevant new material. In any event, where the Attorney-General had recently dealt with an application, he or she would only need to consider any relevant new material in support of grounds that there is no basis for the Minister being satisfied of the grounds for listing.

Recommendation III/14: Extended geographical jurisdiction (category D) should be applied to all offences under Part 4 of the UN Charter Act.⁷ It is unclear why category D extended geographical jurisdiction (the furthestmost extension of jurisdiction that can be applied to a law of the Commonwealth) is applied to the Criminal Code terrorism financing offences (as a wholehearted implementation of 1373⁸) but category A is applied to the terrorism financing offences under Part 4 of the UN Charter Act.⁹

Recommendation III/15: ASIO's questioning powers should be amended to include offences against Part 3 insofar as it relates to terrorism, and Part 4 of the UN Charter Act.¹⁰

Recommendation III/16 Paragraph 15AA(2)(a) of the Crimes Act should be amended to include offences against Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act, as offences to which subsection 15AA applies.¹¹

Recommendation III/17 Subsection 19AG(1) of the Crimes Act should be amended to include offences against Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act, as minimum non-parole offences.¹²

Recommendation III/18 Offences against Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act, should be defined as terrorism offences for the purpose of Div 3A of Part IAA of the Crimes Act.¹³

⁷ Subsec 20(4) of the UN Charter Act currently applies sec 15.1 of the Criminal Code to an offence against subsec 20(1) or (3C) of the UN Charter Act. Subsection 21(3) of the UN Charter Act applies sec 15.1 of the Criminal Code to an offence against subsec 21(1) or (2C). Subsections 20(4) and 21(3) should be amended to apply sec 15.4 of the Criminal Code. See also discussion in Chapter VI.1.

⁸ See eg para 1(e) of 1373 which requires States to "[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures taken against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts".

⁹ While both category A and D extend jurisdiction beyond the "standard geographical jurisdiction" provided for in sec 14.1 of the Criminal Code, the extended geographical jurisdiction (category A) that applies to the offences under Part 4 of the UN Charter Act is more limited than the category D extended geographical jurisdiction that applies to the Criminal Code offences. See also discussion in Chapter VI.1.

¹⁰ The position of the INSLM remains that these powers should be amended by omitting the specific régime of questioning and detention warrants, in accordance with Recommendation V/1 in the INSLM's Second Annual Report. Part 3 of the UN Charter Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹¹ Part 3 of the UN Charter Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹² Part 3 of the UN Charter Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹³ Part 3 of the UN Charter Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

Recommendation III/19 Offences against Part 3 of the UN Charter Act insofar as it relates to terrorism, and Part 4 of the UN Charter Act, should be defined as terrorism offences for the purpose of Part IC of the Crimes Act.¹⁴

CHAPTER IV

Recommendation IV/1: As soon as the Attorney-General ceases to be satisfied that an organisation meets the statutory criteria for proscription under the Criminal Code, the Attorney-General must make a written declaration to that effect as soon as practical. Such a decision should be capable of being taken without consultation with the States and Territories, with any consultation taking place on a case by case basis and only where there is a demonstrated need to consult in order for the Attorney-General to determine whether to make such a declaration. Any such consultation must not unduly delay the Attorney-General's decision. The Commonwealth should inform the other parties to the IGA that the Criminal Code requires the Attorney-General to proceed in this way, and that the IGA either does not contain any contrary provision on its proper interpretation, or is incapable of altering the legal position if it purported to do so.

Recommendation IV/2: When proscribing an eligible organisation under the Criminal Code as a "terrorist organisation", the entire organisation should be proscribed and not just its "military wing". It follows that the ESO and Brigades listings should be revoked and replaced, if the facts continue to support the current reasons for them, by listings of Hizballah and Hamas.¹⁵

Recommendation IV/3: Section 103.2 of the Criminal Code should be repealed.

CHAPTER V

Recommendation V/1: The exceptions in paras 102.8(4)(a) and (b) of the Criminal Code from the offence of associating with terrorist organisations, concerned with close family associations and public religious associations, should be repealed.

Recommendation V/2: Section 21 of the UN Charter Act, sec 9 of the *Charter of the United Nations (Sanctions-the Taliban) Regulation 2013* (Cth), reg 10 of the *Charter of the United*

¹⁴ Part 3 of the UN Charter Act being a related law for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹⁵ Hence, consideration should be given under para (b) of the definition of "terrorist organisation" in subsec 102.1(1) of the Criminal Code, and under subsecs 102.1(2) and (2A) of the Criminal Code to new regulations to replace regs 4Q and 4U of the *Criminal Code Regulations 2002* (Cth)

Nations (Sanctions-Al-Qaida) Regulations 2008 (Cth)¹⁶ and secs 102.5, 102.6, 102.7 and 102.8¹⁷ of the Criminal Code should be amended to include an exception for activities that are humanitarian in character and are conducted by or in association with the ICRC, the UN or its agencies, or (perhaps) agencies of like character designated by a Minister.¹⁸

CHAPTER VII

Recommendation VII/1: The Attorney-General in case of a defence notice and persons advised that a defence notice has been given to the Attorney-General under sec 24 of the NSI Act should be prevented, except with leave of the court, or consent of the defence, from disclosing the description of the national security information referred to in the notice, to the prosecution, directly or indirectly.¹⁹

Recommendation VII/2: The phrase “having regard to the Attorney-General’s certificate” should be omitted from the opening lines of subsec 31(7) of the NSI Act.

Recommendation VII/3: Subsection 31(8) of the NSI Act should be repealed.

Recommendation VII/4: Consideration should be given to supplementing sec 31 of the NSI Act by explicitly providing the court with power to make orders adapting prosecution proceedings so as to accommodate fairness without effectively requiring abandonment of the prosecution, along the lines of the particular provisions of the US *Classified Information Procedures Act* discussed in Chapter VII of this Report.

Recommendation VII/5: The criminal sanctions under Div 2 of Part 3 of the NSI Act should be rendered consistently applicable to all participants including the Attorney-General’s representatives, or consistently non-applicable.

Recommendation VII/6: The NSI Act should be amended so to apply its provisions, with appropriate adaptations (including in relation to appeals), to proceedings in all courts, and in all Commonwealth tribunals. Consideration should be given to special provision in this regard for State coronial proceedings.

¹⁶ The *Charter of the United Nations (Sanctions-the Taliban) Regulation 2013* (Cth) and the *Charter of the United Nations (Sanctions-Al-Qaida) Regulations 2008* (Cth) being related laws for the purposes of subpara 6(1)(a)(ii) of the INSLM Act.

¹⁷ Thus the existing exception in para 102.8(4)(c) should be amended by an appropriate qualification.

¹⁸ eg Médecins Sans Frontières

¹⁹ Hence subsec 24(3) of the NSI Act should be amended or supplemented to impose such restrictions on the Attorney-General and persons mentioned in paras 24(1)(b) and (c). The further question may arise of sanctions for non-compliance, as for which see VII.14 below.

APPENDIX B

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APPENDIX C

CONSULTATIONS AND SUBMISSIONS

This year, the INSLM held hearings under subsec 21(1) of the INSLM Act for the purposes of reviewing the provisions of the NSI Act, as well as Australia's terrorism financing legislation as contained in the Criminal Code and UN Charter Act. This included consideration of the proscription and listing processes under the Criminal Code and UN Charter Act.

The INSLM may direct that any hearings under subsec 21(1) are to be held in private and must give such a direction for any time during which a person is giving evidence that discloses operationally sensitive information. All hearings held this year with Australian Government officials were conducted in private. Witnesses were summoned under subsec 22(1) of the INSLM Act to attend and give evidence at the hearings. In accordance with subsec 21(4) of the INSLM Act, a record was made of each hearing. The INSLM also held two public hearings with members of civil society and academia, details of which are available on the INSLM's website.

The INSLM issued written notices under subsec 24(2) of the INSLM Act for the production of documents and information from Australian Government agencies. A number of agencies also made written submissions to the INSLM.

The INSLM advertised for public submissions and placed information about the review on the INSLM's website. The INSLM wrote to Federal, State and Territory Governments, academics, civil society, solicitors and counsel inviting their views as part of the review process. The INSLM received 10 written submissions from civil society and academia.

Agencies and persons consulted

Australian Government

Attorney-General's Department
Australian Crime Commission
Australian Federal Police
Australian Government Solicitor
Australian Security Intelligence Organisation
Australian Transaction Reports and Analysis Centre
Commonwealth Director of Public Prosecutions
Department of Foreign Affairs and Trade
Office of National Assessments

Non-Government

Mr Kevin Armstrong, Victorian Bar
Mr Phillip Boulten SC, President of the New South Wales Bar Association
Ms Rosemary Budavari, Law Council of Australia
A/Prof Greg Carne, University of Western Australia
Ms Gillian Davy, Western Suburbs Legal Service
Judge Mark Dean SC
Mr Bahoz Deger, Kurdish community member
Dr Patrick Emerton, Castan Centre for Human Rights Law, Monash University
Mr Scott Johns, Victorian Bar
Mr Mahmut Kahraman, Kurdish community member
Ms Nicola McGarrity, Gilbert + Tobin Centre of Public Law, UNSW
Dr David Neal SC, Victorian Bar
Mr Michael O'Connell SC, Victorian Bar
Mr Deniz Ozer, Kurdish community member
Mr Nick Papas SC, Victorian Bar
Mr Robert Stary, Robert Stary Lawyers
Mr Ben Schokman, Human Rights Law Centre
Ms Fiona Todd, Victorian Bar
Mr Mrza Ulus, Kurdish community member

Events attended by the INSLM and the Office of the INSLM

Attendee, Constitutional Law Conference, Gilbert + Tobin Centre of Public Law, UNSW, 15th February 2013

Presenter, *Historical and current tensions between the administration of criminal justice and preventive detention measures*, delivered at the Australian Research Council Centre of Excellence in Policing and Security 2013 Human Rights and Policing Conference, 17th April 2013

Attendee, Australian Red Cross seminar, *Issues in International Humanitarian Law*, 18th May 2013

Attendee, Australian Red Cross seminar, *International Legal Frameworks for Humanitarians*, 13th-14th June 2013

Attendee, Australian and New Zealand Society of International Law Annual Conference, *Accountability and International Law*, 4th-6th July 2013

Commentator, NSW Bar Association Seminar, *Obama's Global Legal Strategy*, presented by Prof Harold Hongju Koh and chaired by Mr Tim Game SC, 11th July 2013

Discussant, Centre for Military and Security Law Workshop, *International Humanitarian Law, Anti-Terrorism Laws and Non-State Actors*, Australian National University, 2nd August 2013

Attendee, Kokoda Foundation Sydney Seminar Series, *The U.S. - Australia Alliance in National Security*, presented by U.S. Consul General Niels Marquardt, 3rd September 2013

Attendee, Kokoda Foundation 2013 Annual Dinner, *Addressing Divergent Futures in the Asia-Pacific*, 31st October 2013

Public submissions received

Australian Lawyers for Human Rights

Australian Research Council Centre of Excellence in Policing and Security

Dr Tim Legrand and Dr Lee Jarvis

Dr James Renwick SC

Humanist Society of Victoria

Human Rights Law Centre

Law Council of Australia – submission on the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)

Law Council of Australia – submission on Financing Terrorism Offences

Law Society of NSW, Young Lawyers Public Law and Government Committee

Queensland Bar Association

APPENDIX D

INTERNATIONAL CONVENTION FOR THE SUPPRESSION OF THE FINANCING OF TERRORISM

Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999

Preamble

The States Parties to this Convention,

Bearing in mind the purposes and principles of the Charter of the United Nations concerning the maintenance of international peace and security and the promotion of good-neighbourliness and friendly relations and cooperation among States,

Deeply concerned about the worldwide escalation of acts of terrorism in all its forms and manifestations,

Recalling the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, contained in General Assembly resolution 50/6 of 24 October 1995,

Recalling also all the relevant General Assembly resolutions on the matter, including resolution 49/60 of 9 December 1994 and its annex on the Declaration on Measures to Eliminate International Terrorism, in which the States Members of the United Nations solemnly reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States,

Noting that the Declaration on Measures to Eliminate International Terrorism also encouraged States to review urgently the scope of the existing international legal provisions on the prevention, repression and elimination of terrorism in all its forms

and manifestations, with the aim of ensuring that there is a comprehensive legal framework covering all aspects of the matter,

Recalling General Assembly resolution 51/210 of 17 December 1996, paragraph 3, subparagraph (f), in which the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds,

Recalling also General Assembly resolution 52/165 of 15 December 1997, in which the Assembly called upon States to consider, in particular, the implementation of the measures set out in paragraphs 3 (a) to (f) of its resolution 51/210 of 17 December 1996,

Recalling further General Assembly resolution 53/108 of 8 December 1998, in which the Assembly decided that the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 should elaborate a draft international convention for the suppression of terrorist financing to supplement related existing international instruments,

Considering that the financing of terrorism is a matter of grave concern to the international community as a whole,

Noting that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain,

Noting also that existing multilateral legal instruments do not expressly address such financing,

Being convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators,

Have agreed as follows:

Article 1

For the purposes of this Convention:

1. “Funds” means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.
2. “State or governmental facility” means any permanent or temporary facility or conveyance that is used or occupied by representatives of a State, members of Government, the legislature or the judiciary or by officials or employees of a State or any other public authority or entity or by employees or officials of an intergovernmental organization in connection with their official duties.
3. “Proceeds” means any funds derived from or obtained, directly or indirectly, through the commission of an offence set forth in article 2.

Article 2

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 define 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.

2. (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact;
- (b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty.
3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b).
4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.
5. Any person also commits an offence if that person:
 - (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;
 - (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article;
 - (c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or
 - (ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.

Article 3

This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases.

Article 4

Each State Party shall adopt such measures as may be necessary:

- (a) To establish as criminal offences under its domestic law the offences set forth in article 2;
- (b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

Article 5

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.
2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.
3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 above are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

Article 6

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.

Article 7

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:
 - (a) The offence is committed in the territory of that State;
 - (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;
 - (c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:
 - (a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;
 - (b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;
 - (c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;
 - (d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;

- (e) The offence is committed on board an aircraft which is operated by the Government of that State.
3. Upon ratifying, accepting, approving or acceding to this Convention, each State Party shall notify the Secretary-General of the United Nations of the jurisdiction it has established in accordance with paragraph 2. Should any change take place, the State Party concerned shall immediately notify the Secretary-General.
 4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.
 5. When more than one State Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.
 6. Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 8

1. Each State Party shall 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.
2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.
3. Each State Party concerned may give consideration to concluding agreements on the sharing with other States Parties, on a regular or case-by-case basis, of the funds derived from the forfeitures referred to in this article.

4. Each State Party shall consider establishing mechanisms whereby the funds derived from the forfeitures referred to in this article are utilized to compensate the victims of offences referred to in article 2, paragraph 1, subparagraph (a) or (b), or their families.
5. The provisions of this article shall be implemented without prejudice to the rights of third parties acting in good faith.

Article 9

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.
2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.
3. Any person regarding whom the measures referred to in paragraph 2 are being taken shall be entitled to:
 - (a) Communicate without delay with the nearest appropriate representative of the State of which that person is a national or which is otherwise entitled to protect that person's rights or, if that person is a stateless person, the State in the territory of which that person habitually resides;
 - (b) Be visited by a representative of that State;
 - (c) Be informed of that person's rights under subparagraphs (a) and (b).
4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or alleged offender is present, subject to the provision that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. The provisions of paragraphs 3 and 4 shall be without prejudice to the right of any State Party having a claim to jurisdiction in accordance with article 7, paragraph 1, subparagraph (b), or paragraph 2, subparagraph (b), to invite the International Committee of the Red Cross to communicate with and visit the alleged offender.
6. When a State Party, pursuant to the present article, has taken a person into custody, it shall immediately notify, directly or through the Secretary-General of the United Nations, the States Parties which have established jurisdiction in accordance with article 7, paragraph 1 or 2, and, if it considers it advisable, any other interested States Parties, of the fact that such person is in custody and of the circumstances which warrant that person's detention. The State which makes the investigation contemplated in paragraph 1 shall promptly inform the said States Parties of its findings and shall indicate whether it intends to exercise jurisdiction.

Article 10

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.
2. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State to serve the sentence imposed as a result of the trial or proceeding for which the extradition or surrender of the person was sought, and this State and the State seeking the extradition of the person agree with this option and other terms they may deem appropriate, such a conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 1.

Article 11

1. The offences set forth in article 2 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties before the entry into force of this Convention. States Parties undertake to include such offences as

extraditable offences in every extradition treaty to be subsequently concluded between them.

2. When a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in article 2. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 2 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.
4. If necessary, the offences set forth in article 2 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with article 7, paragraphs 1 and 2.
5. The provisions of all extradition treaties and arrangements between States Parties with regard to offences set forth in article 2 shall be deemed to be modified as between States Parties to the extent that they are incompatible with this Convention.

Article 12

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.
2. States Parties may not refuse a request for mutual legal assistance on the ground of bank secrecy.
3. The requesting Party shall not transmit nor use information or evidence furnished by the requested Party for investigations, prosecutions or proceedings other than those stated in the request without the prior consent of the requested Party.

4. Each State Party may give consideration to establishing mechanisms to share with other States Parties information or evidence needed to establish criminal, civil or administrative liability pursuant to article 5.
5. States Parties shall carry out their obligations under paragraphs 1 and 2 in conformity with any treaties or other arrangements on mutual legal assistance or information exchange that may exist between them. In the absence of such treaties or arrangements, States Parties shall afford one another assistance in accordance with their domestic law.

Article 13

None of the offences set forth in article 2 shall be regarded, for the purposes of extradition or mutual legal assistance, as a fiscal offence. Accordingly, States Parties may not refuse a request for extradition or for mutual legal assistance on the sole ground that it concerns a fiscal offence.

Article 14

None of the offences set forth in article 2 shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

Article 15

Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Article 16

1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in article 2 may be transferred if the following conditions are met:
 - (a) The person freely gives his or her informed consent;
 - (b) The competent authorities of both States agree, subject to such conditions as those States may deem appropriate.
2. For the purposes of the present article:
 - (a) The State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;
 - (b) The State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;
 - (c) The State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;
 - (d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.
3. Unless the State Party from which a person is to be transferred in accordance with the present article so agrees, that person, whatever his or her nationality, shall not be prosecuted or detained or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of

acts or convictions anterior to his or her departure from the territory of the State from which such person was transferred.

Article 17

Any person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out pursuant to this Convention shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.

Article 18

1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, inter alia, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:
 - (a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;
 - (b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:
 - (i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;
 - (ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence

and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;

- (iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;
- (iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.

2. States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering:

- (a) Measures for the supervision, including, for example, the licensing, of all money-transmission agencies;
- (b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

3. States Parties shall further cooperate in the prevention of the offences set forth in article 2 by exchanging accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2, in particular by:

- (a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2;
- (b) Cooperating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning:

- (i) The identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences;
- (ii) The movement of funds relating to the commission of such offences.

4. States Parties may exchange information through the International Criminal Police Organization (Interpol).

Article 19

The State Party where the alleged offender is prosecuted shall, in accordance with its domestic law or applicable procedures, communicate the final outcome of the proceedings to the Secretary-General of the United Nations, who shall transmit the information to the other States Parties.

Article 20

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

Article 21

Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes of the Charter of the United Nations, international humanitarian law and other relevant conventions.

Article 22

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction or performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.

Article 23

1. The annex may be amended by the addition of relevant treaties that:
 - (a) Are open to the participation of all States;
 - (b) Have entered into force;
 - (c) Have been ratified, accepted, approved or acceded to by at least twenty-two States Parties to the present Convention.
2. After the entry into force of this Convention, any State Party may propose such an amendment. Any proposal for an amendment shall be communicated to the depositary in written form. The depositary shall notify proposals that meet the requirements of paragraph 1 to all States Parties and seek their views on whether the proposed amendment should be adopted.
3. The proposed amendment shall be deemed adopted unless one third of the States Parties object to it by a written notification not later than 180 days after its circulation.
4. The adopted amendment to the annex shall enter into force 30 days after the deposit of the twenty-second instrument of ratification, acceptance or approval of such amendment for all those States Parties having deposited such an instrument. For each State Party ratifying, accepting or approving the amendment after the deposit of the twenty-second instrument, the amendment shall enter into force on the thirtieth day after deposit by such State Party of its instrument of ratification, acceptance or approval.

Article 24

1. Any dispute between two or more States Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation within a reasonable time shall, at the request of one of them, be submitted to arbitration. If, within six months from the date of the request for arbitration, the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court.

2. Each State may at the time of signature, ratification, acceptance or approval of this Convention or accession thereto declare that it does not consider itself bound by paragraph 1. The other States Parties shall not be bound by paragraph 1 with respect to any State Party which has made such a reservation.
3. Any State which has made a reservation in accordance with paragraph 2 may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 25

1. This Convention shall be open for signature by all States from 10 January 2000 to 31 December 2001 at United Nations Headquarters in New York.
2. This Convention is subject to ratification, acceptance or approval. The instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.
3. This Convention shall be open to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 26

1. This Convention shall enter into force on the thirtieth day following the date of the deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.
2. For each State ratifying, accepting, approving or acceding to the Convention after the deposit of the twenty-second instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 27

1. Any State Party may denounce this Convention by written notification to the Secretary-General of the United Nations.
2. Denunciation shall take effect one year following the date on which notification is received by the Secretary-General of the United Nations.

Article 28

The original of this Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations who shall send certified copies thereof to all States.

IN WITNESS WHEREOF, the undersigned, being duly authorized thereto by their respective Governments, have signed this Convention, opened for signature at United Nations Headquarters in New York on 10 January 2000.

Annex

1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.
5. Convention on the Physical Protection of Nuclear Material, adopted at Vienna on 3 March 1980.
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of

Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.

7. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.
8. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf, done at Rome on 10 March 1988.
9. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.

APPENDIX E

SECURITY COUNCIL COMMITTEE PURSUANT TO RESOLUTIONS 1267 (1999) AND 1989 (2011) CONCERNING AL-QAIDA AND ASSOCIATED INDIVIDUALS AND ENTITIES

GUIDELINES OF THE COMMITTEE FOR THE CONDUCT OF ITS WORK

Adopted on 7 November 2002, as amended on 10 April 2003, 21 December 2005,
29 November 2006, 12 February 2007, 9 December 2008, 22 July 2010, 26 January 2011,
30 November 2011, and 15 April 2013

1. The Al-Qaida Sanctions Committee

- (a) The Committee of the Security Council established by paragraph 6 of Security Council resolution 1267 (1999) of 15 October 1999 is known as the Al-Qaida Sanctions Committee. Its functions were modified by resolutions 1390 (2002) of 16 January 2002, 1526 (2004) of 30 January 2004, 1617 (2005) of 29 July 2005, 1730 (2006) of 19 December 2006, 1735 (2006) of 22 December 2006, 1822 (2008) of 30 June 2008, 1904 (2009) of 17 December 2009, 1989 (2011) of 17 June 2011 and 2083 of 17 December 2012. For the purposes of these guidelines, the Al-Qaida Sanctions Committee shall hereinafter be referred to as “the Committee.”
- (b) The Committee is a subsidiary organ of the Security Council and will consist of all Members of the Council.
- (c) The Chair of the Committee will be appointed by the Security Council to serve in his/her personal capacity. The Chair will be assisted by two delegations who will act as Vice-Chairs, and who will also be appointed by the Security Council.
- (d) The Chair will chair meetings of the Committee. When he/she is unable to chair a meeting, he/she will nominate one of the Vice-Chairs or another representative of his/her Permanent Mission to act on his/her behalf.
- (e) The Secretariat of the Committee will be provided by the Secretariat of the United Nations.

