

**THE REAL PRICE OF PAYING RANSOMS:  
THE AUSTRALIAN LEGAL POSITION  
CONCERNING RANSOM PAYMENTS TO  
TERRORIST ORGANISATIONS**

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## I INTRODUCTION

Families and supporters of hostage victims are forced to make difficult decisions to secure the safe release of their loved ones. Do they cooperate and negotiate a ransom payment with the hostage takers, or support the Australian Government's policy of not paying ransoms and risk negotiating their release via other means? Families face an additional legal predicament. If they choose to pay a ransom, they may be in violation of Australia's counter-terrorism laws and be accused of financing a terrorist organisation. The maximum penalty for such offences is life imprisonment.<sup>1</sup> They also face the prospect of breaching international law.

This paper will address Australia's domestic legal framework and the international framework around the payment of ransoms to terrorist organisations. It will examine the policy implications of paying ransoms and the role of third parties, including banks, insurers, the Australian Government, charities or aid organisations, and risk management consultants, who may attract criminal liability for paying ransoms. It addresses comparative state approaches before examining suggestions for reform.

Whilst Australia's legislative landscape and policies should comply with its international obligations, the Australian Government could adopt other measures to assist families in this difficult and unintended legal predicament. Families should be briefed from the beginning on their legal exposure under Australian laws. Government agencies have a role in providing clear and unambiguous advice including the option to engage risk management consultants and therefore proceed without the primary help of the Government. This advice should go as far as recommending consultants that have been successfully engaged by Australian families in the past, to save time and energy filtering through the raft of available consultants.

Australia should not amend its current laws or no-ransom policy. This would send the wrong message to hostage takers and place Australia in breach of its international obligations. Rather, confidential discussions should take place between families and Government agencies to explain that not all offences under the Act must be prosecuted if it is not in the public interest, and to date,

<sup>1</sup> *Criminal Code Act 1995* (Cth) s 103.2(1).

no prosecutions against individuals in their position have been pursued.<sup>2</sup> The legal framework should not be used by Government agencies as a threat or mode of coercion for families to act a certain way.

## II AUSTRALIA'S NO-RANSOM POLICY

### A *Kidnapping Australians for Ransom*

Kidnapping for ransom is a vital form of funding for terrorist organisations. It is reportedly the second greatest source of funding for terrorist organisations, falling only behind direct state sponsorship.<sup>3</sup> At least \$165 million in ransom payments have been funneled to terrorist organisations since 2008.<sup>4</sup> Some of these ransom payments have been directly linked to subsequent terrorist attacks. Al-Qaida in the Arabian Peninsula for example used ransom money estimated at over US\$20 million, reportedly received for the return of European hostages to finance its campaign to seize territory in Yemen between 2011-2012.<sup>5</sup> The estimated US\$53 million raised by Islamic State in 2014 was from oil sales, taxation, extortion and ransom payments.<sup>6</sup>

It can cost very little to finance a terrorist attack with potentially devastating outcomes. It is estimated that the Bali bombings on 12 October 2002 cost USD\$50,000 while the London transport system attack on 7 July 2005 cost as little as £8,000. Ransom payments are often in the hundreds of thousands or millions of dollars with the potential to fund large-scale deadly attacks.<sup>7</sup>

<sup>2</sup> Commonwealth Department of Public Prosecutions, *Prosecution Policy of the Commonwealth*, August 2014, 5.

<sup>3</sup> Under Secretary for Terrorism and Financial Intelligence David Cohen, 'Confronting New Threats in Terrorist Financing' (Speech delivered at the Center for a New American Security, Washington DC, 4 March 2014).

<sup>4</sup> Lee Ferran and Meghan Keneally, 'The Price of Freedom: Inside a Terrorist Hostage Situation', *ABC News* (online), 1 April 2015 <<http://abcnews.go.com/Blotter/fullpage/inside-terrorist-hostage-negotiations-price-freedom-25114240>>.

<sup>5</sup> Cohen, above n 2.

<sup>6</sup> Shane Croucher, 'Isis: Why Theresa May's Ban on UK Insurers Paying Ransom Claims Changes Little', *International Business Times* (online), 24 November 2014 <<http://www.ibtimes.co.uk/isis-why-theresa-mays-ban-uk-insurers-paying-ransom-claims-changes-little-1476341>>.