2. Mandate of the Committee

The mandate of the Committee shall be, on the basis of the measures imposed by paragraph 4 (b) of resolution 1267 (1999), paragraph 8 (c) of resolution 1333 (2000), and paragraphs 1 and 2 of resolution 1390 (2002) as reiterated in paragraph 1 of resolutions 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011) and 2083 (2012), to undertake the tasks and to report on its work to the Council with its observations and recommendations as prescribed by the resolutions outlined above.

3. Meetings of the Committee

- (a) Meetings of the Committee, both formal and informal, will be convened at any time the Chair deems necessary, or at the request of a Member of the Committee. To the extent possible, four working days notice will be given for any meeting of the Committee, although shorter notice may be given in urgent situations.

- (b) The Committee will meet in closed sessions, unless it decides otherwise. The Committee may invite any Member of the United Nations to participate in the discussion of any question brought before the Committee in which interests of that Member are specifically affected. The Committee will consider requests from Member States and relevant international organizations to send representatives to meet with the Committee as described in section 13, paragraph (e). The Committee may invite members of the Secretariat or other persons to provide the Committee with appropriate expertise or information or to give it other assistance in examining matters within its competence.
- (c) The Committee may invite the members of the Monitoring Team established pursuant to paragraph 7 of resolution 1526 (2004), and/or the Ombudsperson to attend meetings as appropriate.
- (d) When the Committee considers a delisting request submitted to the Ombudsperson, the Chair shall invite the Ombudsperson, aided by the Monitoring Team, as appropriate, to present his/her Comprehensive Report in person and answer Committee Members' questions regarding the request.

4. Decision-making

- (a) The Committee shall make decisions by consensus of its Members. If consensus cannot be reached on a particular issue, including listing and delisting, the Chair should undertake such further consultations as may facilitate agreement. If after these consultations consensus still cannot be reached the matter may be submitted to the Security Council by the member concerned. The provisions of this paragraph are without prejudice to the special procedures stipulated in paragraphs 21 and 26 of resolution 2083 (2012).
- (b) Decisions will be taken by a written procedure. In such cases the Chair will circulate to all Members of the Committee the proposed decision of the Committee, and will request Members of the Committee to indicate any objection they may have to the proposed decision within five full working days or, in urgent situations, such shorter period as the Chair shall determine.
- (c) Listing and delisting requests, together with all relevant information in accordance with the guidelines, as assessed by the Chair, shall be considered in accordance with section 6 paragraph (n) and section 7 paragraph (f) respectively. If no objection is received by the end of the specified period, the decision will be deemed adopted.
- (d) Communications submitted to the Committee pursuant to paragraph 1 of resolution 1452 (2002) shall be considered in accordance with the procedure determined by that resolution, as revised by resolutions 1735 (2006) and 2083 (2012).
- (e) Subject to paragraphs 4 (j) and (k), and in the absence of any objection being indicated within the specified period for the decision provided for in paragraph 4 (b), a Committee Member may request more time to consider a proposal by placing a hold on the decision. For the duration of the validity of any hold placed on a matter, the decision on that matter will be considered "pending". The Secretariat shall notify the Committee as soon as a decision becomes pending, include the matter in the list of pending issues and inform the State(s) submitting the request or, where appropriate, the Ombudsperson that the matter is still under the Committee's consideration. For so long as a matter is included on the list of

pending issues, any Committee Member may place its own hold on that matter. The Secretariat shall notify the Committee as soon as a hold is placed on a pending matter.

- (f) If a holding Committee Member requires additional information to resolve the pending matter, it may ask the Committee to request additional information on that specific matter from the State(s) concerned.
- (g) A holding Committee Member shall provide updates after three months on its progress in resolving the pending matter.
- (h) Subject to paragraphs 4 (j) and (k), a matter will remain on the list of pending issues until either:
 - i. one Committee Member with a hold on the matter indicates that they object to the proposed decision; or
 - ii. all Committee Members with holds placed on the matter lift those holds without indicating an objection to the proposed decision.
- (i) If all holds placed on a matter are lifted before 12:00 (noon, EST) on any given working day within the timeframe established in paragraphs 4 (j) and (k), the Secretariat shall immediately take the necessary steps, including updating the Al-Qaida Sanctions List that same day, and inform the State(s) concerned and, where appropriate, the Ombudsperson, about the Committee's decision. If all holds placed on a matter are lifted after 12:00 (noon, EST) on any given working day within the timeframes set out in paragraphs 4(j) and (k), the Secretariat shall take the necessary steps, including updating the Al-Qaida Sanctions List the following working day, and inform the State(s) concerned and, where appropriate, the Ombudsperson, about the Committee's decision.
- (j) The Committee shall ensure that no matter is left pending for a period longer than is provided for by a relevant resolution, or, where no time for a decision is provided for by a resolution, then six months from the end of the original no-objection period. At the end of the relevant period, and without prejudice to the provisions set out in paragraph 4 (a) above, a matter still pending shall be deemed approved.
- (k) For matters where no time for a decision is provided for by a resolution, and before the expiry of the six month period referred to above, a holding Committee Member may request additional time to consider the proposal on the basis that extraordinary circumstances exist. In such cases, the Committee may extend the time for consideration by up to three months from the end of the six month period. At the end of this additional period, a matter still pending shall be deemed approved.
- (l) The Committee will review once a month, as necessary, the status of pending issues as updated by the Secretariat, including updates provided by Committee Members.
- (m) A hold placed on a matter by a Member of the Committee will cease to have effect at the time its membership of the Committee ends. New Members shall be informed of all pending matters one month before their membership of the Committee begins.

5. The Al-Qaida Sanctions List

- (a) The Secretariat will update regularly the Al-Qaida Sanctions List when the Committee has agreed to include or delete relevant information in accordance with the procedures set out in these guidelines.
- (b) The updated Al-Qaida Sanctions List will be made available on the website of the Committee on the day following the Committee's approval. At the same time, any modification to the Al-Qaida Sanctions List will be communicated to Member States immediately through Notes Verbales, including an electronic advance copy, and United Nations Press Releases.
- (c) Once the updated Al-Qaida Sanctions List is communicated to Member States, States are encouraged to circulate it widely, such as to banks and other financial institutions, border points, airports, seaports, consulates, customs agents, intelligence agencies, alternative remittance systems and charities.

6. Listing

- (a) The Committee shall consider including new names based on submissions received from Member States in line with paragraph 10 of resolution 2083 (2012).
- (b) Member States are encouraged to establish a national mechanism or procedure to identify and assess names for inclusion on the Al-Qaida Sanctions List and to appoint a national contact point concerning entries on that list according to national laws and procedures.
- (c) Before a Member State proposes a name for inclusion on the Al-Qaida Sanctions List, it is strongly encouraged, to the extent possible, to approach the State(s) of residence and/or nationality of the individual or entity concerned to seek additional information.
- (d) States are advised to submit names as soon as they gather the supporting evidence of association with Al-Qaida. A criminal charge or conviction is not a prerequisite for listing as the sanctions are intended to be preventive in nature.
- (e) The Committee will consider proposed listings on the basis of the "associated with" standard described in paragraphs 2 and 3 of resolution 2083 (2012).
- (f) When submitting names of groups, undertakings or entities, States are encouraged, if they deem it appropriate, to propose for listing at the same time the names of the individuals responsible for the decisions of the group, undertaking or entity concerned.
- (g) When proposing names for inclusion on the Al-Qaida Sanctions List, Member States should use the standard forms for listing available on the Committee's website¹ and shall include as much relevant and specific information as possible on a proposed name, in particular sufficient identifying information to allow for the accurate and positive identification of the individual, group, undertaking or entity concerned by competent authorities, and to the extent possible, information required by INTERPOL to issue a Special Notice, including:

¹ <http://www.un.org/sc/committees/1267/listing.shtml>

- For individuals: family name/surname, given names, other relevant names, date of birth, place of birth, nationality/citizenship, gender, aliases, employment/occupation, State(s) of residence, passport or travel document and national identification number, current and previous addresses, current status before law enforcement authorities (e.g. wanted, detained, convicted), location;
- For groups, undertakings or entities: name, registered name, short name(s)/acronyms, and other names by which it is known or was formerly known, address, headquarters, branches/subsidiaries, organizational linkages, parent company, nature of business or activity, State(s) of main activity, leadership/management, registration (incorporation) or other identification number, status (e.g. in liquidation, terminated), website addresses.

The Monitoring Team shall be prepared to assist Member States in this regard.

- (h) Member States shall provide a detailed statement of case in support of the proposed listing that forms the basis or justification for the listing in accordance with the relevant resolutions, including paragraph 11 of resolution 2083 (2012). The statement of case should provide as much detail as possible on the basis(es) for listing, including but not limited to: (1) specific information demonstrating that the individual/entity meets the criteria for listing set out in paragraphs 2 and 3 of resolution 2083 (2012); (2) details of any connection with a currently listed individual or entity; (3) information about any other relevant acts or activities of the individual/entity; (4) the nature of the supporting evidence (e.g. intelligence, law enforcement, judicial, open source information, admissions by subject, etc.); (5) additional information or documents supporting the submission as well as information about relevant court cases and proceedings. The statement of case shall be releasable, upon request, except for the parts the designating State identifies as being confidential to the Committee, and may be used to develop the narrative summary of reasons for listing described in section 9 below.
- (i) Member States proposing a new designation, as well as Member States that have proposed names for inclusion on the Al-Qaida Sanctions List before the adoption of resolution 2083 (2012), shall specify if the Committee, or the Secretariat on its behalf, or the Ombudsperson may not make known their status as designating State(s).
- (j) Member States that want to be considered co-designating States should inform the Chair in writing when the listing request is submitted and before the listing request is circulated to the members of the Committee for consideration.
- (k) Member States that want to be considered co-sponsors should inform the Committee in writing before the Committee has decided on the listing request.
- (l) Member States who co-sponsored listing requests that were submitted to the Committee before the adoption of resolution 1989 (2011) will continue to be considered designating States, including in the application of paragraphs 26 and 27 of resolution 2083 (2012).
- (m) Co-sponsors of listing requests that were submitted to the Committee after the adoption of resolution 1989 (2011) will not be considered designating states in the application of paragraphs 26 and 27 of resolution 2083 (2012). Co-sponsors will continue to be addressed, as appropriate, in the context of the Committee's reviews of the Al-Qaida Sanctions List, including in the triennial review described in paragraph 42 of resolution 2083 (2012).

- (n) The Committee will consider listing requests within a period of ten full working days, which may be shortened, if requested by a Member State, at the Chair's discretion, for emergency and time-sensitive listings. If a proposal for listing is not approved within the decision-making period, the Committee, or the Secretariat on its behalf, will notify the submitting State on the status of the request. The Secretariat shall inform the Committee Members the same working day of any holds or objections received before 5:30 p.m. Holds or objections received after 5:30 p.m. shall be communicated to the Committee Members the following working day. If no objection is received by the end of the no-objection period, the decision will be deemed adopted. The Secretariat shall take all the necessary steps to update the Al-Qaida Sanctions List the following day, and inform the State(s) concerned about the Committee's decision.
- (o) Committee Members and the Monitoring Team are called upon to share with the Committee any information available regarding a listing request to help inform the Committee's decision and provide additional material for the narrative summary of reasons for listing.
- (p) Upon request of a Committee Member, listing requests may be placed on the Committee's agenda for more detailed consideration. If deemed necessary, the Committee may request additional background information from the Monitoring Team and/or the designating State(s). Following consideration by the Committee, the Chair shall circulate the listing request under the written decision-making procedure as described in Sections 4 paragraph (b) and section 6 paragraph (n) above.
- (q) On the same day that a name is added to the Al-Qaida Sanctions List, the Committee shall, with the assistance of the Monitoring Team and in coordination with the relevant designating State(s), make accessible on the Committee's website a narrative summary of reasons for listing for the corresponding entry or entries. In addition to the narrative summary, the Secretariat shall, promptly after a name is added to the Al-Qaida Sanctions List, publish on the Committee's website all relevant publicly releasable information, where available.
- (r) In its communication informing Member States of new entries to the Al-Qaida Sanctions List, the Secretariat shall include the narrative summary of reasons for listing.
- (s) Unless the Committee decides otherwise, the Secretariat shall request INTERPOL to issue, where feasible, an INTERPOL-United Nations Security Council Special Notice for each name added to the list.
- (t) As soon as a name is added to the Al-Qaida Sanctions List, the Committee shall request the Secretariat to communicate the decision in writing to the Permanent Mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national (to the extent this information is known).
- (u) The Secretariat shall include with this communication a copy of the narrative summary of reasons for listing, a description of the effects of designation, as set forth in the relevant resolutions, the Committee's procedures for considering delisting requests, including the possibility of submitting delisting requests to the Office of the Ombudsperson in

accordance with paragraphs 19 and annex II of resolution 2083 (2012), and the provisions for available exemptions.

- (v) The letter shall remind States receiving such notification that they are required to take, in accordance with their domestic laws and practices, all possible measures to notify or inform in a timely manner the newly listed individuals and entities on the Al-Qaida Sanctions List of the measures imposed on them, any information on reasons for listing available on the Committee's website as well as all the information provided by the Secretariat in the above-mentioned communication.
- (w) In addition, in its communication, the Secretariat shall invite States to provide in accordance with national law details on measures taken to implement the sanctions.
- (x) Where the address is known, and after the Secretariat has officially notified the Permanent Mission of the State(s) concerned, the Ombudsperson shall notify individuals or entities about the status of their listing. The Ombudsperson shall include all additional information as described in paragraph (u) above.

7. Delisting

The Committee shall consider delisting requests submitted by Member States or by petitioners through the Office of the Ombudsperson pursuant to the following procedures:

Delisting Requests by Member States

- (a) Member States may at any time submit to the Committee requests for delisting of individuals, groups, undertakings, and/or entities inscribed on the Al-Qaida Sanctions List.
- (b) Member States considering a delisting request are requested to bilaterally consult with the designating State(s), the State(s) of nationality, residence or incorporation, where applicable, prior to requesting a delisting.
- (c) When submitting a delisting request, the standard form for delisting, available on the Committee's website², should be used.
- (d) The delisting request should explain why the individual or entity concerned no longer meets the criteria described in paragraphs 2 and 3 of resolution 2083 (2012). Any documentation supporting the request can be referred to and/or attached together with the explanation of its relevance, where appropriate.
- (e) The Chair, with the support of the Secretariat, shall facilitate contacts between the State requesting the delisting and the designating State(s), as well as the State(s) of nationality, residence or incorporation, where applicable. The Chair shall circulate the request, including, as appropriate, additional information provided by the Monitoring Team, under a written no-objection procedure.

² <http://www.un.org/sc/committees/1267/delisting.shtml>

- (f) The Committee will decide on delisting requests within a period of ten full working days, which may be shortened to a minimum of two full working days, if requested by a Member State and in exceptional circumstances, at the Chair's discretion, for emergency and time-sensitive delistings after previously informing the Members of the Committee. The Secretariat shall inform the Committee Members the same working day of any holds or objections received before 5:30 p.m. Holds or objections received after 5:30 p.m. shall be communicated to the Committee Members the following working day. If no objection is received by the end of the no-objection period, the decision will be deemed adopted. The Secretariat shall take all the necessary steps to update the Al-Qaida Sanctions List the following day, and inform the State(s) concerned about the Committee's decision.
- (g) When considering delisting requests, the Committee shall give due consideration to the opinions of designating State(s), State(s) of residence, nationality or incorporation.
- (h) After this period, the Secretariat shall inform the Members of the Committee of any objections received.
- (i) Committee Members shall provide reasons for objecting to delisting requests as stipulated by paragraph 33 of resolution 2083 (2012). The Committee is called upon to share its reasons with relevant Member States and national and regional bodies, where appropriate.
- (j) If no objection to the delisting request has been received, the request is approved and the list will be updated accordingly.
- (k) The Secretariat shall, as soon as possible, but not later than three working days after a name is removed from the Al-Qaida Sanctions List, notify the Permanent Mission of the country or countries where the individual or entity is believed to be located and, in the case of individuals, the country of which the person is a national (to the extent this information is known).
- (l) The letter shall remind States receiving such notification that they are required to take measures, in accordance with their domestic laws and practices, to notify or inform the concerned individual or entity of the delisting in a timely manner.
- (m) The Secretariat will also concurrently request that INTERPOL cancel the INTERPOL-UNSC Special Notice for the relevant name and to provide confirmation when the cancellation is in effect.
- (n) If a delisting request submitted by a Member State is rejected, the Secretariat shall, as soon as possible, but not later than three working days after the Committee's decision, notify the Permanent Mission of the State submitting the request, unless the State concerned is a member of the Committee and thus privy to the decision.
- (o) The notification shall include the Committee's decision, an updated narrative summary of reasons for listing and, where available, any other publicly releasable information about the Committee's decision, as well as other relevant information described in section 6 (n) above.
- (p) The letter shall remind States receiving such notification that they are required to take measures, in accordance with their domestic laws and practices, to notify or inform the

concerned individual or entity in a timely manner of the decision and as well as all the information provided by the Secretariat in the above-mentioned notification.

Delisting requests submitted by Designating States

- (q) Designating States submitting a delisting request pursuant to paragraph 26 of resolution 2083 (2012) shall confirm in writing, at the same time the delisting request is submitted to the Committee, that consensus exists between or among all designating States in cases where there are multiple designating States. It is being recalled that co-sponsors of listing requests submitted after the adoption of resolution 1989 (2011) will not be considered designating states in the application of paragraphs 26 and 27 of resolution 2083 (2012).
- (r) The Chair will circulate the delisting request with a 10-working-day no-objection period.
- (s) Immediately following the expiration of the ten day no-objection deadline, the Secretariat shall inform the Committee Members whether any objections have been received. If no objections are received by the end of the no-objection period, the decision will be deemed adopted. The Secretariat shall take all the necessary steps to update the Al-Qaida Sanctions List the following day, and inform the State(s) concerned about the Committee's decision.
- (t) If one or more Members of the Committee register an objection to the delisting request of a designating State by the end of the no-objection period of 10 working days, the delisting will, in accordance with paragraph 26 of resolution 2083 (2012), take effect 60 days after the Chair has circulated the delisting request, unless
 - (i) all Members of the Committee object in writing to the delisting proposal before the end of that 60 day period; or
 - (ii) one or more Members of the Committee request, before the end of the 60 day period, that the Chair submit the delisting request of a designating State to the Security Council for a decision.
- (u) In the event of such a request, the requirement for States to take the measures described in paragraph 1 of resolution 2083 (2012) shall remain in force for that period with respect to that individual, group, undertaking or entity until the question is decided by the Security Council in accordance with the provisions of paragraph 26 of resolution 2083 (2012).
- (v) Committee Members shall provide reasons for objecting to delisting requests as stipulated by paragraph 33 of resolution 2083 (2012). The Committee is called upon to share its reasons with relevant Member States and national and regional bodies, where appropriate.
- (w) After the Committee has taken a decision, the Secretariat will take the appropriate steps outlined in section 7 (k) – (p).

Delisting Requests through the Office of the Ombudsperson

- (x) A petitioner (an individual, group, undertaking, and/or entity on the Al-Qaida Sanctions List or their legal representative or estate) seeking to submit a request for delisting can do so either directly to the Office of the Ombudsperson as outlined below and in the attached annex, or through his/her State of residence or nationality as outlined in paragraphs (a)-(p).

- (y) In accordance with paragraph 19 and annex II of resolution 2083 (2012) the Office of the Ombudsperson shall receive delisting requests submitted by, or on behalf, of a petitioner following the procedures outlined in annex II of resolution 2083 (2012) (reproduced in the annex to these guidelines).
- (z) Member States are strongly urged to provide all relevant information to the Ombudsperson, including confidential information where appropriate, and are encouraged to do so in a timely manner. Member States may enter into arrangements with the Office of the Ombudsperson to facilitate the sharing of confidential information. The Ombudsperson must comply with any confidentiality restrictions placed upon such information.
- (aa) With paragraph 7 of annex II of resolution 2083 (2012), the Security Council has requested the Ombudsperson to circulate to the Committee a Comprehensive Report on the delisting requests he/she has received upon completion of the period of engagement with the petitioner. The Secretariat will make available the Comprehensive Report to the Members of the Committee promptly after its submission and will arrange for the translation of the Comprehensive Report.
- (bb) After the Comprehensive Report has been translated into all official languages of the United Nations, the Secretariat will make the translation available to all Committee Members and will inform the Ombudsperson accordingly.
- (cc) After the Committee has had 15 days to review the Comprehensive Report of the Ombudsperson in all official languages of the United Nations, the Chair of the Committee shall place the delisting request on the Committee's agenda for consideration.
- (dd) When the Committee considers the delisting request, the Chair shall invite the Ombudsperson, aided by the Monitoring Team, as appropriate, to present the Comprehensive Report in person and answer Committee Members' questions regarding the request.
- (ee) The Committee's consideration of the Comprehensive Report shall be completed no later than 30 days from the date the Comprehensive Report is submitted in all official languages of the United Nations to the Committee for its review.
- (ff) In cases where the Ombudsperson recommends in his/her Comprehensive Report retaining the listing, the Committee will complete its consideration of the Comprehensive Report and notify the Ombudsperson that the listing will be retained. The right of each Committee Member to submit a delisting request as outlined in section 7 paragraph (a) remains unaffected.
- (gg) In cases where the Ombudsperson recommends delisting in his/her Comprehensive Report, and after the Committee has completed its consideration of the Comprehensive Report, the Chair will circulate the delisting request with a no-objection period of 10 working days.
- (hh) Immediately following the expiration of the ten day no-objection deadline, the Secretariat shall inform the Committee Members whether any objections have been received. If no objections are received by the end of the no-objection period, the decision will be deemed adopted. The Secretariat shall take all the necessary steps to update the Al-Qaida Sanctions

List the following day, and inform the State(s) concerned about the Committee's decision. The Chair will inform the Ombudsperson accordingly.

- (ii) If one or more Members of the Committee register an objection to the proposed delisting by the end of the no-objection period of 10 working days, the delisting will, in accordance with paragraph 21 of resolution 2083 (2012), take effect 60 days after the Chair has circulated the delisting request, unless:
 - (i) all Members of the Committee object in writing to the delisting proposal before the end of that 60 day period; or
 - (ii) one or more Members of the Committee request, before the end of the 60 day period, that the Chair submit the recommendation to delist to the Security Council for a decision.
- (jj) In the event of such a request, the requirement for States to take the measures described in paragraph 1 of resolution 2083 (2012) shall remain in force for that period with respect to that individual, group, undertaking or entity until the question is decided by the Security Council in accordance with the provisions of paragraph 21 of resolution 2083 (2012).
- (kk) If the Committee decides to reject a delisting request, the Committee shall convey to the petitioner, through the Ombudsperson or the State(s) concerned, its decision following the respective procedures outlined in annex II of resolution 2083 (2012) or in section 7 paragraph (n) of these Guidelines, as well as a summary of the reasons for its decision.
- (ll) After the Committee has taken a decision, the Secretariat will take the appropriate steps outlined in section 7 (k) – (p).

Deceased Individuals

- (mm) For a deceased individual, the delisting request shall be submitted either directly to the Committee by a State, or to the Office of the Ombudsperson by his/her legal beneficiary, together with official documentation certifying that status.
- (nn) The delisting request shall include an official documentation confirming the death. The Committee considers any official communication from a State declaring a listed person to be dead as fulfilling the requirement for “credible information regarding death” as described in paragraph 40 of resolution 2083 (2012) without prejudice to the final decision of the Committee as to the removal of the name from the List.
- (oo) The official communication, such as documentation certifying death, should include, to the extent possible, the full name, permanent reference number, date of birth, and the date and place of death of the individual, as well as any further information about the circumstances of the death. The submitting State or the petitioner should also ascertain and inform the Committee whether or not any legal beneficiary of the deceased's estate or any joint owner of his/her assets is on the Al-Qaida Sanctions List, and to the extent possible, inform the Committee about the names of any individuals or entities who would be in a position to receive any unfrozen assets of a deceased individual or defunct entity, in order to prevent unfrozen assets from being used for terrorist purposes.

(pp) In cases where individuals have no frozen assets, the Committee will accept as sufficient for delisting an official communication from the State(s) of nationality and residence declaring the financial status of the individuals in question, without prejudice to the final decision of the Committee.

(qq) After the Committee has taken a decision, the Secretariat will take the appropriate steps outlined in section 7 (k) – (p).

8. Updating the Existing Information on the Al-Qaida Sanctions List

- (a) The Committee shall consider expeditiously, in accordance with the following procedures, any information supplied by Member States, regional or international organizations, or the Monitoring Team, in particular additional identifying information and other information, along with supporting documentation, including updates on the operating status of listed individuals, groups, entities and undertakings, the movement, incarceration or death of listed individuals and other significant events as well as any relevant court decisions and proceedings, as such information becomes available, and shall decide which information would improve the existing information on the Al-Qaida Sanctions List.
- (b) The Committee will consider any additional information on listed individuals or entities submitted to it by Member States, regional or international organizations or the Monitoring Team. The Committee or the Monitoring Team, at the Committee's request, may approach the original designating State(s) and consult with it on the relevance of the submitted additional information. The Committee may also encourage Member States or regional or international organizations providing such additional information to consult with the original designating State(s). The Secretariat will, subject to the designating State's consent, assist in establishing the appropriate contacts.
- (c) The Monitoring Team will, as appropriate, review any and all information received by the Committee in order to clarify or confirm such information. In this connection, the Monitoring Team will use all sources available to it, including other sources than those provided by the original designating State(s).
- (d) The Monitoring Team will subsequently advise the Committee, within four weeks, if such information could be included in the Al-Qaida Sanctions List, or if further clarification is recommended in order to ascertain that the information received can be incorporated in the Al-Qaida Sanctions List. The Committee shall decide whether and how such clarification should be obtained and may again call upon the expertise of the Monitoring Team.
- (e) The Monitoring Team may also submit to the Committee any information on listed individuals and entities it has obtained from publicly available official sources, or with the help of United Nations agencies with their agreement. In such cases, the Monitoring Team shall identify the source of each piece of new information when presenting it for the Committee's consideration.
- (f) Upon the decision of the Committee to incorporate additional information into the Al-Qaida Sanctions List the Committee will inform the Member State or regional or international organization that submitted the additional information accordingly.
- (g) Any additional relevant information submitted to the Committee that is not incorporated into the Al-Qaida Sanctions List or the narrative summary of reasons for listing will be

stored by the Monitoring Team in a database for the use of the Committee and the Monitoring Team in carrying out their respective mandates. Upon request, the Committee shall share any such additional information with Member States whose nationals, residents or entities have been included on the Al-Qaida Sanctions List provided that the information is publicly releasable or the provider of the information has agreed to its release. The Committee may also call on the Monitoring Team to assist in conveying such additional relevant information to the requesting State(s). On a case-by-case basis the Committee may decide to release the information to other parties, with the prior consent of the provider of the information.

9. Narrative Summaries of Reasons for Listing

- (a) For all entries on the Al-Qaida Sanctions List, the Committee, with the assistance of the Monitoring Team and in coordination with the relevant designating State(s), shall continue to make accessible on its website narrative summaries of reasons for listing.
- (b) When a new name is proposed for listing, the Monitoring Team shall immediately prepare, in coordination with the relevant designating State(s), a draft narrative summary for the Committee's consideration which shall be circulated together with the corresponding listing request. The narrative summary shall be made accessible on the Committee's website on the same day a name is added to the Al-Qaida Sanctions List.
- (c) Draft narrative summaries should be based on information provided by the designating State(s), Committee members or the Monitoring Team, including the statement of case, the standard form for listing, any other official information provided to the Committee or any other relevant information publicly available from official sources.
- (d) The narrative summary should include: the date of listing; the basis(es) for listing according to the relevant resolutions adopted by the Security Council, i.e. specific information demonstrating that the individual or entity meets the criteria for listing set out in the relevant resolutions; information about any acts or activities of the individual/entity indicating an association with Al-Qaida, pursuant to paragraphs 2 and 3 of resolution 2083 (2012); the names and permanent reference numbers of other entries on the List associated with the listed party; any other relevant information available at the date or after the date of listing such as relevant court decisions and proceedings as provided by the designating State(s) or other Member States concerned; the date(s) when the narrative summary was first made accessible on the Committee's website and when it was reviewed or updated.
- (e) If the Committee decides to grant a delisting request, the Secretariat shall immediately remove the corresponding narrative summary from the Committee's website. If the Committee decides to reject a delisting request, the Monitoring Team shall prepare an updated draft narrative summary for the Committee's consideration reflecting the date of the Committee's decision to reject a delisting request as well as any relevant new publicly releasable information provided during the Committee's consideration.
- (f) When reviewing a list entry in accordance with paragraphs 39, 40, 41 and 42 of resolution 2083 (2012) the Committee shall also review the corresponding narrative summary. Upon completion of the review, the Monitoring Team shall prepare an updated draft narrative summary for the Committee's consideration reflecting the date of the Committee's review as well as any relevant new publicly releasable information provided during the Committee's consideration.

- (g) At any time the Committee may consider updating narrative summaries based on new information, proposed changes or additions as well as information about any relevant court decisions and proceedings submitted by Committee Members, the Monitoring Team, Member States or relevant international organizations.

10. Review of the Al-Qaida Sanctions List

- (a) The Committee with the support of the Monitoring Team and the Secretariat will, as stipulated by paragraphs 39, 40, 41 and 42 of resolution 2083 (2012), conduct the following reviews outlined in this section.
- (b) The procedures for these reviews shall be based on the procedures described in paragraph (f) below, but may be adapted by the Committee as appropriate in a modalities paper.
- (c) The reviews described in this section shall not preclude the submission of delisting requests at any time, in accordance with the relevant procedures set out in section 7 of these guidelines.

Triennial Review

- (d) The Committee shall conduct an annual review of all names on the Al-Qaida Sanctions List that have not been reviewed in three or more years (“the triennial review”), in which the relevant names are circulated to the designating States and States of residence and/or nationality, location or incorporation, where known, in order to continue to ensure the Al-Qaida Sanctions List is as updated and as accurate as possible and to confirm that the listing remains appropriate.
- (e) The Committee’s consideration of a delisting request after the date of adoption of resolution 1989 (2011), pursuant to the procedures set out in annex II to resolution 1989 (2011) or annex II to resolution 2083 (2012) (reproduced in the annex to these guidelines), should be considered equivalent to a review of that listing pursuant to paragraph 26 of resolution 1822 (2008).
- (f) The Committee will implement the triennial review based on the following procedure:
 - (i) Every 12 months, the Monitoring Team shall identify those entries on the Al-Qaida Sanctions List that have not been reviewed in three or more years. The Committee shall circulate these names to the designating State(s), together with the original statement of case and cover sheet, as applicable, and the corresponding draft narrative summary of reasons for listing. The Committee shall also circulate those names to the State(s) of residence and/or nationality, location or incorporation, where known, together with the publicly releasable portion(s) of the statement of case. At the same time, the Chair will invite the members of the Committee to provide any additional information on these listed individuals and entities.
 - (ii) The Committee shall ask the designating State(s) and the State(s) of residence and/or nationality to submit to the Committee within 3 months any updated information on the reasons for listing, as well as any additional identifying and other information, along with supporting documentation, on these listed individuals and entities, including

updates on the operating status of the listed entities, the movement, incarceration or death of the listed individuals and other significant events. The Committee shall also urge these States to indicate whether they deem the listing to remain appropriate.

- (iii) The review replies received will be uploaded to the Committee's eRoom as they are received. At the end of the 3-month information-gathering period, the Monitoring Team will compile all information received from reviewing States, together with any additional information and the Monitoring Team's own assessment, and make it available to the Committee members in the form of dossiers on each entry under review.
- (iv) Once the Monitoring Team has provided the complete dossiers, the Chair will advise the members of the Committee as to when the names will be placed on the Committee's agenda for consideration, so as to allow for sufficient time for the review of all available information and for the members to reach their position on each case.
- (v) In cases where any of the States reviewing the names in accordance with subparagraph (ii) above determines that a listing is no longer appropriate, that State may submit a delisting request following the same relevant procedures set out in section 7 of these guidelines.
- (vi) On the basis of all available information, the Committee shall consider updating the Al-Qaida Sanctions List and shall make accessible on its website the narrative summary of reasons for listing, as appropriate.
- (vii) In cases where a member of the Committee in the course of the review determines that a listing is no longer appropriate, it may, in close consultations with the designating State(s), State(s) of residence and/or nationality and taking into account their views on the matter as referred to in subparagraph (ii) above, submit a delisting request following the same relevant procedures set out in section 7 of these guidelines.
- (viii) When the designating State(s) submits a delisting request, paragraphs 26 and 27 of resolution 2083 (2012) shall apply.
- (ix) If no decision has been taken by the Committee to remove a name under review from the Al-Qaida Sanctions List, the listing of that name shall be confirmed to remain appropriate and those names shall remain on the Al-Qaida Sanctions List.
- (x) Upon completion of the review of a name, the Secretariat shall notify the designating State(s) and the State(s) of residence and nationality thereof. The State(s) of residence and/or nationality, location or incorporation shall be encouraged to take, in accordance with their domestic laws and practices, all possible measures to notify or inform the individual or entity accordingly and in cases where listing is confirmed to remain appropriate, provide any information on reasons for listing available on the Committee's website as well as the procedures for considering delisting requests and the provisions for available exemptions.

Review of reportedly deceased individuals

- (g) The Monitoring Team will provide to the Committee every six months a list of individuals on the Al-Qaida Sanctions List who are reportedly deceased, along with an assessment of relevant information such as the certification of death, and to the extent possible, the status and location of frozen assets and the names of any individuals or entities who would be in a position to receive any unfrozen assets. The Committee shall review these listings along with the original listing request, as well as all relevant information pertaining to those entries to decide whether they remain appropriate, and to remove listings of deceased individuals where appropriate and where there is credible information regarding death as described in section 7 (nn) and (oo) above.
- (h) If after the review of a deceased person as described in paragraph (g) above all members of the Committee are of the view that the name should be removed from the list but no Member State proposes delisting, the delegation of the Chair shall submit a request for delisting to be circulated under the written procedure as described in section 4 (b) above.

Review of entities reported or confirmed to have ceased to exist

- (i) The Monitoring Team shall provide to the Committee every six months a list of entities on the Al-Qaida Sanctions List that are reported or confirmed to have ceased to exist, along with an assessment of any relevant information.
- (j) The Committee shall review these listings along with all relevant information pertaining to those entries to decide whether they remain appropriate, and shall remove such listings where credible information is available.

Review of entries lacking identifiers

- (k) The Committee will request the Monitoring Team to circulate to the Committee every six months a list of individuals and entities on the Al-Qaida Sanctions List whose entries lack identifiers necessary to ensure effective implementation of the measures imposed upon them. The Committee shall review these listings to decide whether they remain appropriate.

11. Exemptions to the Assets Freeze

- (a) Pursuant to resolution 1452 (2002), as amended by paragraph 15 of resolution 1735 (2006), the Committee shall receive notifications from Member States of their intention to authorize, where appropriate, access to frozen funds or other financial assets or economic resources to cover basic expenses, as provided for in paragraph 1(a) of resolution 1452 (2002). The Committee, through the Secretariat, will immediately acknowledge receipt of the notification. Should no negative decision be taken by the Committee within the requisite three working day period, the Committee, through its Chair, will inform the notifying Member State thereof. The Committee will also inform the notifying Member State if a negative decision has been taken regarding the notification.
- (b) The Committee shall consider and approve within the requisite five working days, if appropriate, requests by Member States for extraordinary expenses, as provided for in paragraph 1(b) of resolution 1452 (2002). Member States are encouraged, when submitting requests to the Committee pursuant to paragraph 1(b) of resolution 1452 (2002), to report in a timely way on the use of such funds, with a view to preventing such funds from being used to finance terrorism.

- (c) A listed individual, group, undertaking or entity may apply to the Focal Point mechanism established by resolution 1730 (2006) for an exemption from the measures outlined in paragraph 1(a) of resolution 2083 (2012). Before the Committee will consider a request submitted through the Focal Point, the request must be submitted to the State of residence. The Focal Point may, if necessary, forward requests to States of residence in this context. Once the Focal Point has confirmed that the request has been submitted to the State of residence, the Focal Point will transmit the request to the Committee for a decision. The Committee shall consider such requests in consultation with States of residence and any other relevant States. The Committee, through the Focal Point, shall notify such individuals, groups, undertaking or entities of the Committee's decision.
- (d) Notifications under paragraph 1(a) of resolution 1452 (2002) and requests under paragraph 1(b) of resolution 1452 (2002) and paragraph 37(a) of resolution 2083 (2012) should, as appropriate, include the following information:
- i. recipient (name and address)
 - ii. recipient's permanent reference number on the Al-Qaida Sanctions List
 - iii. recipient's bank information (name and address of bank, account number)
 - iv. purpose of payment and justification of the determination of the expenses falling under paragraph 1(a) or under paragraph 1(b) of resolution 1452 (2002):
 - under paragraph 1(a):
 - basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges;
 - payment of reasonable professional fees and reimbursement of incurred expenses associated with the provisions of legal services;
 - fees or service charges for routine holding or maintenance of frozen funds or other financial assets or economic resources.
 - under paragraph 1(b):
 - extraordinary expenses (other categories than the ones mentioned under paragraph 1 (a)).
 - v. amount of installment
 - vi. number of installments
 - vii. payment starting date
 - viii. bank transfer or direct debit
 - ix. interests
 - x. specific funds being unfrozen
 - xi. other information.
- (e) Pursuant to paragraph 2 of resolution 1452 (2002), paragraph 6 of resolution 1904 (2009) and paragraph 7 of resolution 2083 (2012), States may allow for the addition to accounts subject to the assets freeze of:
- i. interest or other earnings due on those accounts, or

- ii. payments due under contracts, agreements or obligations that arose prior to the date on which those accounts became subject to the assets freeze, or
 - iii. any payment in favour of listed individuals, groups, undertakings or entities, provided that any such interest, other earnings and payments continue to be subject to the assets freeze.
- (f) Pursuant to paragraph 32 of resolution 2083 (2012), before unfreezing any assets frozen as a result of the listing of Usama Bin Laden, Member States must submit a request to the Committee and provide assurances to the Committee that the assets will not be transferred directly or indirectly to a listed individual, group, undertaking or entity, or otherwise used for terrorist purposes in line with resolution 1373 (2001). Such assets may only be unfrozen in the absence of an objection by a Committee member within 30 days of receiving the request.

12. Exemptions from the Travel Ban

- (a) Pursuant to paragraph 2 (b) of resolution 1390 (2002), as reaffirmed by subsequent relevant resolutions, including paragraph 1 (b) of resolution 2083 (2012), the Security Council decided that the travel ban imposed under the Al-Qaida/Taliban sanctions regime shall not apply where the Committee determines, on a case by case basis only, that entry or transit is justified.³
- (b) If the Ombudsperson is unable to interview a petitioner in his or her state of residence, the Ombudsperson may request an exemption for the sole purpose of allowing the petitioner to travel to another State to be interviewed by the Ombudsperson. The Ombudsperson may submit such a request provided that the petitioner is in agreement with the proposal, the application is for a period no longer than necessary to participate in the interview and all States of transit and destination do not object to the travel.
- (c) Each request for exemption must be submitted in writing, on behalf of the listed individual, to the Chair or to the Focal Point mechanism established in resolution 1730 (2006).
- (d) The States that may submit a request are the State(s) of destination, the State(s) of transit, the State of nationality, and the State of residence. Member States are encouraged to consult with other relevant States where appropriate prior to submitting a request for exemption. If no effective central government exists in the country in which the listed individual is located, a United Nations office or agency in that country may submit the request for exemption on the listed individual's behalf.
- (e) Listed individuals, groups, undertakings and entities may submit exemption requests pursuant to the Focal Point mechanism established by resolution 1730 (2006), pursuant to paragraph 37(b) of resolution 2083 (2012). The Focal Point will transmit the request to the Committee to determine, on a case-by-case basis whether the travel is justified.
- (f) Each request for exemption shall be received by the Chair or the Focal Point as early as possible but not less than fifteen working days before the date of the proposed travel, except

³ The Security Council also decided that the travel ban shall not oblige any State to deny entry into or require the departure from its territories of its own nationals and shall not apply where entry or transit is necessary for the fulfillment of a judicial process.

where humanitarian considerations require a shorter period. Petitioners are encouraged to submit exemption requests well in advance of the proposed travel to ensure ample time for the Committee to consult with relevant States. The Committee shall consider such requests in consultation with States of transit and destination and any other relevant States, and will only agree to exemptions to the travel ban with the agreement of the States of transit and destination.

- (g) The Chair shall circulate the exemption request under the written decision-making procedure for a period of ten days following the procedures described in section 4 (b). In urgent situations on humanitarian grounds, the Chair shall determine whether to shorten the consideration period. Any requests received after 12:00 (noon EST) will be circulated the following working day.
- (h) Each request for exemption should include the following information:
 - i. the permanent reference number on the Al-Qaida Sanctions List, full name, nationality, passport number or travel document number of the listed individual;
 - ii. the purpose of and justification for the proposed travel, with copies of supporting documents, including specific details of meetings or appointments;
 - iii. the proposed dates and times of departure and return;
 - iv. the complete itinerary and timetable, including for all transit stops;
 - v. details of the mode of transport to be used, including where applicable, record locator, flight numbers and names of vessels;
 - vi. all proposed uses of funds or other financial assets or economic resources in connection with the travel. Such funds may only be provided in accordance with paragraph 1 of resolution 1452 (2002), as modified by paragraph 15 of resolution 1735 (2006). The procedures for making a request under resolution 1452 (2002) can be found in section 11 of these guidelines.
- (i) Once the Committee has approved a request for exemption from the travel ban, the Chair shall communicate in writing the decision, approved itinerary and timetable to the Permanent Missions to the United Nations of: the State in which the listed individual is resident or believed to be located, the State(s) of which the person is believed to be a national, the State(s) to which the listed individual will be traveling, any transit State, as well as to any UN office/agency involved as provided for in paragraph (b) above.
- (j) Written confirmation of the completion of the travel by the listed individual shall be provided to the Chair within five working days following the expiry of the exemption by the State (or United Nations office/agency as in paragraph (b) above) in which the listed individual has stated he will be resident after completion of the exempted travel.
- (k) Notwithstanding any exemption from the travel ban, listed individuals remain subject to the other measures outlined in paragraph 1 of resolution 2083 (2012).

- (l) Any changes to the information provided under paragraph (d) above, including with regard to points of transit, shall require further consideration by the Committee and shall be received by the Chair no less than three working days prior to the commencement of the travel.
- (m) Any request for an extension of the exemption shall be subject to the procedures set out above and shall be received by the Chair in writing, with a revised itinerary, no less than five working days before the expiry of the approved exemption.
- (n) The submitting State, or the applicant through the Focal Point (or United Nations office/agency as in paragraph (b) above) shall inform the Chair immediately and in writing of any change to the departure date for any travel for which the Committee has already issued an exemption. Written notification will be sufficient in cases where the time of departure is advanced or postponed no more than 48 hours and the itinerary remains otherwise unchanged. If travel is to be advanced or postponed by more than 48 hours, or the itinerary is changed, then a new exemption request shall be submitted in conformity with paragraphs (b), (c) and (d) above.
- (o) In cases of emergency evacuation to the nearest appropriate State, including for medical or humanitarian needs or through force majeure, the Committee will determine whether the travel is justified within the provisions of paragraph 1 (b) of resolution 2083 (2012), within 24 hours once notified of the name of the listed individual traveler, the reason for travel, the date and time of evacuation, along with transportation details, including transit points and destination. The notifying authority shall also provide, as soon as possible, a doctor's or other relevant national official's note containing as many details as possible of the nature of the emergency and the facility where treatment or other necessary assistance was received by the listed individual without prejudice to respect of medical confidentiality, as well as information regarding the date, time, and mode of travel by which the listed individual returned to his/her country of residence or nationality, and complete details on all expenses in connection with the emergency evacuation.
- (p) Unless the Committee otherwise decides, all requests for exemptions and extensions thereto which have been approved by the Committee in accordance with the above procedures shall be posted in the "Exemptions" section of the Committee's website until expiry of the exemption.

13. Reports Submitted by Member States and Other Information Supplied to the Committee

- (a) The Committee will examine reports and checklists submitted by Member States pursuant to relevant resolutions and other relevant information, including through the use of the tools provided on the Committee's website. The Committee may request further information that it considers necessary.
- (b) The Committee will consider other information relevant to its work, including possible non-compliance with the measures imposed by the relevant resolutions, received from different sources through Member States, international or regional organizations or the Monitoring Team.