<sup>7</sup> Nigel Brennan for example paid \$600,000 for his release along with his fellow hostage Amanda Lindhout, see Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Held Hostage: Government's Response to Kidnapping of Australian Citizens Overseas* (2011) 142; Kashmira Gander, 'Isis hostage threat: which countries pay ransoms to release their citizens?', *The Independent* (online), 28 April 2015

The majority of Australians kidnapped overseas have been in Africa, particularly in Nigeria where Australians work in the oil industry, however a growing number of individuals are being kidnapped by the Islamic State in Syria and Iraq.<sup>8</sup> Kidnapping is a risk to any Australia living, working or travelling abroad.

Despite difficulties in collecting accurate data, one kidnap response company found that ransoms are paid in around 64% of cases.<sup>9</sup> Only 18% of hostages are released without any form of payment, around 10% of hostages are rescued, approximately 2% are able to escape and an estimated 6% of incidents result in a hostage death.<sup>10</sup> With the majority of cases resulting in ransom payments, it is important that families of hostages are able to navigate Australian laws and are aware of any legal risks or liabilities involved in the transaction.

Most kidnap and ransom cases never reach media outlets and are negotiated behind closed doors. Red24, a risk management company estimates that 70% of kidnapping cases are not reported and don't feature in official statistics due to inadequate law enforcement and judicial systems in the country of kidnapping coupled with fear of retaliation.<sup>11</sup>

In November 2011, the Australian Senate released its Report from the Senate Inquiry by the Foreign Affairs, Defence and Trade References Committee. It was prompted by the case of Nigel Brennan, an Australian kidnapped in Somalia who was critical of the Australian Government's handling of his case. He believes that had his family received better advice, he would have spent less time in captivity with a lot less expense.<sup>12</sup> This was the

<http://www.independent.co.uk/news/world/politics/isis-hostage-threat-which-countries-pay-ransoms-to-release-their-citizens-9710129.html>.

<sup>8</sup> Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Held Hostage: Government's Response to Kidnapping of Australian Citizens Overseas*, (2011) 17.

<sup>9</sup> *Ibid* 16.

<sup>10</sup> *Ibid*.

<sup>11</sup> Red24, 'Red24 Threat Forecast 2013' (Research Report, Red 24, 2014) 28 <[https://www.red24.com/emails/red24\\_Threat\\_Forecast\\_2013.pdf](https://www.red24.com/emails/red24_Threat_Forecast_2013.pdf)>

<sup>12</sup> Nick Sorbello, 'Brennan welcomes senate kidnap inquiry', *News Mail* (online), 9 July 2011 <<http://www.news-mail.com.au/news/nigel-to-give-evidence-at-new-kidnap-inquiry/900670/>>; Nick Sorbello, 'Brennan speaks at inquiry', *News Mail* (online), 13 October 2011 <<http://www.news-mail.com.au/news/brennan-speaks-at-inquiry/1135460/>>.

first time a Senate Inquiry had been held on the issue since 1995-1997 when the Inquiry into Consular Services was conducted.<sup>13</sup>

The Report released from the Inquiry examines three high profile cases of Australians kidnapped overseas; Douglas Wood taken in Iraq, Nigel Brennan caught in Somalia and John Martinkus also captured in Iraq, and suggests how the Australian response could have been improved. The Report was only aware of a total of 30 cases of Australians kidnapped abroad since 1994 when David Wilson and Kellie Wilkinson were kidnapped and murdered by the Khmer Rouge in Cambodia. The death of these Australians was a turning point in Australian foreign policy and marked the first time Australia took a clear policy stance on not paying ransoms. Australia's no-ransom policy is discussed in detail below.

The 30 cases reported since 1994 represent only those cases reported in the media and those whose families requested the assistance of the Department of Foreign Affairs and Trade (DFAT). DFAT acknowledges there would be other cases which were resolved without any request for Government assistance.<sup>14</sup>

Although estimates vary, a conservative estimate is that in 2013, 33,000 kidnappings for ransom took place globally.<sup>15</sup> The top five countries for kidnapping in 2014 were Mexico, India, Pakistan, Iraq and Nigeria.<sup>16</sup> With these figures in mind, the number of Australians kidnapped annually would be considerably higher than the 30 cases reported between 1994- 2011.

## B *Australia's No-Ransom Policy*

The Australian Government's key policy in response to Australian citizens kidnapped overseas is that it does not pay ransoms. Australia's no-ransom policy has existed since the 1994 kidnapping and murder of David Wilson in Cambodia by the Khmer Rouge. This policy is consistent with Australia's major

<sup>13</sup> Alastair Gaisford (DFAT Officer 1987-2001), Submissions to the Senate Inquiry into the Effectiveness of the Australian Government's response to Australian citizens who are kidnapped and held for ransom overseas, *Personal Submission*, October 2011, 1.

<sup>14</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7.

<sup>15</sup> Red24, above n 10; Red24, 'Red24 Threat Forecast 2014' (Research Report, Red 24, 2015) 27 <<https://www.red24.com/uploads/red24%20Threat%20Forecast%202014.pdf>>.

<sup>16</sup> Control Risks, *Top Ten Kidnap Countries 2014* (March 2015), Control Risks <<https://www.controlrisks.com/en/our%20thinking/analysis/top%20ten%20kidnap%20countries%202014>>.

international consular partners including the US, UK, Canada and New Zealand and generally with the international community and the United Nations.<sup>17</sup>

Whilst not all countries have adopted a no-ransom policy in practice, a number of European and Middle Eastern countries have allegedly paid ransoms in recent years, there is increasing agreement that the international community should be united in its anti-kidnapping activities.<sup>18</sup> In June 2013, the Group of Eight leaders unequivocally rejected the payment of ransoms to terrorists for the first time and called on private companies to follow.<sup>19</sup> In June 2014, the United Nations Security Council adopted Resolution 2161 calling on member states to secure the safe release of hostages without ransom payments or political concessions.<sup>20</sup>

There are two key rationales underlining Australia's no-ransom policy. First, by paying ransoms, you increase the risk of further kidnappings of Australian citizens.<sup>21</sup> Second, the policy is consistent with Australia's domestic and international legal obligations, particularly in relation to transferring ransom payments to terrorist organisations.<sup>22</sup> These obligations are examined further in sections II and III.

Australia's no-ransom policy has not been widely criticized. Families and victims of hostage situations spoke to the Senate Inquiry in favour of the policy and understood that by paying ransoms it raises the expectations of hostage takers in relation to the monetary value of ransoms and the value of the hostage.<sup>23</sup> By paying ransoms, you run the risk of the hostage still not being released even after an agreed payment has been received. A hostage payment also has broader implications, it undermines the cooperation of states

<sup>17</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 31, 33, 42.

<sup>18</sup> Sky News, *Ransom Demands and the Countries that Pay Up*, (20 January 2015), Sky News <<http://news.sky.com/story/1411314/ransom-demands-and-the-countries-who-pay-up>>; Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 42.

<sup>19</sup> Group of Eight Leaders Communique; 2013 *Lough Erne* (17 June 2013) <[http://www.francophonie.org/IMG/pdf/lough\\_erne\\_2013\\_g8\\_leaders\\_communique.pdf](http://www.francophonie.org/IMG/pdf/lough_erne_2013_g8_leaders_communique.pdf)>; BBC, 'Cameron: G8 to stamp our ransom payments', *BBC News* (online), 18 June 2013 <<http://www.bbc.com/news/uk-politics-22951654>>.

<sup>20</sup> SC Res 2161, UN SCOR, 68<sup>th</sup> sess, 7198<sup>th</sup> mtg, UN Doc S/RES/2161 (17 June 2014).

<sup>21</sup> Australian Government, Department of Foreign Affairs and Trade, *General Advice to Australia Travellers* (11 February 2014), Smart Traveller <<http://www.smarttraveller.gov.au/zw-cgi/view/Advice/General>>.

<sup>22</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 32.