- (c) The information received by the Committee will be kept confidential if the provider so requests or if the Committee so decides.
- (d) With a view to assisting States in their endeavour to implement the measures set out in paragraph 1 of resolution 2083 (2012), the Committee may decide to supply information forwarded to it relating to possible non-compliance to the States concerned, and ask any such State to report to the Committee subsequently on any follow-up action undertaken.
- (e) The Committee will provide Member States and relevant international organizations with an opportunity to send representatives to meet the Committee for more in-depth discussion of relevant issues or to give voluntary briefings on their efforts to implement the measures, including particular challenges that hinder full implementation of the measures.

14. Reports to the Security Council

- (a) The Committee, through its Chair, may report to the Council when it deems appropriate.
- (b) The Committee, through its Chair, will report orally to the Security Council at least once per year pursuant to paragraph 59 of resolution 2083 (2012) on the state of the overall work of the Committee and the Monitoring Team, and, as appropriate, in conjunction with the reports by the Chairmen of the Counter-Terrorism Committee and the Committee established pursuant to resolution 1540 (2004), including briefings for all interested Member States.
- (c) In its periodic reports to the Council, the Chair will also provide progress reports on the Committee's work on the identification of possible cases of non-compliance with the measures pursuant to paragraph 1 of resolution 2083 (2012). The Committee will also submit written reports to the Council in accordance with relevant resolutions.

15. Outreach

- (a) In order to enhance the dialogue with Member States and to publicize the work of the Committee, the Chair will hold briefings on a regular basis for all interested Member States, as well as brief interested Member States and the press following formal meetings of the Committee, unless the Committee decides otherwise. In addition, the Chair may, after prior consultations and with the approval of the Committee, hold press conferences and/or issue press releases on any aspect of the Committee's work.
- (b) The Secretariat shall maintain a website for the Committee which should include all public documents relevant to the Committee's work, including the Al-Qaida Sanctions List, relevant resolutions, public reports of the Committee, relevant press releases, reports submitted by Member States pursuant to resolution 1455 (2003), and reports of the Monitoring Group and the Monitoring Team. Information on the website should be updated in an expeditious manner.
- (c) The Committee may consider, as appropriate, visits by the Chair and/or Committee Members to selected countries to enhance the full and effective implementation of the measures referred to above, with a view to encouraging States to comply fully with the relevant resolutions:

- (i) The Committee shall consider and approve the proposal to visit selected countries, and coordinate such visits with the 1988 Committee pursuant to resolution 1988 (2011) and other subsidiary organs of the Security Council as appropriate.
 - (ii) The Chair will contact the selected countries through their Permanent Missions in New York, and will also send letters seeking their prior consent and explaining the objectives of the trip.
 - (iii) The Secretariat and the Monitoring Team will provide the Chair and the Committee with the necessary assistance in this regard.
 - (iv) Upon his return the Chair will prepare a comprehensive report on the findings of the trip and will brief the Committee orally and in writing.
- (d) The Committee shall consider and approve the six monthly travel plan of the Monitoring Team. Any new travel plans in addition to already approved travel of the Monitoring Team shall be sent to the Committee Members for information on a regular basis as necessary. Unless a Committee Member expressly objects to any proposed travel, the Chair will take it that the Members of the Committee have no objection to the proposed travel and will advise the Monitoring Team to proceed accordingly.

* * * * *

Annex II

In accordance with paragraph 19 of this resolution, the Office of the Ombudsperson shall be authorized to carry out the following tasks upon receipt of a delisting request submitted by, or on behalf of, an individual, group, undertaking or entity on the Al-Qaida Sanctions List or by the legal representative or estate of such individual, group, undertaking or entity (“the petitioner”).

The Council recalls that Member States are not permitted to submit delisting petitions on behalf of an individual, group, undertaking or entity to the Office of the Ombudsperson.

Information gathering (four months)

1. Upon receipt of a delisting request, the Ombudsperson shall:
 - (a) Acknowledge to the petitioner the receipt of the delisting request;
 - (b) Inform the petitioner of the general procedure for processing delisting requests;
 - (c) Answer specific questions from the petitioner about Committee procedures;
 - (d) Inform the petitioner in case the petition fails to properly address the original designation criteria, as set forth in paragraph 2 of this resolution, and return it to the petitioner for his or her consideration; and,
 - (e) Verify if the request is a new request or a repeated request and, if it is a repeated request to the Ombudsperson and it does not contain any additional information, return it to the petitioner for his or her consideration.
2. For delisting petitions not returned to the petitioner, the Ombudsperson shall immediately forward the delisting request to the members of the Committee, designating State(s), State(s) of residence and nationality or incorporation, relevant United Nations bodies, and any other States deemed relevant by the Ombudsperson. The Ombudsperson shall ask these States or relevant United Nations bodies to provide, within four months, any appropriate additional information relevant to the delisting request. The Ombudsperson may engage in dialogue with these States to determine:
 - (a) These States’ opinions on whether the delisting request should be granted; and
 - (b) Information, questions or requests for clarifications that these States would like to be communicated to the petitioner regarding the delisting request, including any information or steps that might be taken by a petitioner to clarify the delisting request.
3. The Ombudsperson shall also immediately forward the delisting request to the Monitoring Team, which shall provide to the Ombudsperson, within four months:
 - (a) All information available to the Monitoring Team that is relevant to the delisting request, including court decisions and proceedings, news reports, and information that States or relevant international organizations have previously shared with the Committee or the Monitoring Team;

(b) Fact-based assessments of the information provided by the petitioner that is relevant to the delisting request; and

(c) Questions or requests for clarifications that the Monitoring Team would like asked of the petitioner regarding the delisting request.

4. At the end of this four-month period of information gathering, the Ombudsperson shall present a written update to the Committee on progress to date, including details regarding which States have supplied information, and any significant challenges encountered therein. The Ombudsperson may extend this period once for up to two months if he or she assesses that more time is required for information gathering, giving due consideration to requests by Member States for additional time to provide information.

Dialogue (two months)

5. Upon completion of the information gathering period, the Ombudsperson shall facilitate a two-month period of engagement, which may include dialogue with the petitioner. Giving due consideration to requests for additional time, the Ombudsperson may extend this period once for up to two months if he or she assesses that more time is required for engagement and the drafting of the Comprehensive Report described in paragraph 7 below. The Ombudsperson may shorten this time period if he or she assesses less time is required.

6. During this period of engagement, the Ombudsperson:

(a) May ask the petitioner questions or request additional information or clarifications that may help the Committee's consideration of the request, including any questions or information requests received from relevant States, the Committee and the Monitoring Team;

(b) Should request from the petitioner a signed statement in which the petitioner declares that they have no ongoing association with Al-Qaida, or any cell, affiliate, splinter group, or derivative thereof, and undertakes not to associate with Al-Qaida in the future;

(c) Should meet with the petitioner, to the extent possible;

(d) Shall forward replies from the petitioner back to relevant States, the Committee and the Monitoring Team and follow up with the petitioner in connection with incomplete responses by the petitioner;

(e) Shall coordinate with States, the Committee and the Monitoring Team regarding any further inquiries of, or response to, the petitioner;

(f) During the information gathering or dialogue phase, the Ombudsperson may share with relevant States information provided by a State, including that State's position on the delisting request, if the State which provided the information consents;

(g) In the course of the information gathering and dialogue phases and in the preparation of the report, the Ombudsperson shall not disclose any information shared by a state on a confidential basis, without the express written consent of that state; and,

(h) During the dialogue phase, the Ombudsperson shall give serious consideration to the opinions of designating states, as well as other Member States that come forward with relevant information, in particular those Member States most affected by acts or associations that led to the original designation.

7. Upon completion of the period of engagement described above, the Ombudsperson, with the help of the Monitoring Team, shall draft and circulate to the Committee a Comprehensive Report that will exclusively:

(a) Summarize and, as appropriate, specify the sources of, all information available to the Ombudsperson that is relevant to the delisting request. The report shall respect confidential elements of Member States' communications with the Ombudsperson;

(b) Describe the Ombudsperson's activities with respect to this delisting request, including dialogue with the petitioner; and

(c) Based on an analysis of all the information available to the Ombudsperson and the Ombudsperson's recommendation, lay out for the Committee the principal arguments concerning the delisting request. The recommendation should state the Ombudsperson's views with respect to the listing as of the time of the examination of the delisting request.

Committee discussion

8. After the Committee has had fifteen days to review the Comprehensive Report in all official languages of the United Nations, the Chair of the Committee shall place the delisting request on the Committee's agenda for consideration.

9. When the Committee considers the delisting request, the Ombudsperson, aided by the Monitoring Team, as appropriate, shall present the Comprehensive Report in person and answer Committee members' questions regarding the request.

10. Committee consideration of the Comprehensive Report shall be completed no later than thirty days from the date the Comprehensive Report is submitted to the Committee for its review.

11. After the Committee has completed its consideration of the Comprehensive Report, the Ombudsperson may notify all relevant States of the recommendation.

12. In cases where the Ombudsperson recommends retaining the listing, the requirement for States to take the measures in paragraph 1 of this resolution shall remain in place with respect to that individual, group, undertaking or entity, unless a Committee member submits a delisting request, which the Committee shall consider under its normal consensus procedures.

13. In cases where the Ombudsperson recommends that the Committee consider delisting, the requirement for States to take the measures described in paragraph 1 of this resolution shall terminate with respect to that individual, group, undertaking or entity sixty days after the Committee completes consideration of a Comprehensive Report of the Ombudsperson, in accordance with this annex II, including paragraph 6 (h), unless the Committee decides by consensus before the end of that sixty-day period that the requirement shall remain in place with respect to that individual, group, undertaking or entity; *provided* that, in cases where consensus does not exist, the Chair shall, on the request of a Committee Member, submit the

question of whether to delist that individual, group, undertaking or entity to the Security Council for a decision within a period of sixty days; and *provided further* that, in the event of such a request, the requirement for States to take the measures described in paragraph 1 of this resolution shall remain in force for that period with respect to that individual, group, undertaking or entity until the question is decided by the Security Council.

14. After the Committee decides to accept or reject the delisting request, the Committee shall convey to the Ombudsperson its decision, setting out its reasons, and including any further relevant information about the Committee's decision, and an updated narrative summary of reasons for listing, where appropriate, for the Ombudsperson to transmit to the petitioner.

15. After the Committee has informed the Ombudsperson that the Committee has rejected a delisting request, then the Ombudsperson shall send to the petitioner, with an advance copy sent to the Committee, within fifteen days a letter that:

- (a) Communicates the Committee's decision for continued listing;
- (b) Describes, to the extent possible and drawing upon the Ombudsperson's Comprehensive Report, the process and publicly releasable factual information gathered by the Ombudsperson; and
- (c) Forwards from the Committee all information about the decision provided to the Ombudsperson pursuant to paragraph 14 above.

16. In all communications with the petitioner, the Ombudsperson shall respect the confidentiality of Committee deliberations and confidential communications between the Ombudsperson and Member States.

17. The Ombudsperson may notify the petitioner, as well as those States relevant to a case but which are not members of the Committee, of the stage at which the process has reached.

Other Office of the Ombudsperson Tasks

18. In addition to the tasks specified above, the Ombudsperson shall:

- (a) Distribute publicly releasable information about Committee procedures, including Committee Guidelines, fact sheets and other Committee-prepared documents;
- (b) Where address is known, notify individuals or entities about the status of their listing, after the Secretariat has officially notified the Permanent Mission of the State or States, pursuant to paragraph 17 of this resolution; and
- (c) Submit biannual reports summarizing the activities of the Ombudsperson to the Security Council.

APPENDIX F

GENERAL CONCERNS WITH THE 1267 LISTING PROCESS

Special Rapporteurs on the promotion and protection of human rights and fundamental freedoms while countering terrorism

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr Ben Emmerson QC, (“**Special Rapporteur**”) and the first Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr Martin Scheinin, (“**first Special Rapporteur**”) reported to the UN General Assembly on the 1267 listing process. Their concerns with the 1267 process are discussed below. The Special Rapporteur reported that the 1267 régime “typically result[s] in a denial of access by listed individuals to their own property, a refusal of social security benefits, limitations on their ability to work and restrictions on their ability to travel domestically and internationally” and as “individual listings under the current régime are open-ended in duration, they may result in effective permanent designation”.¹ The Special Rapporteur recommended that there should be “a “sunset clause” imposing a time limit on the duration of 1267 designations”.² The first Special Rapporteur also expressed concerns about whether the practice of listing is really a temporary measure. Suggesting that there must be regular reviews of lists so that they do not become open ended in duration therefore making temporary sanctions, such as the freezing of funds, a permanent measure.³

¹ Ben Emmerson QC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 26 September 2012, A/67/396, para 13. For a full list of recommendations made by the Special Rapporteur in relation to the 1267 process, see para 59.

² A/67/396, para 58

³ Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, 16 August 2006, A/61/267 paras 34-35. In this respect the first Special Rapporteur also questioned procedural safeguards and standards of proof that should apply depending on whether sanctions imposed criminal punishments or administrative measures.

The first Special Rapporteur reported that to ensure individuals and entities are not arbitrarily included on terrorist lists there must be precision and clarity in the definition of terrorism, particularly in light of the lack of a UN definition of terrorism.⁴

The Special Rapporteur reported that:-

Since its inception, the sanctions regime established by Security Council resolution 1267 (1999) has evolved in nature and scope into a permanent tool of the United Nations global counter-terrorism apparatus, more closely resembling a system of international law enforcement than a temporary political measure adopted by the Security Council with a view to averting an imminent threat to international peace and security. As a result, the regime has been subject to frequent criticism for its failure to incorporate a mechanism of independent judicial review.⁵

The Special Rapporteur criticized the absence of an independent judicial review mechanism at the UN level for 1267 listing decisions:-

the absence of an independent judicial review mechanism at the United Nations level has seriously undermined the effectiveness and the perceived legitimacy of the regime. National and regional courts and treaty bodies, recognizing that they have no jurisdiction to review Council decisions per se, have focused their attention instead on domestic measures of implementation, assessing their compatibility with fundamental norms of due process. A series of successful legal challenges has highlighted the problem by quashing implementing legislation, or declaring it unlawful, for precisely this reason.⁶ [footnotes omitted]

The first Special Rapporteur also reported that “as long as there is no independent review of listings at the United Nations level...it is essential that listed individuals and entities have access to domestic judicial review of any measure implementing the sanctions pursuant to [1267]”.⁷ The first Special Rapporteur reported that an individual or entity subject

⁴ A/61/267, paras 30-33

⁵ A/67/396, para 12

⁶ A/67/396, para 20. See also the Court of Justice of the European Union decision in *Kadi*, discussed at Appendix G.

⁷ Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 6 August 2010, A/65/258, para 58. See also the first Special Rapporteur's recommendations for a best practice approach to terrorist listings and judicial review of such listings: Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism: Ten areas of best practices in countering terrorism*, 22 December 2010, A/HRC/16/15, paras 33-35, discussed below.

to designation as terrorist, whether as a result of listing on the 1267 List or through a domestic procedure for listing, “must be informed of that fact and of the measures taken as a consequence of listing, and is entitled to know the case against him, her or it, and be able to be heard within a reasonable time by the relevant decision-making body”.⁸ The first Special Rapporteur identified the following best practice in the listing of terrorist entities and individuals:-

Practice 9. Core elements of best practice in the listing of terrorist entities

Irrespective of the continued existence of the practice of the Security Council to list individuals or entities as terrorist, the implementation of any sanctions against individuals or entities listed as terrorist shall comply with the following minimum safeguards:

1. Sanctions against the individual or entity are based on reasonable grounds to believe that the individual or entity has knowingly carried out, participated in or facilitated a terrorist act;
2. The listed individual or entity is promptly informed of the listing and its factual grounds, the consequences of such listing and the matters in items 3 to 6 below;
3. The listed individual or entity has the right to apply for de-listing or non-implementation of the sanctions, and has a right to court review of the decision resulting from such application, with due process rights applying to such review, including disclosure of the case against him, her or it, and such rules concerning the burden of proof that are commensurate with the severity of the sanctions;
4. The listed individual or entity has the right to make a fresh application for de-listing or lifting of sanctions in the event of a material change of circumstances or the emergence of new evidence relevant to the listing;
5. The listing of an individual or entity, and the sanctions resulting from it, lapse automatically after 12 months, unless renewed through a determination that meets the requirements of items 1 to 3 above; and
6. Compensation is available for persons and entities wrongly affected, including third parties.⁹

⁸ A/HRC/16/51 para 34

⁹ A/HRC/16/51, para 35

The first Special Rapporteur reported that inclusion on proscribed lists must be subject to certain procedural guarantees. That is, the right to be informed of inclusion on a list, procedures for de-listing,¹⁰ the right to be informed of the existence of humanitarian exemptions and how to obtain them and the right to be informed of procedures for de-listing.¹¹

The first Special Rapporteur described the right to be informed of the grounds for inclusion on the list as “a precondition to a reasoned and argued contestation” of the listing.¹² The first Special Rapporteur noted that the grounds would often be based on secret intelligence but reiterated that access to information used as a basis for an individual’s inclusion on a list “is a prerequisite for appeal against inclusion and as such, its limitation must be narrowly construed”.¹³

The first Special Rapporteur reported on the need to proscribe on the basis of cogent evidence and for judicial oversight of proscription decisions and actions taken as the result of the proscription.¹⁴ The first Special Rapporteur reported that there must be the right to seek judicial review of a decision to list an individual. This is particularly important given that listing decisions are “often the result of political decisions taken by States’ political representatives within political bodies, based on confidential evidence”.¹⁵

The first Special Rapporteur considered that there must be national review procedures even for international lists where States apply terrorism financing sanctions. In addition, where the information is classified security information, consideration should be given to means through which a listed entity can still challenge the evidence against it. In particular, through the use of vetted or security-cleared counsel.¹⁶

¹⁰ In relation to 1267 despite improvements to the 1267 Committee’s procedures for listing and de-listing, including the establishment of an Ombudsperson, the first Special Rapporteur remained concerned that the revised procedures for de-listing do not meet the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law, noting the judgements of the European Court of Justice in the cases of *Kadi* and *Al Barakaat* as well as para 20 of General Assembly resolution 63/158 which urged States, while ensuring full compliance with their international obligations, to include adequate human rights guarantees in their national procedures for the listing of individuals and entities. See A/65/258, paras 55-58.

¹¹ A/61/267, para 38

¹² A/61/267, para 38

¹³ A/61/267, para 38

¹⁴ A/61/267, paras 26-41

¹⁵ A/61/267, para 39. The first Special Rapporteur considered that procedures for contesting inclusion at the international level, eg on the 1267 List, were inadequate.

¹⁶ A/61/267, para 39

The Special Rapporteur reported that decisions to list whether made at the UN, regional or domestic level are often based on secret information that cannot be disclosed to the listed individual and this impacts on the right to judicial review.¹⁷ The Special Rapporteur reported that:-

22. ...domestic judicial review is not an adequate substitute for due process at the United Nations level since the State responsible for implementation may not have access to the full justification for the listing. Even if it does, it may not have the designating State's consent to reveal the information. This can obstruct the ability of national or regional courts to carry out an effective judicial review.

23. While none of the judicial rulings to date has directly impugned Council resolutions, their effect has been to render those resolutions effectively unenforceable. If the measures cannot be lawfully implemented at the national and regional levels, then the logic of universal sanctions falls away, raising the spectre that targeted funds could begin migrating towards those jurisdictions that cannot lawfully implement the regime. It is therefore imperative that the Council find a solution that is compatible with the human rights standards binding on Member States. [footnotes omitted]¹⁸

The Special Rapporteur reported on the political and diplomatic character of the 1267 listing process, noting that Member States who propose a listing are generally expected to have reviewed the underlying evidence in their Statement of Reasons, however:-

while some Member States have clear procedures for conducting such a review, others do not. Significantly, the [1267] Committee as a whole does not examine the evidence justifying a designation, and it may not have all the relevant information available to it. Bilateral diplomatic negotiations and selective disclosure of intelligence sometimes takes place prior to a designation among States sympathetic to one another's positions, and there is no duty on designating States to disclose exculpatory information to the

¹⁷ A/67/396, paras 31-43. Although regional and domestic courts and tribunals have developed rules of procedure for considering information that the State is unwilling to disclose to a listed individual including arrangements for special advocates and confidentiality arrangements. See Chapter VII for a discussion of Australia's NSI Act. Most recently the European Court of Justice in *Kadi* has started to explore how such procedures could operate in the European courts. The European Court of Human Rights has held that where judicial review of a counter terrorism measure is based solely or decisively on secret information in order for the essential requirements of due process to be met an individual must be provided with sufficient information to enable him or her to give an effective answer to allegations as a "core irreducible minimum" see European Court of Human Rights in *A v United Kingdom* (2009) 49 EHRR 29, para 218. This decision was applied by the UK Supreme Court in *Secretary of State for the Home Department v AF* [2010] 2 AC 269, which concerned the imposition of a control order and the seeking of judicial review.

¹⁸ A/67/396

Committee. The political and diplomatic character of the listing process has raised concerns that the regime is open to misuse as a means of targeting individuals and entities in order to advance national political goals essentially unrelated to Al-Qa'ida, or even that States might use listing "as a convenient means of crippling political opponents".¹⁹

The Special Rapporteur noted that the resolutions establishing the criteria for listing by the 1267 Committee indicate "only that national criminal standards of proof are inappropriate".²⁰ The Special Rapporteur recommended that the standard of review must be set as high as possible, consistent with the terms of the resolution, which would require the 1267 Committee and the Ombudsperson to:-

be satisfied on the material available to them that the allegation of association with Al-Qaida is at least more likely than not to be true (a "balance of probabilities" test). Further, the standard must incorporate a proportionality element, if it is to meet the requirements laid down by the European Court of Human Rights in *Nada v. Switzerland*, and as envisaged by the High Commissioner for Human Rights and the Human Rights Committee. Where the imposition of the measures would involve a disproportionate interference with a protected human right, the [Ombudsperson] should have power to issue a delisting decision. [footnotes omitted]²¹

The Special Rapporteur noted that there is no obligation on Member States to provide the Ombudsperson with relevant confidential information "even where the information may be decisive for a delisting request" noting that this "represents a significant limitation on the Ombudsperson's ability to examine the full facts".²² The Special Rapporteur reported that:-

40. If a State elects not to share confidential information with the Ombudsperson, she obviously cannot take it into account in her report. While this provides some incentive to a designating State to disclose inculpatory material, it does little to counterbalance the procedural unfairness to the petitioner. This is because there is no means of preventing the undisclosed information from being held against the petitioner in the decision-making process. The State concerned may elect to disclose

¹⁹ A/67/396, para 26

²⁰ A/67/396, para 57. See eg UN Security Council Resolution 1989 (2011).