<sup>23</sup> *Ibid* 32-3.

endeavoring to prevent future acts of hostage taking and their efforts to starve terrorists of a critical source of funding.<sup>24</sup>

Despite apparent confusion, it is likely the no-ransom policy precludes other Australian Government agencies, such as the Australian Federal Police (AFP), negotiating ransom payments on behalf of a hostage's family. In the Nigel Brennan case in Somalia, his family took the view that the AFP would negotiate the payment of the kidnappers "costs." They understood this play on words to be a ransom payment while DFAT maintains that the "basic starting point is that the government will not negotiate a ransom payment."<sup>25</sup> A later examination of Australia's legal obligations relating to financing ransoms indicates the reluctance of agencies to get involved and their desire to minimise exposure at the cost of creating further confusion and distress for family members.

In some cases, an Australian is kidnapped abroad and his or her company will take the lead in resolving the situation typically with the help of a K&R (kidnap and ransom) consultant. The Australia Government in these situations will take a step back. In DFAT's view "it is open to employers and families to take whatever approach they consider most effective to achieve resolution."<sup>26</sup>

When the Australian Government is working towards the release of a hostage abroad there are many factors for consideration including, "international conventions, humanitarian considerations such as the safety of the hostage, the state of law and order in the country where the hostage is held, the relationship with the respective government and law enforcement agencies and the need to deter future similar acts."<sup>27</sup> The Senate Inquiry was concerned that any participation of Australian officials in the negotiation of monetary or material offers to hostage takers would run against the no-ransom policy and Australia's legal obligations.<sup>28</sup>

<sup>24</sup> Ibid 35.

<sup>25</sup> Ibid 38-9.

<sup>26</sup> Ibid 40.

<sup>27</sup> Ibid 20.

<sup>28</sup> Ibid 42.

### III AUSTRALIAN DOMESTIC LEGISLATIVE FRAMEWORK

The Australian Government has established a domestic legal framework to criminalise the financing of terrorist organisations which has direct effect on the payment of ransoms to hostage takers. The Australian legislative framework is consistent with its international obligations which will be examined in Section III.

#### A *Defining a Terrorist Organisation under Australian Law*

Hostage situations usually occur in countries that are politically unstable or conflict prone where the rule of law is weak. Hostage takers of foreign nationals are often linked to criminal gangs or terrorist organisations who seek financial gain or political concessions.<sup>29</sup>

It is important to determine the nature of the group of hostage takers in order to determine the laws applicable to the situation. A hostage taker who is perhaps known to the hostage or a local street gang who demand a ransom payment may not fall under the same legislative framework as a terrorist organisation such as Al Qa'ida or Islamic State who kidnap an Australian.

In Australia, there are three ways an organisation can be deemed a "terrorist organisation"; a court determination supported by the *Criminal Code Act 1995* (Cth) (Criminal Code), executive proscription by the Attorney General, or by the *Charter of the United Nations Act 1945* (Cth) (UN Charter Act).

When determining the status of a terrorist organisation under the Criminal Code, a court will need to be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act.<sup>30</sup>

Alternatively, by executive proscription, the organisation may be listed in the Regulations to the Criminal Code as a terrorist organisation determined by the Attorney General.<sup>31</sup>

<sup>29</sup> Red24, 'Red24 Threat Forecast 2014' (Research Report, Red 24, 2015) available at <[https://www.red24.com/emails/red24\\_Threat\\_Forecast\\_2013.pdf](https://www.red24.com/emails/red24_Threat_Forecast_2013.pdf)> 28-31.

<sup>30</sup> *Criminal Code Act 1995* (Cth) s 102.1(a).

<sup>31</sup> *Criminal Code Regulations 2002* (Cth)



In making his determination to list an organisation under the Criminal Code, the Attorney General, on advice from the Australian Security Intelligence Organisation (ASIO), will consider a number of legislative and non-legislative factors. The test under section 102.1(1) is whether the group is directly or indirectly engaged in preparing, planning, assisting or fostering the doing of a terrorist act, or advocates the doing of a terrorist act. The non-legislative factors include the organisation's engagement in terrorism, its ideology, links to other terrorist groups, links to Australia, threats to Australian interests, listing by the United Nations or like-minded countries, or their engagement in peace or mediation processes.<sup>32</sup>

Currently 20 organisations are listed in the Criminal Code Regulations as terrorist organisations, the great majority of which self-identify as Islamic. These include Abu Sayyaf Group, Al-Murabitun, Al-Qa'ida, Al-Qa'ida in the Arabian Peninsula, Al-Qa'ida in the Islamic Maghreb, Al-Shabaab, Ansar al-Islam, Boko Haram, Hamas's Izz al-Din al-Qassam Brigades, Hizballah's External Security Organisation, Islamic Movement of Uzbekistan, Islamic State, Jabhat al-Nusra, Jaish-e-Mohammed, Jamiat ul-Ansar, Jamaah Islamiyah, Kurdistan Workers Party, Lashkar-e Jhangvi, Lashkar-e-Tayyiba and Palestinian Islamic Jihad.<sup>33</sup>

If the hostage takers are considered a part of these listed groups, for example the Islamic State, the prosecution does not need to satisfy the court of the nature of the group as they are automatically deemed to be a terrorist organisation. For example, Islamic State in Iraq and Syria are kidnapping a growing number of individuals. Islamic State is a listed group and therefore constitutes a terrorist organisation under Australian law.

Hostage takers can also be associates or linked to known terrorist organisations, organised crime groups or criminal gang members looking to profit from their kidnapping victims. In these more ambiguous situations, Australian prosecutors would need to carefully examine the group's conduct

<sup>32</sup> Australian Government, *Australian National Security: Protocol for Listing Terrorist Organisations* (2 April 2015), Australian National Security <<http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/ProtocolForListingTerroristOrganisations.aspx>>.

<sup>33</sup> *Criminal Code Regulations 2002* (Cth); Australian Government, *Australian National Security: Listed Terrorist Organisations* (2 April 2015), Australian National Security <<http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx>>.

and determine if they are planning or preparing or in some way assisting a “terrorist act” pursuant to section 102.1(a) of the Criminal Code.

A “terrorist act” is an act, or a threat to commit an act, that is done with the intention to coerce or influence the public or any government by intimidation, to advance a political, religious or ideological cause, and the act causes; death, serious harm or endangers a person; serious damage to property; a serious risk to the health or safety of the public, or seriously interferes with, disrupts or destroys critical infrastructure such as a telecommunications or electricity network.<sup>34</sup>

Nigel Brennan’s kidnappers claimed to be a part of the “Somali Mujahadeen” and claimed the kidnapping was politically motivated because the Australian Government was “at war with Islam”.<sup>35</sup> Given the nature of their motivation and their intention to advance a political cause, it is likely their conduct in kidnapping, endangering and causing harm to an Australian citizen because of his country’s political beliefs would be considered a terrorist act by a terrorist organisation.

The third legal framework that can make terrorist organisation designation is the UN Charter Act. The UN Charter Act implements United Nations Security Council sanctions and particularly financial restrictions. The Act criminalises the direct or indirect provision of assets to individuals or entities that are listed pursuant to UN Security Council resolutions. As of 1 April 2015, 3,085 individuals and organisations were subject to targeted financial sanctions, including having their assets frozen, under the UN Charter because they are deemed to be “associated with terrorism” pursuant to section 15 of the Act.<sup>36</sup> The list includes a number of international charities but no Australian-based organisations are yet listed.

<sup>34</sup> Australian Government Attorney General’s Department, ‘Australia’s counter-terrorism laws’ (Questions and Answers pamphlet, 2015) 4 available at <<https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Australias%20counter%20terrorism%20laws.pdf>>.

<sup>35</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 26.

<sup>36</sup> Australian Government, Department of Foreign Affairs and Trade, *Australia and Sanctions: Consolidated List* (15 April 2015), Department of Foreign Affairs and Trade <<http://www.dfat.gov.au/international-relations/security/sanctions/Pages/consolidated-list.aspx>>.

This is a rapidly expanding list. In May 2008, the list contained 1,700 individuals.