²¹ A/67/396, para 57

²² A/67/396, para 38

information bilaterally to other Committee members, or to the Committee as a whole, without disclosing it to the Ombudsperson; it may disclose information to the Ombudsperson, but refuse to give permission for its onward disclosure to the petitioner; or it may refer the delisting request to the Security Council, where any permanent Member can exercise a veto. Any one of these eventualities would be fundamentally inconsistent with international standards of due process. [footnotes omitted]²³

The Special Rapporteur went further, explaining:-

43. The Ombudsperson considers that she has managed to convey to the petitioners the essential case against them in sufficient detail to enable them to answer it. Lawyers acting for petitioners, on the other hand, have informed the Special Rapporteur that they had to guess at the case their clients had to meet, requiring “speculative lawyering” that was difficult to reconcile with their professional obligations. Due to the lack of transparency in the process, it is impossible for the Special Rapporteur to provide an objective assessment of these competing views. What is certain, however, is that the regime allows for the possibility that the petitioner (and even the Ombudsperson) may be kept in ignorance of information that is decisive to the outcome of a delisting petition...

...

45. A further striking feature of the current procedures is the absence of any duty on Member States to disclose exculpatory information. Lawyers acting for petitioners have satisfied the Special Rapporteur that there have been instances in which key exculpatory material was withheld. Rudimentary principles of procedural fairness dictate that a petitioner should have access to any information in the possession of States that might support a delisting application, including any indication that a confession or statement was obtained by torture or ill treatment. The Special Rapporteur recommends that States be subject to an express obligation to indicate whether or not there is such material in their possession; and that a State’s refusal to authorize the disclosure of any such material to the [Ombudsperson] or its onward disclosure to the petitioner, should provide an independent ground for delisting since such a stance would otherwise frustrate a full and fair judicial review. [footnotes omitted]²⁴

²³ A/67/396, para 40

²⁴ A/67/396, para 37. See the Special Rapporteur’s recommendations in para 59.

The Special Rapporteur expressed grave concerns as to the Ombudsperson's approach with respect to information that was or may have been obtained by torture and the fact that such information is not excluded from her assessment since she does not consider herself bound by formal rules of evidence.²⁵ The Special Rapporteur noted that the prohibition of torture is *jus cogens*, and Art 15 of the *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* provides that statements that are established to have been made as a result of torture shall not be invoked as evidence in any proceedings.²⁶

The first Special Rapporteur noted the enhanced procedures for listing at the UN level and the appointment of an Ombudsperson but remained concerned about procedural inadequacies of the listing and de-listing process for the 1267 List, in particular, that "the revised procedures for de-listing do not meet the standards required to ensure a fair and public hearing by a competent, independent and impartial tribunal established by law".²⁷ The first Special Rapporteur reported:-

...the Ombudsperson does not have the decisionmaking power to overturn the listing decision of the Committee...de-listing decisions are still taken confidentially and by consensus of a political body [the 1267 Committee], as opposed to being the result of judicial or quasi-judicial examination of evidence. Further, access to information by the Ombudsperson continues to depend on the willingness of States to disclose information, as States may choose to withhold information in order to safeguard their security or other interests. The system continues to lack transparency since there is no obligation for the Committee to publish in full the Ombudsperson's report or to fully disclose information to the petitioner.²⁸

The Special Rapporteur noted two major shortcomings to the procedure under resolution 1904 (2009), which established the Office of the Ombudsperson. The first was that the Ombudsperson was given no formal power to make recommendations.²⁹ The Ombudsperson "nonetheless took the view that her comprehensive reports should address, to the defined standard, the question whether the continued listing was justified. Resolution 1989 (2011)

²⁵ A/67/396, paras 46-47

²⁶ A/67/396, para 47. Accordingly, the Special Rapporteur recommended at para 59(v) that where the Ombudsperson "considers that there is a plausible basis for believing that information may have been obtained through torture, and the designating State is unable to establish that it was not so obtained, the information should be excluded".

²⁷ A/65/258 at para 56, see also discussion in paras 51-58.

²⁸ A/65/258 at para 56

²⁹ A/67/396, para 28

endorsed this practice and gives the Ombudsperson a mandate to make consequential recommendations regarding processed de-listing requests”.³⁰

The Special Rapporteur commented that the second shortcoming was that a consensus of the Committee was required for de-listing:-

The most far-reaching change introduced by resolution 1989 (2011) was to reverse this consensus presumption. A delisting recommendation by the Ombudsperson now takes effect automatically 60 days after the Committee completes its consideration of the comprehensive report, unless the Committee decides otherwise by consensus. If there is no consensus, any member of the Committee may refer the delisting request to the Security Council (the “trigger mechanism” procedure).³¹

The Special Rapporteur reported that prior to the amendments made by UN Security Council Resolution 1989, the mandate of the Ombudsperson had been assessed for compatibility with minimum standards of due process by UN bodies (eg UN High Commissioner for Human Rights) and by courts (eg General Court of the European Union and the UK Supreme Court). The Special Rapporteur reported that:-

While welcoming the introduction of an independent element to the procedure, they each concluded that the mandate of the Ombudsperson under Resolution 1904 (2009) failed adequately to address the due process-related concerns previously expressed about the regime, identifying 10 key objections:-

- (i) the mandate of the Ombudsperson did not confer a power to overturn decisions of the Committee;
- (ii) the Committee therefore continued to act as judge in its own cause;
- (iii) de-listing required a consensus within the Committee;
- (iv) the Ombudsperson lacked a power of recommendation;
- (v) disclosure of information to the Ombudsperson or the Committee was subject to the unfettered discretion of States;
- (vi) the Ombudsperson’s authority to disclose sensitive information to the petitioner was similarly at the discretion of States;

³⁰ A/67/396, para 28. See also Security Council Resolution 1989 (2011), para. 21 which provides: “...the Ombudsperson shall present to the Committee observations and a recommendation on the delisting of those individuals, groups, undertakings or entities that have requested removal from the Al-Qaida Sanctions List through the Office of the Ombudsperson, either a recommendation to retain the listing or a recommendation that the Committee consider delisting”.

³¹ A/67/396, para 29

- (vii) there was no requirement that the petitioner be informed of the identity of the designating State;
- (viii) neither the comprehensive report, nor the Ombudsperson's conclusions, could be disclosed to the petitioner;
- (ix) the Committee was under no obligation to provide reasons for its decision; and
- (x) the office of the Ombudsperson lacked the authority to grant appropriate relief where human rights were violated.³²

The Special Rapporteur recommended the disclosure of the Ombudsperson's recommendations to the petitioner, commenting that:-

Neither the report of the Ombudsperson nor her recommendation may be made public or disclosed to the petitioner. The Ombudsperson considers that these restrictions "unnecessarily impair the transparency" of the process. The Monitoring Team also supports some increased transparency. If the present system is retained, the Special Rapporteur agrees that the Ombudsperson should be permitted to disclose her recommendation to the petitioner, and further recommends that, subject to any necessary redactions, the comprehensive reports of the Ombudsperson be published.³³

The Special Rapporteur found that:-

35. ...despite the significant improvements brought about by resolution 1989 (2011), the mandate of the Ombudsperson still does not meet the structural due process requirement of objective independence from the Committee" and that the Security Council must now explore "every avenue of possibility" for establishing "an independent quasi-judicial procedure for review of listing and delisting decisions". This necessarily implies that the Ombudsperson's comprehensive reports should be accepted as final by the Committee and that the decision-making powers of the Committee and Council should be removed.³⁴

³² A/67/396, para 31. Of these key objections only (i) to (iv) have been remedied (at least in part) to date.

³³ A/67/396, para 50. The Special Rapporteur also recommended at para 51 that the 1267 Committee "should give reasons in all cases and that the Committee's reasons should be as full as possible, and should in all cases be made public".

³⁴ A/67/396. See the Special Rapporteur's recommendations in para 59.

The Special Rapporteur also recommended that the Ombudsperson's mandate should be extended to enable petitions to be made to the Ombudsperson for humanitarian exemptions.³⁵

Report of the 1267 Analytical Support and Sanctions Monitoring Team³⁶

The Analytical Support and Sanctions Monitoring Team ("1267 Monitoring Team") provides support to the UN Security Council 1267 Committee. The Monitoring Team conducted a review of the 1267 listing régime and reported to the UN Security Council on the deficiencies of that system.³⁷ The report of the 1267 Monitoring Team was critical of the listing process, in particular, its lack of transparency and due process requirements, and inadequate review mechanisms for updating the 1267 List.

The 1267 Monitoring Team reported that States had expressed concern that the 1267 régime lacked fairness.³⁸ The 1267 Monitoring Team reported that:-

Although the measures are preventive, many States regard their effect as punitive and therefore requiring basic legal protections for the listed parties. The sanctions measures also have no expiry date, which some States see as compounding their lack of fairness. The Committee has made several major improvements to its procedures for listing and de-listing since 2001 but, nonetheless, as at 30 June 2008 the Team knew of cases before national and regional courts concerning 22 listed individuals and entities that had challenged the implementation of sanctions against them as lacking fairness and transparency.³⁹

A further issue of importance to many States was that the 1267 Committee "gives no clear role to the State of citizenship or residence — or incorporation or operation in the case of entities — in its listing and de-listing procedures".⁴⁰ The 1267 Monitoring Team reported:-

³⁵ A/67/396, para 37. See the Special Rapporteur's recommendations in para 59.

³⁶ *Report of the Analytical Support and Sanctions Monitoring Team on the outcome of the review described in paragraph 25 of resolution 1822 (2008) submitted pursuant to paragraph 30 of resolution 1904 (2009)*, 29 September 2010, S/2010/497. This is the Report of the 2010 Review of the 1267 régime (which included a review of all listed names), undertaken by the Analytical Support and Sanctions Monitoring Team (which provides support to the 1267 Committee pursuant to UN Security Council Resolution 1526 (2004)).

³⁷ See also Chapter VI for a discussion of the review findings.

³⁸ S/2010/497, para 11

³⁹ S/2010/497, para 11

⁴⁰ S/2010/497, para 12

States argue that, as a result, the Security Council Committee may make listing or de-listing decisions without access to important information, and that the initial List entries may contain errors. While the Security Council Committee may still consider listing and de-listing submissions without consulting States of residence or nationality, the review required their involvement, and so provided an effective if belated way of giving them a voice.⁴¹

...

...many States feel that they have limited influence over the decisions of the Committee. In particular, States of residence and nationality (or incorporation or location for entities) have frequently complained that the Committee has added or removed a name without consulting them, even though they are the ones that are most likely to know about the case. This has led to accusations of double standards or even to the sense that the sanctions regime reflects the concerns of Committee members more than those of other Member States, including those that face the greatest threat from Al-Qaida and the Taliban.⁴²

In relation to narrative summaries of reasons for listing prepared by the 1267 Monitoring Team in conjunction with the designating States,⁴³ the 1267 Monitoring Team found the summaries:-

...often contain less than obvious justification for an initial listing, let alone for its continuation. For example, all too often narrative summaries contain no information about the activities of the listed individual or entity over the last five years or more. This lack of information may be because States do not wish to reveal what they know, or because the older information is so strong that an inference of continued activity is warranted, but it may also be an indication of inactivity. A thin narrative summary inevitably raises questions about a listing but, unfortunately, although the Team has either proposed or intends to propose 217 amendments to narrative summaries on the basis of information collected during the review, many of the least revealing narrative summaries will remain unchanged.⁴⁴

⁴¹ S/2010/497, para 12

⁴² S/2010/497, para 24

⁴³ Narrative summaries of listing are required by UN Security Council Resolution 1822 (2008).

⁴⁴ S/2010/497, para 57

The 1267 Monitoring Team noted that:-

Information contained in the narrative summaries was particularly relevant when determining whether a listing remained appropriate, and, as well as detailing the activities of listed parties, States provided the Team with considerable additional information about their identity, whereabouts and the result of legal action brought against them. While members of the Committee may have had access to other, undisclosed information, the Team noticed that, with regard to several names, the narrative summaries were the only source of substantive information about the individual's or entity's association with Al-Qaida, Osama bin Laden or the Taliban available to the Committee as a whole.⁴⁵ [footnotes omitted]

The 1267 Monitoring Team reported that States that are not directly involved in the Security Council Committee's decision-making process may "resent spending time researching a name and giving their opinion on the listing if they believe that their advice is consistently ignored with no reason given".⁴⁶ The 1267 Monitoring Team reported that the "implementation of the sanctions measures by Member States have been undermined by factors such as a lack of effective legislation, a lack of capacity or a lack of priority; but the most corrosive issue has been a perceived lack of fairness, whether expressed by national or regional courts, by politicians or by the public at large".⁴⁷

The 1267 Monitoring Team recommended that the 1267 Committee must actively engage with Member States who can provide further information about proposed listings or listed parties, submit new names for listing or argue for, or against, de-listing. The 1267 Monitoring Team reported "it is only through such engagement that the [1267 List] will remain current and useful, and maintain international support".⁴⁸ The 1267 Monitoring Team also recommended that:-

82. The triennial review prescribed by paragraph 32 of resolution 1904 (2009) presumes that a name will remain on the List unless the Committee decides to remove it. The Team recommends however, that where no Member State or the Monitoring Team has discovered any information about the activities of a listed person over two review

⁴⁵ S/2010/497, para 28

⁴⁶ S/2010/497, para 71

⁴⁷ S/2010/497, para 68

⁴⁸ S/2010/497, para 69

periods, the Committee invite the designating State to submit a de-listing request or update the List entry.

83. ...As Committee members should be in possession of all available information before deciding on the appropriateness of a listing, the Team recommends that the Chair continue to collect in advance information from Committee members in their capacity as the designating State or State of residence or nationality, or incorporation or location for entities, but allow them to delay expressing their opinion on the listing until the Committee discusses the name.

84. Other States should be more aware of the importance of supporting their recommendations for the de-listing or retention of names on the List, and the Team recommends that for future reviews the Committee request Member States that express their opinion on the appropriateness of a listing to give their reasons, regardless of whether they argue for the retention or the removal of the name.

85. The Team recommends that, when writing to States about listings, the Committee attach the latest version of the corresponding narrative summary and ask the State to provide any further information that could be used to update it.

86. The Team further recommends that the Committee request it to prepare annually a list of all entries for which the corresponding narrative summary of reasons for listing contains no information that substantiates the listing in accordance with the criteria set out in paragraph 2 of resolution 1904 (2009).

88. The Team recommends that when reviewing listed individuals who are reportedly deceased, the Committee take a flexible approach to the documentation required to confirm death.

90. Defunct entities, by definition, can no longer perform any of the activities described in paragraph 2 of resolution 1617 (2005) and therefore no longer meet the criteria for listing. The Team recommends that the Committee include in its review of dead people a review of entities reported to be defunct.

91. At the start of the review, there were 77 entries on the List for individuals that had fewer than four basic identifiers. As a result of information provided during the review, this number is likely to drop to 39. In order to continue to purge the List of

inadequate entries, the Team recommends that, when conducting its triennial review, the Committee invite the relevant designating States to submit de-listing requests for names that lack sufficient identifiers to allow effective implementation of the measures. For an individual, this should include the full name, date of birth, place of birth and nationality. For a legal entity, this should include full registered name and the location of all offices, branches or subsidiaries that are subject to sanctions.⁴⁹

Report of the Independent expert on the protection of human rights and fundamental freedoms while countering terrorism

The former UN independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman, expressed the following concerns in relation to UN Security Council sanctions régimes, including the 1267 régime:-

63. The identification and freezing of the assets of persons and groups involved in terrorism are appropriate and necessary measures to combat terrorism. In light of the severe consequences that can result from inclusion on such lists, a high degree of care must be exercised to ensure that no person or group will be erroneously placed on such lists. Yet, no relevant Security Council resolution establishes precise legal standards governing the inclusion of persons and groups on lists or the freezing of assets, much less mandates safeguards or legal remedies to those mistakenly or wrongfully included on these lists.

64. This is problematic since States, having measures containing widely divergent definitions of terrorism and terrorist offences, not only draw up such lists and issue the freezing orders, but commonly fail to provide for judicial review or right to appeal of initial inclusion decisions...Lawyers for some of these affected persons have charged that such designations are based on vague and sweeping criteria and, once made, are open ended in their duration. In addition, questions have been raised about the reliability and accuracy of the information relied on by States in compiling these lists, which is often treated as classified material. The International Bar Association noted in this regard: "... states that introduce these measures often protect the secrecy of the information they possess. The opportunity to challenge the state's action is therefore restricted as persons affected by freezing orders and the like simply have no information as to the basis of the order, and are thus disadvantaged in any challenge they may make to the orders affecting them".

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65. Such due process concerns underscore the need for such determinations to be subject to meaningful judicial scrutiny in order to protect the property rights of those who may have been mistakenly placed on such lists. [footnotes omitted]⁵⁰

Views of the Ombudsperson

De-listing petitions in regards to a 1267 listing can be made to the Office of the Ombudsperson, who is required to submit biannual reports to the UN Security Council summarizing her activities.⁵¹ Since the establishment of the Office of the Ombudsperson there have been 49 de-listing petitions submitted to the Ombudsperson and all were accepted, with 33 comprehensive reports submitted to the 1267 Committee. 42 of the 49 cases were brought forward by individuals, 2 by an individual together with one or more entities and 5 by entities alone. In 24 of the 49 cases, the petitioner is or was assisted by legal counsel. 34 cases involving requests from an individual, an entity or a combination of both have been completed. As a result of the consideration of these cases, 25 individuals and 24 entities have been delisted, 1 entity has been removed as an alias of a listed entity, two delisting requests have been refused and one petition has been withdrawn.⁵²

The Ombudsperson, Kimberly Prost, has expressed a number of concerns with the Ombudsperson process.⁵³ The Ombudsperson has expressed concern that her mandate does not extend to providing reasons on delisting petitions, regardless of the outcome:-

40. ...a significant concern with regard to fairness has been identified with regard to the provision of reasons for refusing a request for delisting through the Ombudsperson process. That concern arises from the fact that the recommendation of the Ombudsperson to retain the listing, once reported and discussed with the Committee, ends the consideration of that specific delisting petition. In those circumstances, evidently the assessment of the Ombudsperson forms the basis for the retention of the listing and, as a result, fairness requires that

⁵⁰ *Report of the independent expert on the protection of human rights and fundamental freedoms while countering terrorism, Robert K. Goldman*, E/CN.4/2005/103, 7 February 2005

⁵¹ UN Security Council, *Security Council resolution 2083 (2012) [on extension of the mandate of the Office of the Ombudsperson and the implementation of measures relating to the Al-Qa'ida sanctions list]*, 17 December 2012, S/RES/2083 (2012), para 18(c) of Annex II. The process for de-listing petitions made to the Ombudsperson is described in pp9-11 of Appendix E. Reports from the Ombudsperson to the UN Security Council are available at: www.un.org/en/sc/ombudsperson/reports.shtml

⁵² As at 31 July 2013. See Kimberly Prost, *Report of the Office of the Ombudsperson pursuant to Security Council resolution 2083 (2012), [for the period from 31 January 2013 to 31 July 2013]*, 31 July 2013, S/2013/452

⁵³ S/2013/452

the reasons given to the petitioner be reflective of the analysis and conclusions of the independent mechanism.

41. At present, however, the process mandates that reasons for the decision be provided by the Committee, not the Ombudsperson. As a result, there exists the potential for a discrepancy between the comprehensive report of the Ombudsperson and the reasons given by the Committee. The existence of such a discrepancy could significantly undermine the fairness of the process and its consistency with fundamental principles in that regard...

42. Consideration should be given to making the process for the delivery of reasons consistent with the means by which a decision on refusal is taken. Specifically, this could be done by making the Ombudsperson responsible for providing the reasons. [footnotes omitted]⁵⁴

The Ombudsperson has also expressed concern about the cooperation of States and the specificity of information received in responses to the Ombudsperson's enquiries:-

47...one significant hurdle to effective State cooperation remains: the Ombudsperson continues to receive responses in the form of assertions but not the supporting information or the level of detail necessary to assess the sufficiency, reasonableness and credibility of the underlying information. This failing undermines the effectiveness of the overall process, including the meaningfulness of the dialogue with the petitioner and the ability to conduct a thorough analysis of the underlying information. Moreover, this trend is very worrying in terms of the ability of the Ombudsperson to prepare a comprehensive report that properly reflects the facts of the case and to provide, in all circumstances, an appropriate recommendation.

48. The major impediment to the disclosure of detailed information remains the question of confidential or classified material. While some confidential material was used during the reporting period [used by the Ombudsperson to inform her recommendations but not disclosed to the petitioner], no progress was made in terms of increasing the number of arrangements or agreements for accessing such material...

⁵⁴ S/2013/452

49. In sum, the lack of detailed information and substantiation remains the most critical problem in the Ombudsperson process. Progress on this issue is only possible if practical solutions can be found to overcoming the access restrictions, especially with States that are frequently implicated in specific cases. [footnotes omitted]⁵⁵

The Ombudsperson has noted problems with the lack of transparency in the de-listing process:-

50. Problems with the lack of transparency in the process have continued to be evident during the reporting period. Security Council resolution 2083 (2012) allows for the Ombudsperson to communicate her recommendation to States that are not members of the Committee. The comprehensive report, however, remains confidential to the Committee; relevant States that are not members of the Committee are not aware of the information gathered, the analysis conducted or the basis for the recommendation made. This limitation not only weakens the transparency and credibility of the process, it also has the potential to have a negative impact on the cooperative relationship between the Ombudsperson and these States. To minimize the damage in that regard, in some instances the Ombudsperson has sought the consent of the Committee to disclose some factual information about the case and to discuss the outcome with the relevant States. Such requests have been granted. Nonetheless, the discussion is still limited by the confidential nature of the overall process. As to the extent of the problem, it is notable that every case during the reporting period involved a non-Committee member as either a designating State or a State of residence.

51. The confidentiality restrictions with reference to States also create a fundamental inequality in terms of access to information between States that objectively have an equal interest in knowing and understanding the basis for the recommendation of the Ombudsperson and the decision taken in the case. In sum, it is not clear why membership in the Committee, whether temporary or permanent, should allow one designating State or State of residence to have more information on a case than another.

⁵⁵ S/2013/452

52. With reference to the petitioner, as detailed in the previous report, the process remains frustrating in its lack of transparency. The recommendation of the Ombudsperson cannot be disclosed and the petitioner is not advised as to the analysis leading to the same, except to the extent that it is captured in any reasons provided. As for the public — including interested bodies such as courts and academia — only basic information on the overall process and the statistics related to the cases are disclosed. The lack of transparency in the process for the petitioner and the general public detracts from the fairness and credibility of the process as a whole. [footnotes omitted]⁵⁶

⁵⁶ S/2013/452

APPENDIX G

KADI CASE SUMMARY

Yassin Kadi was placed on the 1267 List as associated with Al-Qa'ida and the Taliban, and was subsequently designated by European Union regulations implementing the 1267 List. The Grand Chamber of the Court of Justice of the European Union (“**the Court**”) upheld the General Court’s annulment of Kadi’s EU designation.¹ The following provides a summary of the Court’s reasons.

No immunity from review

The European Commission, Council of the European Union and the UK Government submitted that the EU regulation implementing 1267 should have immunity from the jurisdiction of the European courts because judicial review by the courts would amount to “reviewing the legality of Security Council resolutions in light of European Union law. The uniform, unconditional and immediate application of those resolutions is jeopardised. States which are members both of the United Nations and of the European Union find themselves in an impossible position as regards meeting their international obligation”.²

However, the Court maintained that there is a “constitutional guarantee which is exercised, in a Union based on the rule of law...by judicial review of the lawfulness of all European Union measures, including those which...implement an international

¹ Judgement in Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council, United Kingdom v Kadi* (18th July 2013). The European Commission, the Council of the European Union and the UK Government sought to have set aside the General Court’s judgement in Case T-85/09 *Kadi v Commission* [2010] ECR II-5177, by which that Court annulled the European regulation implementing 1267 in so far as the regulation concerned Kadi. Setting aside the judgement of the Court of First Instance, the General Court ruled that the European Community courts have jurisdiction to review measures adopted by the Community giving effect to resolutions of the UN Security Council. In exercising that jurisdiction, the General Court considered that the regulation infringed Mr Kadi’s fundamental rights under Community law. The General Court concluded that the rights of defence, in particular the right to be heard, and the right to effective judicial review of those rights, were not respected.

² C-584/10 P, C-593/10 P and C-595/10 P at [61]

law measure, in the light of the fundamental rights guaranteed by the European Union”.³ The Court reiterated its previous findings on this issue and made clear that “European Union measures implementing restrictive measures decided at international level enjoy no immunity from jurisdiction”.⁴

Extent of the rights of the defence and the right to effective judicial protection

The Court upheld the General Court’s decision that the European courts must provide judicial review (“in principle the full review”) of the lawfulness of EU acts, in the light of fundamental rights, including EU measures implementing UN sanctions. The Court held that in reviewing whether an annulment should be granted, the European courts must review not only that there has been a proper procedure, legal basis, and reasons for the listing but that the courts must also conduct a verification of the allegations to check whether the reasons are substantiated and well founded and have a solid factual basis.⁵

The Court held that European courts must assess the probative value of the information or evidence, whether the facts alleged are made out and whether the accuracy of the facts relating to the reason concerned has been established. If a particular reason is unfounded or unsubstantiated, the Council may not rely on it to justify a listing decision, and the court will base its assessment only on the evidence disclosed to it – if insufficient evidence is disclosed to substantiate a reason, the court will disregard that reason.⁶

The Court did not agree with the Advocate General’s view that there is a lesser need for a full review by the European courts given the role of the Ombudsperson in the 1267 de-listing process. The Court held that the Ombudsperson does not provide effective judicial protection

³ C-584/10 P, C-593/10 P and C-595/10 P at [66]

⁴ C-584/10 P, C-593/10 P and C-595/10 P at [67], citing the Court’s recent decision in C-548/09 P, *Bank Mellî Iran v Council* [2011] ECR I-0000 at [105] where the Court held “...without the primacy of a Security Council resolution at the international level thereby being called into question, the requirement that the Community institutions should pay due regard to the institutions of the United Nations could not result in their abstaining from reviewing the lawfulness of Community measures in the light of the fundamental rights forming an integral part of the general principles of Community law”.

⁵ In establishing the requirements for judicial review, the Court did not follow Advocate General Bot’s opinion that it should restrict its review in UN sanctions cases. The Court went even further than the General Court towards reviewing the basis of UN Security Council decisions, adopting the same standard applied by the Court to reviews of EU autonomous sanctions regulations against individuals and entities associated with Iran’s nuclear proliferation program. For the Court’s discussion of the requirements of effective judicial review of EU regulations implementing 1267 see C-584/10 P, C-593/10 P and C-595/10 P at [97]-[137].

⁶ See esp C-584/10 P, C-593/10 P and C-595/10 P at [122]-[124]

(particularly given the decisions of the Ombudsperson are not binding).⁷ The Court held that:-

...for the rights of the defence and the right to effective judicial protection to be respected first, the competent European Union authority must (i) disclose to the person concerned the summary of reasons provided by the [1267] Committee which is the basis for listing or maintaining the listing of that person's name [in the European regulation], (ii) enable him effectively to make known his observations on that subject and (iii) examine, carefully and impartially, whether the reasons alleged are well founded, in the light of the observations presented by that person and any exculpatory evidence that may be produced by him.⁸

The Court held that European courts “are to review, in the light of the information and evidence which have been disclosed...whether the reasons relied on in the summary provided by the [1267] Committee are sufficiently detailed and specific and, where appropriate, whether the accuracy of the facts relating to the reason concerned has been established”⁹

Information not available to the European courts

The Court held that the fact that the competent European authority “does not make accessible to the person concerned and, subsequently, to the [European courts] information or evidence which is in the sole possession of the [1267] Committee or the Member of the UN concerned and which relates to the summary of reasons underpinning the decision at issue, cannot, as such, justify a finding that those rights have been infringed”¹⁰

However, the European courts in reviewing whether the reasons in the 1267 Committee summary are well founded in fact, must take into consideration any observations and exculpatory evidence produced by the person concerned and the response of the competent European Union authority to those observations. Where the court does not have available to it supplementary information or evidence “if it is impossible for the court to find that those

⁷ C-584/10 P, C-593/10 P and C-595/10 P at [95]

Note: Kadi was de-listed by the 1267 Committee on 5th October 2012 on the recommendation of the Ombudsperson. Kadi submitted a de-listing request to the Office of the Ombudsperson and after reviewing the evidence, the Ombudsperson recommended that he be de-listed by the 1267 Committee.

⁸ C-584/10 P, C-593/10 P and C-595/10 P at [135]

⁹ C-584/10 P, C-593/10 P and C-595/10 P at [136]

¹⁰ C-584/10 P, C-593/10 P and C-595/10 P at [137]

reasons are well founded, those reasons cannot be relied on as the basis for the contested listing decision”.¹¹

The Court noted that where the 1267 Committee has decided to list the name of an organisation, entity or individual on its Consolidated List in accordance with UN Security Council resolutions, “the competent European Union authority must, in order to give effect to that decision on behalf of the Member States, take the decision to list the name of that organisation, entity or individual, or to maintain such listing, in [the Annex to the EU regulation] on the basis of the summary of reasons provided by the 1267 Committee”.¹² However, the Court acknowledged that “there is no provision in those [UN Security Council] resolutions to the effect that the [1267] Committee is automatically to make available to, in particular, the European Union authority responsible for the adoption by the European Union of its decision to list or maintain a listing, any material other than that summary of reasons”.¹³

Accordingly, both in respect of an initial decision to list an organisation, entity or individual in the EU regulation or a decision to maintain such a listing, the competent European Union authority refers exclusively to the statement of reasons provided by the 1267 Committee. The European Commission, in the case of Kadi, decided to maintain him on the EU regulation list on the basis of the narrative summaries of reasons which had been transmitted by the 1267 Committee.¹⁴

Information to be made available to the person listed

The Court held that in relation to a decision to list or maintain the listing of a person for the purposes of an EU regulation:-

...respect for the rights of the defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against that person available to that authority and relied on as the basis of its decision, that is to say, at the very least, the summary of reasons provided by the [1267]

¹¹ C-584/10 P, C-593/10 P and C-595/10 P at [137] and [138]. The court held that the General Court had erred in finding that the Commission had failed to disclose information underlying the reasons for Kadi’s 1267 listing as the Commission was not in the possession of that information. This finding was the basis of the General Court’s finding that the rights to defence and the right to effective judicial protection, and consequently the principle of proportionality, had been infringed.

¹² C-584/10 P, C-593/10 P and C-595/10 P at [107]

¹³ C-584/10 P, C-593/10 P and C-595/10 P at [107]

¹⁴ As the European Commission confirmed at the hearing before the Court, the Commission was not, for the purposes of listing Kadi, put in possession of evidence other than such a summary of reasons: C-584/10 P, C-593/10 P and C-595/10 P at [110]

Committee...so that that individual is in a position to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in bringing an action before the [European Courts].¹⁵

The Court held that when that disclosure takes place, the competent Union authority “must ensure that that individual is placed in a position in which he may effectively make known his views on the grounds advanced against him”.¹⁶ As regards a decision to maintain an individual on the EU list, compliance with that dual procedural obligation must, contrary to the position in respect of an initial listing, precede the adoption of that decision.¹⁷

The Court held that:-

When comments are made by the individual concerned on the summary of reasons, the competent European Union authority is under an obligation to examine, carefully and impartially, whether the alleged reasons are well founded, in the light of those comments and any exculpatory evidence provided with those comments...

In that context, it is for that authority to assess, having regard, to the content of any such comments, whether it is necessary to seek the assistance of the [1267] Committee and, through that committee, the Member of the UN which proposed the listing of the individual concerned on [the 1267 list] in order to obtain...the disclosure of information or evidence, confidential or not, to enable it to discharge its duty of careful and impartial examination.¹⁸

The Court held that “without going so far as to require a detailed response to the comments made by the individual concerned”, there is an obligation to provide a statement of reasons to the individual concerned which identifies “the individual, specific and concrete reasons why the competent [European] authorities consider that the individual concerned must be subject to restrictive measures”.¹⁹

¹⁵ C-584/10 P, C-593/10 P and C-595/10 P at [111]

¹⁶ C-584/10 P, C-593/10 P and C-595/10 P at [112]

¹⁷ C-584/10 P, C-593/10 P and C-595/10 P at [113]

¹⁸ C-584/10 P, C-593/10 P and C-595/10 P at [114] and [115]

¹⁹ C-584/10 P, C-593/10 P and C-595/10 P at [116]

The Court held that where a person challenges the lawfulness of the decision to list them or to maintain their listing, the review by the European courts must extend to whether procedural rules and safeguards and rules as to competence, including whether or not the legal basis is adequate, are observed.²⁰

The Court held that:-

The effectiveness of the judicial review guaranteed by Article 47 of the Charter²¹ also requires that, as part of the review of the lawfulness of the grounds which are the basis of the decision to list or to maintain the [EU] listing of a given person...the [European] courts are to ensure that that decision, which affects that person individually is taken on a sufficiently solid factual basis...that entails a verification of the allegations factored in the summary of reasons underpinning that decision...with the consequence that judicial review cannot be restricted to an assessment of the abstract cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated²².

The Court held that in order for the European courts to undertake this examination, they must request the competent European Union authority, when necessary, to produce information or evidence, confidential or not, relevant to such an examination.²³ However, the Court recognized that there is no requirement that the European authority produce before the European courts all the information and evidence underlying the reasons alleged in the summary provided by the 1267 Committee. Although it is “necessary that the information or evidence produced should support the reasons relied on against the person concerned”²⁴

²⁰ C-584/10 P, C-593/10 P and C-595/10 P at [117]-[118]

²¹ Art 47 of the *Charter of Fundamental Rights of the European Union* (2000/C 364/01) provides that everyone has the right to an effective remedy and to a fair trial.

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice”.

²² C-584/10 P, C-593/10 P and C-595/10 P at [119]

²³ That is because “it is the task of the competent European Union authority to establish, in the event of challenge, that the reasons relied on against the person concerned are well founded, and not the task of that person to adduce evidence of the negative, that those reasons are not well founded”. C-584/10 P, C-593/10 P and C-595/10 P at [121]

²⁴ C-584/10 P, C-593/10 P and C-595/10 P at [120]-[122]

The Court elaborated on the consequences of the European Union authority not complying with a request for information. The Court held that if the European Union authority finds itself unable to comply with the request by the European courts:-

It is then the duty of those Courts to base their decision solely on the material which has been disclosed to them, namely, in this case, the indications contained in the narrative summary of reasons provided by the [1267] Committee, the observations and exculpatory evidence that may have been produced by the person concerned and the response of the competent European Union authority to those observations. If that material is insufficient to allow a finding that a reason is well founded, the Courts of the European Union shall disregard that reason as a possible basis for the contested decision to list or maintain a listing.²⁵

The Court took the opportunity in this case to comment on the need to disclose national security information in relation to listing decisions and the possibility of closed material proceedings.²⁶

The Court held, that “overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned”.²⁷ In such circumstances, it is for the court before whom the secrecy of that information is to be presented:-

to apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process.²⁸

²⁵ C-584/10 P, C-593/10 P and C-595/10 P at [123]. If, on the other hand, the authority provides relevant information or evidence, the Court held at [124] that European courts “must then determine whether the facts alleged are made out in the light of that information or evidence and assess the probative value of that information or evidence in the circumstances of the particular case and in the light of any observations submitted in relation to them by, among others, the person concerned”.

²⁶ The Court is currently considering amending the General Court’s rules of procedure to permit a form of closed material proceedings.

²⁷ C-584/10 P, C-593/10 P and C-595/10 P at [125]

²⁸ C-584/10 P, C-593/10 P and C-595/10 P at [125] and [126]

It is for the court to determine whether the reasons relied on by the competent European authority as grounds to preclude that disclosure are well founded. If the court concludes that those reasons do not preclude disclosure, at the very least partial disclosure, of the information, it must give the authority the opportunity to make the disclosure to the person concerned. If that authority does not permit the disclosure of that information, in whole or in part, the court must then “undertake an examination of the lawfulness of the contested measure solely on the basis of the material which has been disclosed”.²⁹

If the court determines that the reasons relied on by the authority do preclude the disclosure to the person concerned of the information produced before the court, “it is necessary to strike an appropriate balance between the requirements attached to the right to effective judicial protection, in particular respect for the principle of an adversarial process, and those flowing from the security of the European Union or its Member States or the conduct of their international relations”.³⁰ In order to strike such a balance, it is “legitimate to consider possibilities such as the disclosure of a summary outlining the information’s content or that of the evidence in question”.³¹

However, it is for the European court to ultimately assess “whether and to what the extent the failure to disclose confidential information or evidence to the person concerned and his consequential inability to submit his observations on them are such as to affect the probative value of the confidential evidence”.³²

The need for the standard of judicial review set by the Court

The Court described the prescribed standard of judicial review as “indispensable to ensure a fair balance between the maintenance of international peace and security and the protection of the fundamental rights and freedoms of the person concerned...those being shared values of the UN and the European Union”.³³ The Court held that notwithstanding their preventive nature, the restrictive measures at issue have a substantial negative impact on fundamental rights and freedoms, highlighting the serious disruption of the working and family life of the person concerned due to the restrictions on the exercise of his right to property and the

²⁹ C-584/10 P, C-593/10 P and C-595/10 P at [126-127]

³⁰ C-584/10 P, C-593/10 P and C-595/10 P at [128]

³¹ C-584/10 P, C-593/10 P and C-595/10 P at [129]

³² C-584/10 P, C-593/10 P and C-595/10 P at [129]

³³ C-584/10 P, C-593/10 P and C-595/10 P at [131]. The Court at [33] found such a review all the more essential since, despite the improvements added, the procedure for de-listing and ex officio re-examination at the UN level do not provide the individual concerned with the guarantee of effective judicial protection.

public opprobrium and suspicion of that person which those measures provoke.³⁴ The Court explained that:-

The essence of effective judicial protection must be that it should enable the person concerned to obtain a declaration from a court, by means of a judgment ordering annulment whereby the contested measure is retroactively erased from the legal order and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the list concerned was vitiated by illegality, the recognition of which may reestablish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered...³⁵

Unsubstantiated grounds for listing

The Court dismissed the appeals and upheld the General Court's annulment of Kadi's EU designation on the grounds that none of the reasons given in the UN's narrative summary of listing were substantiated. The Court held that the duty to give reasons had been complied with in Kadi's case, as the majority of the reasons given by the 1267 Committee for listing were sufficiently specific and concrete.³⁶ However, the Court found:-

none of the allegations presented against Mr Kadi in the summary provided by the 1267 Committee are such as to justify the adoption, at European Union level, of restrictive measures against him, either because the statement of reasons is insufficient, or because information or evidence which might substantiate the reason concerned, in the face of detailed rebuttals submitted by the party concerned, is lacking.³⁷

Specifically, the Court held that there must be reasonably recent evidence of terrorist activity to justify a listing.³⁸ The Court held that no information or evidence was submitted to the Court that would enable it to determine the accuracy or probative value of any of the

³⁴ C-584/10 P, C-593/10 P and C-595/10 P at [132]

³⁵ C-584/10 P, C-593/10 P and C-595/10 P at [134]

³⁶ While the General Court found the reasons against Kadi too vague, the Court held that the duty to give reasons had been complied with in Kadi's case, as the majority of the reasons given by the 1267 Committee for listing were sufficiently specific and concrete. See C-584/10 P, C-593/10 P and C-595/10 P at [140-150]

³⁷ C-584/10 P, C-593/10 P and C-595/10 P at [163]

³⁸ While material relied on in the summary of reasons relating to Kadi's alleged terrorist activities in 1992 may have justified his initial inclusion on the 1267 list, that material, otherwise unsubstantiated, could not justify maintaining him on an EU listing in 2008 due to the passage of time. See C-584/10 P, C-593/10 P and C-595/10 P at [156]

allegations in the 1267 Committee's statement of reasons for listing (which formed the entirety of the basis for listing under the EU regulation).³⁹

The Court took into account the fact that Kadi refuted all of the allegations in assessing whether the allegations had been substantiated.⁴⁰ The Court held that, having regard to the "preventive nature" of the restrictive measures at issue, if, in the course of reviewing the lawfulness of the contest decision to list or maintain a listing, a European court considers that at the very least, one of the reasons mentioned in the summary provided by the 1267 Committee is sufficiently detailed and specific, that it is substantiated and that it constitutes in itself sufficient basis to support that decision, the fact that the same cannot be said of other such reasons cannot justify the annulment of that decision. However, in the absence of one such reason, the European courts must annul the decision.⁴¹

³⁹ The Court held that it had no evidence or information was submitted that would allow it to determine the accuracy of the statement attributed to Mr Talad Fuad Kassem in the summary of reasons provided by the 1267 Committee and to assess, having regard, in particular, to Mr Kadi's claim that he had no knowledge of Mr Kassem, "the probative value of that statement in respect of the allegations that the Muwafaq Foundation was providing support to terrorist activities in Bosnia and Herzegovina in association with Usama bin Laden. In such circumstances, the indication relating to the statement of Mr Talad Fuad Kassem does not constitute sufficient basis to justify the adoption, at European Union level, of restrictive measures against Mr Kadi". C-584/10 P, C-593/10 P and C-595/10 P at [159]

⁴⁰ The 1267 summary of reasons included that Kadi had provided financial support to international terrorism through Depositna Banka. However, Kadi explained that he had acquired an interest in that bank for entirely commercial reasons having regard to the prospects of social and economic reconstruction in Bosnia after the Dayton Peace Accord of 1995, and that he had, in order to comply with local law, appointed Mr Al-Ayadi, a Bosnian national, as his nominee to hold his shares in that bank.

In reply to Kadi's comments, the Commission asserted that there were indications that Depositna Banka was used for the planning of an attack in Saudi Arabia serve as partial corroboration that Mr Kadi had used his position for purposes other than ordinary business purposes. However, the Court rejected this as a grounds for the EU listing since no information or evidence was produced "to support the claim that planning sessions might have taken place in the premises of Depozitna Banka for terrorist acts in association with Al-Qa'ida, the indications relating to the association of Mr Kadi with that bank are insufficient to sustain the adoption, at European Union level, of restrictive measures against him". C-584/10 P, C-593/10 P and C-595/10 P at [162]

⁴¹ C-584/10 P, C-593/10 P and C-595/10 P at [130]

APPENDIX H

THE POSITION OF HIZBALLAH AND HAMAS AS TERRORIST ORGANISATIONS IN CRIMINAL CODE LISTINGS

Each of the *Criminal Code Amendment Regulation 2012 (No. 6)* (Cth) (“**the ESO listing**”) and the *Criminal Code Amendment Regulation 2012 (No. 7)* (Cth) (“**the Brigades listing**”)¹ correctly proceeds by operative wording turning on the concept of an “organisation”.

The provisions of Reg 4Q made by the ESO listing relevantly reads – “...the organisation known as Hizballah’s External Security Organisation is specified...”. They proceed to list “names” by which the ESO “is also known” – all using English language and variously including “Unit”, “Organisation” and “Branch”. Without explanation, that list of other names does not include “Hizballah’s Military Wing” notwithstanding that the attached reasons for the ESO listing note that the United Kingdom and New Zealand have listed the ESO as a terrorist organisation under that name.

The English words “unit”, “branch” and “wing” all rather strongly suggest parts of a whole, or components of an overall organisation of which they are not themselves the whole.

The provisions of Reg 4U made by the Brigades listing relevantly reads – “...the organisation known as Hamas’ Izz al-Din al-Qassam Brigades is specified...”. It also proceeds to list “names” by which the Brigades “is also known”, both of which use the English word “Brigades”.

The common question for the ESO and Brigades listings is whether the reasons given for them adequately justify how these parts of Hizballah and Hamas come to be treated as discrete organisations for the purposes of Criminal Code listing.

¹ These specific regulations are themselves spent, but their substantive operation continues by their amendments of the *Criminal Code Regulations 2002* (Cth)

The importance of this question is, as argued in Chapters IV and V, that the efficacy of Australia's laws to counter the financing of terrorism is best achieved by refusing to distinguish for the purposes of the offences in question between the "good" and "bad" activities of terrorist organisations.

The question is a pointed one, given the listing of Hizballah and Hamas, each of them as an "entity", under the UN Charter Act for the purposes of its terrorism financing offences. If they are the entities for that statute, why are they not the organisations for the Criminal Code?

The question also has implications for the proper administration of criminal justice, given that the present anomalous listing of the whole of Hizballah and the whole of Hamas for the purposes of the UN Charter Act offences but of only the so-called military parts of Hizballah and of Hamas for the purposes of the Criminal Code offences permits the exercise of a prosecutorial discretion of an unprincipled kind. That is, the same kind of conduct could render a person liable to prosecution for giving money to Hizballah or Hamas, under the UN Charter Act, but not liable to prosecution if the gifts cannot be connected to their respective military parts, under the Criminal Code.

Understood in the context of material such as that noted in footnotes 224 and 225 in IV.4, the reasons for these purported part listings are most unconvincing.

For the ESO, and under the heading "Details of the organization", the discussion at first (quite sensibly) concerns "The Hizballah Context". It notes that "Hizballah evolved into a multi-faceted organisation including...military components..." - surely indicating that what became the ESO has only ever been a part of the Hizballah organisation. Consistently with that view, that discussion continues to note that "Hizballah also maintains a highly capable and well-resourced military..." - of which it might be thought the ESO forms part, thus being part of a part of the whole Hizballah organisation.