The UN Charter Act creates new offences for those who provide assets to, or deal in the assets of persons or entities involved in terrorist activities.<sup>37</sup> Organisations such as the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka, which are not listed under the Criminal Code, are listed under the UN Charter Act. The Commonwealth Director of Public Prosecutions may therefore prefer to use this legislation if deciding whether to proceed with a prosecution if it is uncertain it can satisfy the “terrorist organisation” test under the Criminal Code. The maximum penalty under the UN Charter Act is 10 years imprisonment.<sup>38</sup>

If the family of a hostage faces a situation where the hostage takers are clearly a terrorist organisation or the family decides to lean on the side of caution due to the group’s ambiguous nature and consider it is a terrorist organisation for the purpose of determining their legal liability, the next question is how are their interactions with the terrorist organisation treated under Australian law?

#### B *New Counter-Terrorism Measures Following 9/11*

Families will naturally want to communicate with their loved one in a hostage situation and one of the first steps will be seeking proof of life of the kidnapping victim. Negotiations usually then quickly move to the demand of a ransom payment by the hostage takers for the victim’s release. The difficulty is Australia’s counter-terrorism laws, whilst consistent with its international obligations, criminalise any payments or support to terrorist groups without making exception.<sup>39</sup>

The financing and support of terrorist organisations was criminalised in Australia in mid-2002 in response to the 9/11 attacks on the US and UN Resolution 1373 which followed the attacks.<sup>40</sup> UN Resolution 1373 required Australia to ensure its laws criminalised terrorist activities and included laws to capture terrorist financing and material support for terrorist organisations. It

<sup>37</sup> *Charter of the United Nations Act 1945* (Cth) pt IV.

<sup>38</sup> *Charter of the United Nations Act 1945* (Cth), ss 20-21, 27-28.

<sup>39</sup> *Criminal Code Act 1995* (Cth) divs 102-103.

<sup>40</sup> The Security Legislation Amendment (Terrorism) Bill 2001 (Cth) proposed the new provisions in the Criminal Code and was first introduced on 12 March 2002. An amended version of the Bill was passed on 27 June 2002 and received royal assent on 5 July 2002.

required that Australia apply and enforce its laws in conformity with other foreign jurisdictions.<sup>41</sup>

The *Security Legislation Amendment (Terrorism) Act 2002* (Cth) was first introduced on 12 March 2002 and created new provisions in the Criminal Code.<sup>42</sup> Prior to its introduction, Australian legislation covered “politically motivated violence”, “treason”, “unlawful associations”, “foreign incursions”, “national security”, and “organised crime” which would have arguably covered terrorism related crimes but the word “terrorism” had rarely been used.<sup>43</sup> It was felt new measures were necessary to strengthen Australia’s counter-terrorism capabilities.<sup>44</sup>

### C *Financing Offences under Australian Law*

The key financing and material support offences are contained in Schedule 1, Part 5.3 (Terrorism), Divisions 102 and 103 of the Commonwealth Criminal Code and particularly section 102.6 (getting funds to, from or for a terrorist organisation), section 102.7 (providing support to a terrorist organisation) and section 103.2(1) (financing a person with reckless regard if for terrorist act). The offences distinguish between an individual’s specific knowledge of the nature of the terrorist organisation. Knowledge that the group is a terrorist organisation attracts a higher penalty as oppose to being reckless as to the nature of the group. These broad offences are amongst the most serious offences in the Criminal Code.

Under section 102.6(1), a person commits an offence, carrying a maximum penalty of 25 years imprisonment, if he intentionally receives or collects funds or makes funds available, whether directly or indirectly, to a terrorist organisation. He or she must know that the organisation is a terrorist organisation. The offence carries a maximum penalty of 25 years imprisonment.

<sup>41</sup> SC Res 1373, UN SCOR, 56<sup>th</sup> sess, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (28 September 2001).

<sup>42</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 12 March 2002, 1043 (D Williams).

<sup>43</sup> Attorney General, *Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]*, No. 126 of 2001-02, 13 March 2002, 5-6.

<sup>44</sup> *Ibid* 3, 6.