Nonetheless, under the heading "The ESO Objectives", the reasons assert that it "is a discrete branch within Lebanese Hizballah responsible for the planning, coordination and execution of terrorist attacks..." - surely a statement showing it is a part of a whole, whatever the epithet "discrete" might be thought to convey. In the same vein, the reasons refer to Hizballah's "reputation as a terrorist group", albeit as a reputation Hizballah "has sought to...lessen" - surely an outright acceptance of Hizballah as a whole being a terrorist organisation.

As to its history, ESO is described in the reasons as having been “set up by Imad Mughniyah, who has been described variously as the head of Hizballah’s security section...” – scarcely a mark of ESO being a separate organisation in any realistic sense. Similarly, this history is described as “the genesis of Hizballah’s ‘international wing’ or the ESO” – again, plainly describing it as a part of a whole organisation. That appearance is really confirmed by the reasons describing the ESO as something that “grew out of the military wing to become a separate branch under Mughniyah’s control” – the word “branch” unmistakably conveying the status of being a part of a whole.

Indeed, when the reasons address the fact that “no major acts of terrorism [have been] specifically attributed to the ESO since 1994”, the reason given for the listing, at least in this regard, is that “Hizballah has vowed to retaliate against Israel...” and “The ESO is likely to be responsible for planning future terrorist attacks against Israeli interests to this end”. Not only does this suggest ESO is an operative part of the whole Hizballah, it surely demonstrates the terrorist character of Hizballah as a whole.

The same conclusion follows from the reasons’ reference to the 2012 “arrest in Bangkok of an individual allegedly linked to Hizballah and in possession of explosive precursors”, where in the face of that individual’s denial the reasons stated that “Nonetheless, any Hizballah connection almost certainly would be through the ESO...”.

Insistence, if this be the case, within the responsible Australian bureaucracy that ESO can sensibly be seen as a separate organisation from Hizballah is undermined more than somewhat by the reasons noting that “little is known about the current structure or membership of the ESO. It remains a covert and highly secretive organization that has been successful in restricting information about its organizational structure...”.

The lack of respectable basis for the view of ESO as a sensibly separate organisation from Hizballah is highlighted by another observation in the reasons, all under the heading “Terrorist activity of the organization”. With respect to Palestine and Iraq, the reasons report that “Hizballah elements provide training, operational support and material...” to proscribed entities and Shia militants, adding for good measure that “Although these activities are undertaken by units within Hizballah specifically created for these tasks, elements of the ESO are likely involved”. The unmeritorious linguistic manipulation of this last observation is unworthy of official reason for serious statutory proscription. In truth, they plainly show that the so-called ESO, if it has any sensible separate identity at all, is and is only a part of the Hizballah whole.

The “Conclusion” of the reasons repeat the matter of “Hizballah’s stated desire to avenge the death of Imad Mughniyah, and the recent arrest of a probable Hizballah operative in Bangkok”, as the reason that “it is likely that the ESO retains its separate terrorist function within Hizballah’s overall organizational structure”. Why this is thought to justify listing only part of Hizballah is not addressed in the reasons.

More gravely for the integrity of the Australian implementation of its international obligations to counter terrorist financing, nor was there any explanation for the glaring discrepancy between this Criminal Code part listing and the UN Charter Act whole listing of Hizballah.

If Australia’s counter terrorist policies are intended to contemplate with equanimity the funding of terrorist organisations so long as the money is said to be intended for non-terrorist purposes, Australia’s counter terrorist legislation has miscarried. Importantly, if our policies were so intended, they would lack efficacy in countering terrorism, for the reasons explained above and in Chapters IV and V. They would probably also be contrary to Australia’s international obligations. But, in the view of the INSLM, there has been no announcement of any such policy on the part of Australia.

It follows that the ESO listing, demonstrably for the very reasons given for it, should not have been confined to part of Hizballah.

As noted above, under their own laws upon which the INSLM expresses no view, the United Kingdom and New Zealand have listed Hizballah’s ESO as a terrorist organisation under another name. However, the reasons also note that “Hizballah as a whole (including ESO) has been listed as a terrorist organization by the governments of the United States and Canada”. There is no accompanying suggestion that the notion of “Hizballah as a whole” let alone that is one “including ESO” has been considered and rejected by the Australian officials responsible for this part listing.

The ultimate test is what the Australian statute requires, which is attention to the character of an “organisation”. That no doubt involves facts and evaluative assessment. All the material considered by the INSLM supports the view that the Australian officials responsible for this listing accept that the so-called ESO is but a part of an organisation that may be called Hizballah, but have proceeded as if there may lawfully be a listing of something in the nature of a sub-organisation. In the INSLM’s view, this is a serious error that has resulted in less than the intended efficacy in the implementation of this part of Australia’s counter-terrorist international obligations.

The same inappropriate and counter-productive approach can be seen in the case of the Brigades listing. Even in the name chosen for the listing, there appears to be the possessive form of language indicating the Brigades are (is?) merely a part of a whole – ie “ Hamas’s...”, rendered as “ Hamas’s” in the accompanying reasons.

Under the heading “Details of the organisation”, the reasons for the Brigades listing starts with the description that “ Hamas is a militant Sunni Islamist organisation... Hamas began as a branch of, and retains an ideological affinity with the Muslim Brotherhood, and is a multi-faceted well organised and relatively moderate organisation renowned for its extensive social service networks in the Palestinian Territories”. The Brigades are then described as “officially established in 1991 to provide Hamas with a military capability”.

Under the heading “Objectives”, presumably of the organisation being listed, the reasons describe the Brigades as “ Hamas’s military wing” and their objectives as “subordinate to Hamas’s broad political goals”. Crucially for the listing, the reasons state that “the Brigades have adopted terrorist tactics... [and] the use of suicide bombings...”. Surely these descriptions should have indicated that on no reasonable view could Hamas as a whole escape characterization as a terrorist organisation, once those descriptions were accepted, as they were.

In another unmeritorious linguistic manipulation, the reasons for the Brigades listing proceed, despite these descriptions, to assert that “the Brigades are structured as a distinct and discrete organisation which can survive the dissolution of Hamas’s political structures. Accordingly, the Brigades operate with a significant degree of independence in their decision making”. The muddled thinking here starts with speculating about a future that has not happened – Hamas’s political structures are intact and working, and by implication the reasons accept that accordingly the Brigades are part of the Hamas organisation, still.

Next, the reasons unwisely imply that the structuring of terrorist organisations so as to permit cells or components to continue operations when central direction is disrupted somehow prevents those cells or components being regarded as parts of the whole. This is unworldly, counter-productive in dealing with terrorist organisations and likely to impede rather than promote the strangling of terrorist organisations’ financing.

This is highlighted by the reasons themselves noting that “ Hamas’s funding comes from a range of both official and private sources...”. Crucially, though without its proper impact on the decision to list only part of Hamas, the reasons state that “The amount of money

earmarked specifically for the Brigades is difficult to ascertain”. There could not be a more obvious demonstration why effective counter-terrorist legislation should criminalize supporting a terrorist organisation by giving it money or resources, regardless how the donor or supplier intends, hopes or has been deceived into believing the money or resources will be used.

Again, for their own reasons, the United Kingdom and New Zealand have listed the Brigades rather than Hamas as a whole. Again, “Hamas (including the Brigades) has been proscribed as a terrorist organisation by the governments of the United States and Canada” – without any explanation in these Australian reasons why that is not the only reasonable approach to have taken under our law, which is concerned with an “organisation”.

The reasons also note the listing by the European Union for the purposes of its anti-terrorism financing measures of “Hamas” - without any attempt to explain why that was not the appropriate entity or organisation to be listed in Australia as well.

Finally, as noted above, it is “Hamas” that is noted in the reasons for the Brigades listing as having been “included in the DFAT Consolidated List that refers to United Nations Council Resolution 1373 in relation to countering financing of terrorism”. First, no explanation is offered why Hamas as a whole is not thereby shown to be the appropriate Criminal Code listing. Surely it cannot be a case of one set of Australian officials disagreeing without giving reasons with another set of Australian officials. Second, that bland closing statement in the reasons for the Brigades listing should really have spelled out that this list is of entities that have been listed because Australian agency and Ministerial considerations regard them as terrorist for the purposes of the UN Charter Act– a proposition which may have altered the decision to list only part of Hamas for the purposes of the Criminal Code.

Enquiries by the INSLM did not reveal any coherent articulation of reasons for, let alone justification of, these contradictory approaches to characterization of Hizballah and Hamas. If there are any calculations or approaches of what might be called a diplomatic kind that produced these anomalies, they have not been expounded either in contemporaneous reasons or explanations to the INSLM.

APPENDIX I

INTER-GOVERNMENTAL AGREEMENT

Agreement on Counter-terrorism Laws

25 June 2004

This agreement is entered into on 25 June 2004 by:

The Commonwealth of Australia

The State of New South Wales

The State of Victoria

The State of Queensland

The State of Western Australia

The State of South Australia

The State of Tasmania

The Australian Capital Territory

The Northern Territory of Australia.

Recitals

1. The Prime Minister, Premiers and Chief Ministers agreed on 5 April 2002 to take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power so that the Commonwealth may enact specific, jointly-agreed legislation. It was agreed that the new Commonwealth legislation will incorporate roll back provisions to ensure that it does not override State or Territory law where that is not intended, and that the Commonwealth will have power to amend the new legislation in accordance with provisions similar to those which apply under Corporations arrangements. It was further agreed that any amendment based on the referred power will require consultation with, and agreement of, States and Territories, and that this will be contained in the legislation.

2. The Commonwealth subsequently enacted legislation designed to enhance Australia's capacity to deal with terrorists, including certain Federal offences contained in Part 5.3 of the Commonwealth Criminal Code.
3. The parties consider it appropriate to facilitate comprehensive national application of those offences by means of State references in accordance with paragraph 51 (xxxvii) of the Commonwealth Constitution.
4. The parties consider it appropriate to facilitate agreement in relation to amendment of those offences from time to time by the Commonwealth Parliament by means of this agreement.
5. The parties also consider it appropriate to facilitate agreement in relation to regulations specifying terrorist organisations for the purposes of Part 5.3 of the Commonwealth Criminal Code by means of this agreement.
6. This agreement sets out a process, consistent with undertakings given to the States and Territories by the Commonwealth, for obtaining the States' and Territories' agreement to amendments and regulations which may be proposed.

The parties agree:

Part 1 Preliminary

1.1 Definitions

(1) In this agreement:

Commonwealth means the Commonwealth of Australia;

express amendment means the direct amendment of the text of the legislation by Commonwealth Acts, but does not include the enactment by a Commonwealth Act of a provision that has or will have substantive effect other than as part of the text of the legislation;

initiate, in relation to the making of legislation, includes introduction in the Commonwealth Parliament and other processes leading to enactment;

party means the Commonwealth, or a referring State or a Territory that is a party to this agreement;

referring State means a State which:-

- (a) in accordance with paragraph 51 (xxxvii) of the Commonwealth Constitution, has referred matters to the Commonwealth Parliament sufficient to enable the following legislation to extend, of its own force, to the State:
 - (i) Part 5.3 of the Commonwealth Criminal Code, as enacted by the Commonwealth Parliament on 27 May 2003, and
 - (ii) express amendments to Chapter 2 and Part 5.3 of the Commonwealth Criminal Code after that date, and
- (b) has not withdrawn either or both of the referred matters covered by subparagraphs (a) (i) and (ii);

State means a State of the Commonwealth; and

Territory means the Australian Capital Territory or the Northern Territory.

(2) In this agreement, a reference to an Act, whether of the Commonwealth or a State, includes a reference to:

- (a) that Act as amended and in force for the time being; and
- (b) an Act passed in substitution for the Act.

Part 2 Effect and operation of agreement

2.1 Commencement

This agreement comes into operation when it has been signed on behalf of all parties.¹

2.2 Amendment of Agreement

This agreement may be varied only by the unanimous decision of the parties.

Part 3 Legislation

Division 1 Preliminary

3.1 Purpose of this Part

- (1) The purpose of this Part is to preserve and promote the legislative scheme that the parties are enacting for the punishment of persons participating in terrorism or terrorist acts.
- (2) This Part establishes procedures for consultation and agreement between the parties before:
 - (a) the enactment of any legislation that would amend or alter Chapter 2 or Part 5.3 of the Commonwealth Criminal Code (to the extent that amendments of Chapter 2 are intended to apply only to Part 5.3, and not to be of general application to Commonwealth offences); and
 - (b) the making of any regulation specifying a terrorist organisation for the purposes of Part 5.3 of the Commonwealth Criminal Code.

[Note: Limitation to amendments of Chapter 2 that would apply only to Part 5.3 reflects 100.8 of the Criminal Code as amended by the Criminal Code Amendment (Terrorism) Act 2003.]

3.2 Nature of the legislative scheme

The legislative scheme agreed to by the parties involves:

- (a) the enactment by State Parliaments of legislation referring certain matters to the Commonwealth Parliament in accordance with paragraph 51 (xxxvii) of the Constitution; and

¹ The agreement was signed by all parties on 25 June 2004.

- (b) the re-enactment by the Commonwealth Parliament of Part 5.3 of the Commonwealth Criminal Code, partly in reliance on the State referrals mentioned in paragraph (a); and
- (c) the possible amendment from time to time of Chapter 2 and Part 5.3 of the Commonwealth Criminal Code in accordance with this agreement.

Division 2 Alterations of Chapter 2 and Part 5.3 of the Commonwealth Criminal Code

3.3 Commonwealth legislation relating to Chapter 2 and Part 5.3 of the Commonwealth Criminal Code

(1) Except as provided by subclause (2), the Commonwealth will not introduce a Bill or make subordinate legislation that would repeal or amend Chapter 2 or Part 5.3 of the Commonwealth Criminal Code unless, before its introduction or making:

- (a) the other parties have been consulted about it; and
- (b) except as provided by subclause (3), a majority of the other parties, including at least four States, have approved it.

[Note: For the avoidance of doubt, a regulation specifying a terrorist organisation for the purposes of Part 5.3 of the Criminal Code as amended by the Criminal Code Amendment (Terrorism) Act 2003 is not covered by this provision; a regulation made for the purpose of section 100.7 of the Criminal Code is taken to be covered by this provision.]

- (2) If a Bill contains amendments to Part 5.3 of the Commonwealth Criminal Code that the Prime Minister nominates as urgent amendments, the Commonwealth may introduce the Bill before the requirements set out in subclause (1) are fulfilled but must not seek the making of the amendments unless those requirements are fulfilled.
- (3) Subclause (1) applies to a Bill or subordinate legislation that repeals or amends Chapter 2 only to the extent that the repeal or amendment applies only to Part 5.3.
- (4) The Commonwealth will provide the other parties with the text of the proposed legislation.

- (5) The Commonwealth is not obliged to introduce, make or support any legislation, including subordinate legislation, or to proceed with any legislative proposal, including a proposal relating to subordinate legislation, with which it does not concur.
- (6) If approval is sought for amendments to a Bill that is at that time before the Commonwealth Parliament, the Commonwealth will use its best endeavours to give the other parties a reasonable time to consider and to comment on the proposed amendments.
- (7) If approval is sought for amendments to a Bill that is at that time before the Commonwealth Parliament, then the other parties will use their best endeavours to respond within a time frame nominated by the Commonwealth.
- (8) Approval for amendments must be sought, and responses from other parties must be provided, through the Prime Minister and Premiers and Chief Ministers.

Division 3 Regulations specifying terrorist organisations for the purposes of Part 5.3 of the Commonwealth Criminal Code

3.4 Consultation on regulations specifying terrorist organisations

- (1) 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.
- (2) 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 and provide reasons for their objections, the Commonwealth will not make the regulation at that time.
- (3) 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.
- (4) 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.

- (5) The other parties will use their best endeavours to respond within a time frame nominated by the Commonwealth.
- (6) 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.

Part 4 Ceasing to be a party

4.1 State or Territory ceasing to be a party

- (1) The failure of a State or Territory to remain a party does not terminate this agreement.
- (2) If a State or Territory ceases to be a party, this agreement will remain in force in relation to the remaining parties.
- (3) If a State or Territory ceases to be a party, the Commonwealth will, within three months, convene a meeting of the remaining parties for the purpose of negotiating such variations to this agreement as are necessary or convenient to take account of that fact (including variations relating to the voting arrangements).

Signed for and on behalf of each of the parties by:

The Honourable John Winston Howard MP)
Prime Minister of the Commonwealth of Australia)

The Honourable Robert John Carr MP)
Premier of New South Wales)

The Honourable Stephen Phillip Bracks MP)
Premier of Victoria)

The Honourable Peter Beattie MP)
Premier of Queensland)

The Honourable Michael Rann MP)
Premier of South Australia)

The Honorable Dr Geoff Ian Gallop MLA)
Premier of Western Australia)

The Honourable Paul Lennon MHA)
Premier of Tasmania)

Jonathon Donald Stanhope MLA)
Chief Minister of the Australian Capital Territory)

The Honourable Clare Martin MLA)
Chief Minister of the Northern Territory)

APPENDIX J

AUSTRALIA'S TERRORISM FINANCING CHARGES AND PROSECUTIONS

TABLE A: TERRORISM FINANCING OFFENCES – CHARGES

Offence provision	Penalty	Charged	Total	Outcome of Prosecution	Total
subsec 102.6(1) of the Criminal Code (intentionally making funds available to a terrorist organisation)	Imprisonment for 25 years. (Where the person knows the organisation is a terrorist organisation)	<p><u>Pendennis (Melbourne)</u> B RAAD, HAMMOUD</p> <p>A RAAD, E RAAD, JOUD, TAHA (all with attempt: 102.6(1) & 11.1(1))</p> <p>THOMAS</p> <p><u>Halophyte</u> VINAYAGAMOORTHY, YATHAVAN, RAJEEVAN</p>	10	<p>Acquitted</p> <p>JOUD, A RAAD, E RAAD (convicted)</p> <p>TAHA (acquitted)</p> <p>Acquitted</p> <p>Charge not proceeded with</p>	3
subsec 102.6(2) of the Criminal Code (recklessly making funds available to a terrorist organisation)	Imprisonment for 15 years. (Where the person is reckless as to whether the organisation is a terrorist organisation)	-	0	-	0

Offence provision	Penalty	Charged	Total	Outcome of Prosecution	Total
sec 103.1 of the Criminal Code (financing terrorism)	Imprisonment for life	-	0	-	0
sec 103.2 of the Criminal Code (financing a terrorist)	Imprisonment for life	-	0	-	0
subsec 20(1) of the UN Charter Act (dealing with freezable assets)	Imprisonment for 10 years and/or a triple-value fine	-	0	-	0
subsec 20(3C) of the UN Charter Act (dealing with freezable assets)	Triple-value fine	-	0	-	0
subsec 21(1) of the UN Charter Act (making an asset available to a proscribed entity)	Imprisonment for 10 years and/or a triple-value fine	Halophyte VINAYAGAMOORTHY, YATHAVAN, RAJEEVAN	3	VINAYAGAMOORTHY, YATHAVAN, RAJEEVAN (convicted)	3
subsec 21(2C) of the UN Charter Act (making an asset available to a proscribed entity)	Triple-value fine	-	0	-	0

TABLE B: AUSTRALIA'S TERRORISM FINANCING PROSECUTIONS

State	Person Charged	Date Arrested	Offences	Plea	Result	Date of plea or conviction /acquittal	Sentence (a / b: a=total, b=non-parole)
Victoria	Aimen Joud	8 November 2005	Financing subsec 102.6(1) of the Criminal Code (intentionally making funds available to a terrorist organisation) and subsec 11.1(1) of the Criminal Code (attempting to intentionally make funds available to a terrorist organisation)	Not guilty	Guilty	15 September 2008	5 years
			Other subsec 101.4(1) of the Criminal Code (possessing a thing connected with the preparation of a terrorist act) – 2 counts	Not guilty	Conviction overturned	25 October 2010	
			subsec 102.7(1) of the Criminal Code (providing resources to a terrorist organisation)	Not guilty	Guilty	15 September 2008	8 yrs
			sec 102.3 of the Criminal Code (membership of terrorist organisation)	Not guilty	Guilty	15 September 2008	4.5 yrs
							Total sentence: 8 / 6 yrs

State	Person Charged	Date Arrested	Offences	Plea	Result	Date of plea or conviction /acquittal	Sentence (a / b: a=total, b=non-parole)
			<p>Separate trial - sec 11.5 and subsec 101.6(1) of the Criminal Code (conspiracy to do acts in preparation for, or planning, a terrorist act)</p> <p>Separate indictment - subsec 102.7(1) of the Criminal Code (intentionally providing support to a terrorist organisation) - video production charge</p>	Not guilty	<p>Proceedings stayed</p> <p>Charge not proceeded with</p>		
Victoria	Ahmed Raad	8 November 2005	<p>Financing <u>subsecs</u> 102.6(1) and 11.1(1) of the Criminal Code (attempting to intentionally make funds available to a terrorist organisation)</p> <p><u>Other</u> subsec 102.7(1) of the Criminal Code (providing resources to a terrorist organisation)</p>	<p>Not guilty</p> <p>Not guilty</p>	<p>Guilty</p> <p>Guilty</p>	<p>15 September 2008</p> <p>15 September 2008</p>	<p>5 yrs</p> <p>8 yrs</p>

State	Person Charged	Date Arrested	Offences	Plea	Result	Date of plea or conviction /acquittal	Sentence (a / b: a=total, b=non-parole)
			sec 102.3 of the Criminal Code (membership of terrorist organisation) Separate trial – sec 11.5 and subsec 101.6(1) of the Criminal Code (conspiracy to do acts in preparation for, or planning, a terrorist act)	Not guilty Not guilty	Guilty Proceedings stayed		4.5 yrs Total sentence: 8 / 6 yrs
Victoria	Ezzit Raad	8 November 2005	<u>Financing</u> subsecs 102.6(1) and 11.1(1) of the Criminal Code (attempting to intentionally make funds available to a terrorist organisation) <u>Other</u> sec 102.3 of the Criminal Code (membership of terrorist organisation)	Not guilty Not guilty	Guilty Guilty	15 September 2008 15 September 2008	4 yrs 4 yrs Total sentence: 6 yrs / 4.5 yrs (sentence was reduced on appeal to 6 years)

State	Person Charged	Date Arrested	Offences	Plea	Result	Date of plea or conviction /acquittal	Sentence (a / b: a=total, b=non-parole)
Victoria	Shoue Hammoud	31 March 2006	<u>Financing</u> subsec 102.6(1) of the Criminal Code (intentionally make funds available to a terrorist organisation)	Not guilty	Acquitted	15 September 2008	
			<u>Other</u> sec 102.3 of the Criminal Code (membership of terrorist organisation)	Not guilty	Acquitted	15 September 2008	
Victoria	Bassam Raad	31 March 2006	<u>Financing</u> subsec 102.6(1) of the Criminal Code (attempting to intentionally make funds available to a terrorist organisation)	Not guilty	Acquitted	15 September 2008	
			<u>Other</u> sec 102.3 of the Criminal Code (membership of terrorist organisation)	Not guilty	Acquitted	15 September 2008	

State	Person Charged	Date Arrested	Offences	Plea	Result	Date of plea or conviction /acquittal	Sentence (a / b: a=total, b=non-parole)
Victoria	Hany Taha	8 November 2005	<u>Financing</u> subsecs 102.6(1) and 11.1(1) of the Criminal Code (attempting to intentionally make funds available to a terrorist organisation)	Not guilty	Acquitted	15 September 2008	
			<u>Other</u> sec 102.3 of the Criminal Code (membership of terrorist organisation)	Not guilty	Acquitted	15 September 2008	
Victoria	Joseph Terrence Thomas	18 November 2004	<u>Financing</u> subsec 102.6(1) of the Criminal Code (receiving funds from a terrorist organisation)	Not guilty	Acquitted (on retrial)	23 October 2008	
			<u>Other</u> subsec 102.7(1) of the Criminal Code (providing support or resources to a terrorist organisation) – 2 charges	Not guilty	Acquitted	26 February 2006	

State	Person Charged	Date Arrested	Offences	Plea	Result	Date of plea or conviction /acquittal	Sentence (a / b: a=total, b=non-parole)
Victoria	Aruran Vinayaga-moorthy	1 May 2007	<p><u>Financing</u> subsec 102.6(1) of the Criminal Code (intentionally making funds available to a terrorist organisation)</p> <p>subsec 21(1) of the UN Charter Act (intentionally making an asset available to a proscribed entity) - 2 counts</p> <p><u>Other</u> sec 102.3 of the Criminal Code (intentionally being a member of a terrorist organisation)</p> <p>subsec 102.7(1) of the Criminal Code (intentionally providing support or resources to a terrorist organisation)</p>	Guilty	<p>Charge not proceeded with</p> <p>Guilty</p> <p>Charge not proceeded with</p> <p>Charge not proceeded with</p>	24 December 2009	2 yrs suspended

State	Person Charged	Date Arrested	Offences	Plea	Result	Date of plea or conviction /acquittal	Sentence (a / b: a=total, b=non-parole)
Victoria	Sivarajah Yathavan	1 May 2007	<p><u>Financing</u> subsec 102.6(1) of the Criminal Code (intentionally making funds available to a terrorist organisation)</p> <p>subsec 21(1) of the UN Charter Act (intentionally making an asset available to a proscribed entity)</p> <p><u>Other</u> sec 102.3 of the Criminal Code (intentionally being a member of a terrorist organisation)</p> <p>subsec 102.7(1) of the Criminal Code (intentionally providing support or resources to a terrorist organisation)</p>	Guilty	<p>Charge not proceeded with</p> <p>Guilty</p> <p>Charge not proceeded with</p> <p>Charge not proceeded with</p>	24 December 2009	1 yr suspended

State	Person Charged	Date Arrested	Offences	Plea	Result	Date of plea or conviction /acquittal	Sentence (a / b: a=total, b=non-parole)
Victoria	Aru-mugam Rajeevan	10 July 2007	<p><u>Financing</u> subsec 102.6(1) of the Criminal Code (intentionally making funds available to a terrorist organisation)</p> <p>subsec 21(1) of the UN Charter Act (intentionally making an asset available to a proscribed entity)</p> <p><u>Other</u> sec 102.3 of the Criminal Code (intentionally being a member of a terrorist organisation)</p> <p>subsec 102.7(1) of the Criminal Code (intentionally providing support or resources to a terrorist organisation)</p>	Guilty	<p>Charge not proceeded with</p> <p>Guilty</p> <p>Charge not proceeded with</p> <p>Charge not proceeded with</p>	24 December 2009	1 yr suspended

APPENDIX K

UN DOCUMENTS ON STATES' OBLIGATIONS TO COUNTER TERRORISM FINANCING

S/RES/1267 (1999)

...

4. Decides further that, in order to enforce paragraph 2 above, all States shall:

...

(b) Freeze funds and other financial resources, including funds derived or generated from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban, as designated by the Committee established by paragraph 6 below, and ensure that neither they nor any other funds or financial resources so designated are made available, by their nationals or by any persons within their territory, to or for the benefit of the Taliban or any undertaking owned or controlled, directly or indirectly, by the Taliban, except as may be authorized by the Committee on a case-by-case basis on the grounds of humanitarian need; territorial link

5. Urges all States to cooperate with efforts to fulfil the demand in paragraph 2 above, and to consider further measures against Usama bin Laden and his associates; no territorial link (provides for cooperation between States and to consider further measures, which could include extraterritorial laws)

...

S/RES/1269 (1999) – no territorial link

...

4. Calls upon all States to take, inter alia, in the context of such cooperation and coordination, appropriate steps to:-

- cooperate with each other, particularly through bilateral and multilateral agreements and arrangements, to prevent and suppress terrorist acts, protect

their nationals and other persons against terrorist attacks and bring to justice the perpetrators of such acts;

- prevent and suppress in their territories through all lawful means the preparation and financing of any acts of terrorism;
- deny those who plan, finance or commit terrorist acts safe havens by ensuring their apprehension and prosecution or extradition;
- take appropriate measures in conformity with the relevant provisions of national and international law, including international standards of human rights, before granting refugee status, for the purpose of ensuring that the asylum-seeker has not participated in terrorist acts;
- exchange information in accordance with international and domestic law, and cooperate on administrative and judicial matters in order to prevent the commission of terrorist acts;

...

S/RES/1368 (2001) – no territorial link

...

3. Calls on all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable;

4. Calls also on the international community to redouble their efforts to prevent and suppress terrorist acts including by increased cooperation and full implementation of the relevant international anti-terrorist conventions and Security Council resolutions, in particular resolution 1269 of 19 October 1999;

...

S/RES/1373 (2001)

...

Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that all States shall:

- (a) Prevent and suppress the financing of terrorist acts; no territorial link

- (b) 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; territorial link

- (c) 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; no territorial link
- (d) 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; territorial link

2. *Decides also* that all States shall:

...

- (b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information; no territorial link
- (c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens; no territorial link
- (d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens; territorial link
- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts; no territorial link

- (f) Afford one another the greatest measure of assistance in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings; no territorial link

...

3. *Calls upon* all States to:

...

- (b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts; no territorial link

- (c) Cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts; no territorial link

- (d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999; some territorial link (several provisions of the Terrorism Financing Convention have an explicit territorial nexus, while others do not)

- (e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001); some territorial link (as Security Council resolutions 1269 and 1368 have no territorial link)

...

International Convention for the Suppression of the Financing of Terrorism

Preamble

...

Recalling also all the relevant General Assembly resolutions on the matter, including resolution 49/60 of 9 December 1994 and its annex on the Declaration on Measures to Eliminate International Terrorism, in which the States Members of the United Nations solemnly reaffirmed their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States, no territorial link

...

Recalling General Assembly resolution 51/210 of 17 December 1996, paragraph 3, subparagraph (f), in which the Assembly called upon all States to take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds, no territorial link

...

Considering that the financing of terrorism is a matter of grave concern to the international community as a whole, no territorial link

Noting that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain, no territorial link

...

Being convinced of the urgent need to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism, as well as for its suppression through the prosecution and punishment of its perpetrators, no territorial link

...

Article 3 territorial link

This Convention shall not apply where the offence is committed within a single State, the alleged offender is a national of that State and is present in the territory of that State and no other State has a basis under article 7, paragraph 1, or article 7, paragraph 2, to exercise jurisdiction, except that the provisions of articles 12 to 18 shall, as appropriate, apply in those cases.

Article 4 no territorial link

Each State Party shall adopt such measures as may be necessary:

- (a) To establish as criminal offences under its domestic law the offences set forth in article 2;

- (b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

Article 5 territorial link

1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative.

...

Article 7 territorial link

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 when:

- (a) The offence is committed in the territory of that State;
- (b) The offence is committed on board a vessel flying the flag of that State or an aircraft registered under the laws of that State at the time the offence is committed;
- (c) The offence is committed by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:

- (a) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), in the territory of or against a national of that State;
- (b) The offence was directed towards or resulted in the carrying out of an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), against a State or government facility of that State abroad, including diplomatic or consular premises of that State;
- (c) The offence was directed towards or resulted in an offence referred to in article 2, paragraph 1, subparagraph (a) or (b), committed in an attempt to compel that State to do or abstain from doing any act;
- (d) The offence is committed by a stateless person who has his or her habitual residence in the territory of that State;

(e) The offence is committed on board an aircraft which is operated by the Government of that State.

4. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 2 in cases where the alleged offender is present in its territory and it does not extradite that person to any of the States Parties that have established their jurisdiction in accordance with paragraphs 1 or 2.

5. When more than one State Party claims jurisdiction over the offences set forth in article 2, the relevant States Parties shall strive to coordinate their actions appropriately, in particular concerning the conditions for prosecution and the modalities for mutual legal assistance.

6. Without prejudice to the norms of general international law, this Convention does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

Article 8 no territorial link

1. Each State Party shall 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.

2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.

...

Article 9 territorial link

1. Upon receiving information that a person who has committed or who is alleged to have committed an offence set forth in article 2 may be present in its territory, the State Party concerned shall take such measures as may be necessary under its domestic law to investigate the facts contained in the information.

2. Upon being satisfied that the circumstances so warrant, the State Party in whose territory the offender or alleged offender is present shall take the appropriate measures under its domestic law so as to ensure that person's presence for the purpose of prosecution or extradition.

...

Article 10 some territorial link (imposes an obligation to extradite or prosecute in lieu of extradition where an offender is present in the State Party's territory, regardless of where the offence was committed)

1. The State Party in the territory of which the alleged offender is present shall, in cases to which article 7 applies, if it does not extradite that person, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without undue delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

...

Article 12 no territorial link

1. States Parties shall afford one another the greatest measure of assistance in connection with criminal investigations or criminal or extradition proceedings in respect of the offences set forth in article 2, including assistance in obtaining evidence in their possession necessary for the proceedings.

...

Article 18 some territorial link (preparatory acts committed within territory regardless of where the terrorist act may be committed)

1. States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or outside their territories, including:

- (a) Measures to prohibit in their territories illegal activities of persons and organizations that knowingly encourage, instigate, organize or engage in the commission of offences set forth in article 2;
- (b) Measures requiring financial institutions and other professions involved in financial transactions to utilize the most efficient measures available for the identification of their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity. For this purpose, States Parties shall consider:

- (i) Adopting regulations prohibiting the opening of accounts the holders or beneficiaries of which are unidentified or unidentifiable, and measures to ensure that such institutions verify the identity of the real owners of such transactions;
- (ii) With respect to the identification of legal entities, requiring financial institutions, when necessary, to take measures to verify the legal existence and the structure of the customer by obtaining, either from a public register or from the customer or both, proof of incorporation, including information concerning the customer's name, legal form, address, directors and provisions regulating the power to bind the entity;
- (iii) Adopting regulations imposing on financial institutions the obligation to report promptly to the competent authorities all complex, unusual large transactions and unusual patterns of transactions, which have no apparent economic or obviously lawful purpose, without fear of assuming criminal or civil liability for breach of any restriction on disclosure of information if they report their suspicions in good faith;
- (iv) Requiring financial institutions to maintain, for at least five years, all necessary records on transactions, both domestic or international.

2. States Parties shall further cooperate in the prevention of offences set forth in article 2 by considering:

- (a) Measures for the supervision, including, for example, the licensing, of all money-transmission agencies;
- (b) Feasible measures to detect or monitor the physical cross-border transportation of cash and bearer negotiable instruments, subject to strict safeguards to ensure proper use of information and without impeding in any way the freedom of capital movements.

3. States Parties shall further cooperate in the prevention of the offences set forth in article 2 by exchanging accurate and verified information in accordance with their domestic law and coordinating administrative and other measures taken, as appropriate, to prevent the commission of offences set forth in article 2, in particular by:

- (a) Establishing and maintaining channels of communication between their competent agencies and services to facilitate the secure and rapid exchange of information concerning all aspects of offences set forth in article 2;
- (b) Cooperating with one another in conducting inquiries, with respect to the offences set forth in article 2, concerning:
 - (i) The identity, whereabouts and activities of persons in respect of whom reasonable suspicion exists that they are involved in such offences;
 - (ii) The movement of funds relating to the commission of such offences.

...

Article 20 [territorial link](#)

The States Parties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

...

Article 22 [territorial link](#)

Nothing in this Convention entitles a State Party to undertake in the territory of another State Party the exercise of jurisdiction or performance of functions which are exclusively reserved for the authorities of that other State Party by its domestic law.

...

A/RES/51/210 (General Assembly)

...

Article 3 [no territorial link](#)

...

- (f) To take steps to prevent and counteract, through appropriate domestic measures, the financing of terrorists and terrorist organizations, whether such financing is direct or indirect through organizations which also have or claim to have charitable, social or cultural goals or which are also engaged in unlawful activities such as illicit arms trafficking, drug dealing and racketeering, including the exploitation of persons for purposes of funding terrorist activities, and in particular to consider, where appropriate, adopting regulatory measures to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements and to intensify the exchange of information concerning international movements of such funds;

APPENDIX L

FINANCIAL ACTION TASK FORCE IX

SPECIAL RECOMMENDATIONS

I. Ratification and implementation of UN instruments

Each country should take immediate steps to ratify and to implement fully the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism.

Countries should also immediately implement the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts, particularly United Nations Security Council Resolution 1373.

II. Criminalising the financing of terrorism and associated money laundering

Each country should criminalise the financing of terrorism, terrorist acts and terrorist organisations. Countries should ensure that such offences are designated as money laundering predicate offences.

III. Freezing and confiscating terrorist assets

Each country should implement measures to freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions relating to the prevention and suppression of the financing of terrorist acts.

Each country should also adopt and implement measures, including legislative ones, which would enable the competent authorities to seize and confiscate property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations.

IV. Reporting suspicious transactions related to terrorism

If financial institutions, or other businesses or entities subject to anti-money laundering obligations, suspect or have reasonable grounds to suspect that funds are linked or related to, or are to be used for terrorism, terrorist acts or by terrorist organisations, they should be required to report promptly their suspicions to the competent authorities.

V. International Co-operation

Each country should afford another country, on the basis of a treaty, arrangement or other mechanism for mutual legal assistance or information exchange, the greatest possible measure of assistance in connection with criminal, civil enforcement, and administrative investigations, inquiries and proceedings relating to the financing of terrorism, terrorist acts and terrorist organisations.

Countries should also take all possible measures to ensure that they do not provide safe havens for individuals charged with the financing of terrorism, terrorist acts or terrorist organisations, and should have procedures in place to extradite, where possible, such individuals.

VI. Alternative Remittance

Each country should take measures to ensure that persons or legal entities, including agents, that provide a service for the transmission of money or value, including transmission through an informal money or value transfer system or network, should be licensed or registered and subject to all the FATF Recommendations that apply to banks and non-bank financial institutions. Each country should ensure that persons or legal entities that carry out this service illegally are subject to administrative, civil or criminal sanctions.

VII. Wire transfers

Countries should take measures to require financial institutions, including money remitters, to include accurate and meaningful originator information (name, address and account number) on funds transfers and related messages that are sent, and the information should remain with the transfer or related message through the payment chain.

Countries should take measures to ensure that financial institutions, including money remitters, conduct enhanced scrutiny of and monitor for suspicious activity funds transfers which do not contain complete originator information (name, address and account number).

VIII. Non-profit organisations

Countries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable, and countries should ensure that they cannot be misused:

- (i) by terrorist organisations posing as legitimate entities;
- (ii) to exploit legitimate entities as conduits for terrorist financing, including for the purpose of escaping asset freezing measures; and
- (iii) to conceal or obscure the clandestine diversion of funds intended for legitimate purposes to terrorist organisations.

IX. Cash Couriers

Countries should have measures in place to detect the physical cross-border transportation of currency and bearer negotiable instruments, including a declaration system or other disclosure obligation.

Countries should ensure that their competent authorities have the legal authority to stop or restrain currency or bearer negotiable instruments that are suspected to be related to terrorist financing or money laundering, or that are falsely declared or disclosed.

Countries should ensure that effective, proportionate and dissuasive sanctions are available to deal with persons who make false declaration(s) or disclosure(s). In cases where the currency or bearer negotiable instruments are related to terrorist financing or money laundering, countries should also adopt measures, including legislative ones consistent with Recommendation 3 and Special Recommendation III, which would enable the confiscation of such currency or instruments.

APPENDIX M
CRIMINAL NON-DISCLOSURE AND WITNESS
EXCLUSION CERTIFICATES ISSUED UNDER
SECS 26 AND 28 OF THE NSI ACT

Year	Matter	Number of Certificates Issued	Issuing Minister
2012-13	-	0	-
2011-12	-	0	-
2010-11	-	0	-
2009-10	-	0	-
2008-09	-	0	-
2007-08	-	0	-
2006-07	<i>R v Baladjam & Ors</i> (criminal matter)	2	Attorney-General
	<i>R v Khazaal</i> (criminal matter)	1	Attorney-General
2005-06	<i>R v Lodhi</i> (criminal matter)	10	Attorney-General
2004-05	-	0	-

APPENDIX N

AUSTRALIA'S SECRECY OBLIGATIONS UNDER NATIONAL SECURITY INFORMATION SHARING TREATIES

Australia has 13 treaties relating to the mutual protection of national security information in force including with the United States, France, Canada, the European Union and the North Atlantic Treaty Organisation. Australia has no treaty relating to the mutual protection of national security information in force with the United Kingdom.

Provisions of applicable treaty obligations owed by Australia include restrictions on the use of the foreign government's national security information received by Australia. These restrictions are variously described but generally include:

- Prohibitions on the use of the foreign government national security information for any other purpose than that for which it was provided without the prior written approval of the foreign government; and
- Prohibitions on the disclosure of the foreign government national security information to any person who does not hold a security clearance to the appropriate level and whose "official duties" do not require access to the information.

A number of applicable treaty provisions are reproduced below.

Agreement between the Government of Australia and the Government of the United States of America Concerning Security Measures for the Protection of Classified Information

([2002] ATS 25, entry into force 7th November 2002)

ARTICLE 1

Commitment to the Protection of Classified Information

Each Party shall protect classified information received directly or indirectly from the other Party according to the terms set forth herein and in accordance with its laws and regulations.

...

ARTICLE 4

Protection of Classified Information

No individual shall be entitled to access to classified information received from the other Party solely by virtue of rank, appointment, or security clearance. Access to the information shall be granted only to those individuals whose official duties require such access and who have been granted a personnel security clearance in accordance with the prescribed standards of the Parties. The recipient Parties shall ensure that:

...

C. The recipient Party shall not use or permit the use of the information for any other purpose than that for which it was provided without the prior written approval of the releasing Party;

...

G. The recipient Party shall comply with any additional limitations on the use, disclosure, release and access to the information which may be specified by the originating Party.

ARTICLE 5

Personnel Security Clearances

...

3. Before a representative of a Party releases classified information to an officer or representative of the other Party, the receiving Party shall provide to the releasing Party an assurance that the officer or representative possesses the necessary level of security clearance and requires access for official purposes, and that the information will be protected by the receiving Party.

Agreement between the Government of Australia and the Government of the French Republic relating to the Exchange and Communication of Classified Information
([1985] ATS 20, entry into force 15th July 1985)

Article 2

Within the framework of their respective national legislation, the Parties shall take all appropriate measures to ensure the reciprocal protection of classified information which is exchanged on the basis of cooperation between the competent national authorities of the Parties including that supplied within the framework of purchase orders indents or contracts

placed with public or private Australian or French establishments or derived from such classified information exchanged or communicated.

Article 3

Within the framework of their respective national legislation, the Parties shall take all appropriate measures to ensure that the know-how as well as the proprietary rights are respected, that these rights are not conceded nor any classified information communicated to third parties without the prior written consent of the originating Party.

Agreement between the Government of Australia and the Government of Canada concerning the Protection of Defence Related Information exchanged Between Them
([1996] ATS 16, entry into force 31st October 1996)

Article 5

Protection and use of Transmitted Information

1. The Parties shall apply the following rules for the protection and use of Transmitted Information:

...

(b) the receiving Party shall not permit Transmitted Information to be used for any purpose other than that for which it is provided without the prior written consent of the originating Party;

(c) the receiving Party shall not disclose, release or provide access to Transmitted Information, or anything incorporating Transmitted Information, to any third party, including any third country government, any national of a third country, or any contractor, organization or other entity other than the Parties, without the prior written consent of the originating Party or unless such disclosure, release or access is otherwise in accordance with the provisions of another agreement or arrangement between the Parties;

...

(g) the receiving Party shall take all steps legally available to it to keep Transmitted Information free from disclosure under any legislative provision;

...

Article 6

Access

Access to Transmitted Information shall be limited to those personnel of a Party who:

(a) are nationals of either of the Parties, unless the originating Party has given its prior written consent otherwise;

- (b) require the information for the performance of their official duties; and
- (c) have been Security Screened to the appropriate level.

Agreement between Australia and the European Union on the Security of Classified Information

([2011] ATS 20, entry into force 1st June 2011)

ARTICLE 5

Protection of Classified Information

Each Party shall:

...

(d) not use such Classified Information for purposes other than those established by the Providing Party or those for which the Classified Information is provided;

(e) not disclose such Classified Information to third parties, or to any EU institution or entity not mentioned in Article 2(b), without the prior written consent of the Providing Party;

(f) not allow access to such Classified Information to individuals unless they have a Need-to-know in order to perform their official duties and, where required, have been security-cleared to the appropriate level for access to such Classified Information;

...

ARTICLE 6

Release of Classified Information

1. Classified Information may be disclosed or released, in accordance with the principle of originator control, by the Providing Party to the Receiving Party.

2. In implementing paragraph 1, no generic release shall be possible unless procedures are agreed between the Parties, pursuant to Article 12, regarding certain categories of Classified Information, relevant to their operational requirements.

ARTICLE 7

Security Clearances

1. Access to Classified Information shall be limited to individuals in Australia and in the EU who:

(a) require access, on a Need-to-know basis, to the Classified Information for the performance of their official duties; and

(b) in case they require access to information classified CONFIDENTIAL, PROTECTED, CONFIDENTIEL UE, or above, have been granted a personnel security clearance at the relevant level or have otherwise been duly authorised by virtue of their functions, in accordance with the relevant laws, rules and regulations.

...

Agreement between the Government of Australia and the North Atlantic Treaty

Organisation on the Security of Information

([2009] ATS 12, entry into force 8th May 2009)

Article 1

The Parties shall:

...

(iii) not use the exchanged information or material for purposes other than those laid down in the framework of the cooperative activities and the decisions and resolutions pertaining to these cooperative activities;

(iv) not disclose such information and material to third parties without the consent of the originator.

Article 2

(i) The Government of Australia accepts the commitment to have all persons of its nationality who, in the conduct of their official duties, require or may have access to information or material exchanged under the cooperative activities approved by the North Atlantic Council appropriately cleared before they are granted access to such information and material.

...