Under section 102.6(2) there is a lesser charge for a person who intentionally receives funds or makes funds available, directly or indirectly, to a terrorist organisation but is reckless as to whether it is a terrorist organisation. This offence attracts a 15-year sentence. “Funds” is defined as property and assets of every kind and legal documents or instruments in any form.<sup>45</sup>

Section 102.6(3) provides a defence to both offences if one can prove that the money was received to pay for legal representation for the same crime or that the funds are to assist the organisation comply with an Australian law. The defendant bears the legal burden in proving this defence. If the defendant is a legal practitioner for example who receives funds, he or she must prove on the balance of probabilities by gaining consent to waive legal professional privilege, that the money was for the purpose of providing legal assistance for offences under Division 102.

Section 102.7 criminalises providing support to a terrorist organisation. Pursuant to section 102.7(1), a person is guilty of an offence if he intentionally provides an organisation support or resources that would help them engage in a terrorist activity where the person knows the organisation is a terrorist organisation. The penalty is 25 years imprisonment.

Similarly, under section 102.7(2), there is a lesser charge if an individual commits the same crime without knowledge it is a terrorist organisation, but is reckless to the nature of the organisation. The penalty for that lesser offence is 15 years imprisonment. There is no specific defence provision under section 102.7 (providing material support) as there is in section 102.6 (financing).

Sections 5.3 and 5.4 of the Criminal Code define “knowledge” and “recklessness” respectively. A person will be liable for the higher knowledge charge if he has intention with respect to conduct, if he or she believes that the organisation exists or will exist in the ordinary course of events.<sup>46</sup> A person is “reckless” and liable for the lesser “reckless” charge if aware of a substantial risk that the result or circumstance will exist and having regard to the circumstances known to the person, it is unjustifiable to take the risk.<sup>47</sup>

<sup>45</sup> *Criminal Code Act 1995* (Cth) s 100.1(1).

<sup>46</sup> *Criminal Code Act 1995* (Cth) s 5.3.

<sup>47</sup> Australian Government Attorney General’s Department, ‘Australia’s counter-terrorism laws’ (Questions and Answers pamphlet, 2015) available at <https://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Documents/Australias%20counter%20terrorism%20laws.pdf>.

Sections 102.6 and 102.7 are very similar offences, the difference being the nature of the contribution to the terrorist organisation. The difference is whether one collects or provides funds (section 102.6) or provides broader support to the organisation (section 102.7, perhaps by providing other resources such as equipment or personnel).

It is an offence under section 102.8 to “associate” with a terrorist organisation. However, it is unlikely that a family member paying a ransom would be charged under this provision as they must intend that the support they give assist the organisation to expand or continue to exist.<sup>48</sup>

The *Suppression of the Financing Terrorism Act 2002* (Cth) inserted a new offence in the Commonwealth Criminal Code at section 103.1 (Financing Terrorism). It was introduced to implement Australia’s international obligations, discussed in section III, in the aftermath of the 9/11 attacks.<sup>49</sup> It created an offence directed at individuals who collect or provide funds with the intention they be used to facilitate terrorist activities. It is an offence to provide or collect funds if reckless as to whether those funds would be used to carry or facilitate a terrorist act. The maximum penalty is imprisonment for life. The maximum fine for a natural person is \$340,000 and \$1,700,000 for a body corporate.<sup>50</sup> This provision can capture the conduct of banking institutions, discussed in section IV.

An additional offence was created in 2005 by the *Anti-Terrorism Act (No. 2) 2005* (Cth). Under section 103.2(1) (Financing a Terrorist) it is an offence attracting life imprisonment, to collect funds or make funds available to another person, directly or indirectly, and be reckless as to whether the other person will use the funds for a terrorist act. This offence takes away the requirement of specifically funding a terrorist organisation. Under this offence you do not need to prove the receiver of the fund’s link to a terrorist organisation. Section 103.2(2) confirms that it does not matter whether a terrorist act actually occurs.<sup>51</sup>

<sup>48</sup> *Criminal Code Act 1995* (Cth) s 102.8(1)(a)(iv).

<sup>49</sup> *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002) Art 2 and SC Res 1373, UN SCOR, 56<sup>th</sup> sess, 4385<sup>th</sup> mtg, UN Doc S/RES/1373 (28 September 2001) para 1(b).

<sup>50</sup> This is based on the existing penalty unit of \$170 listed in section 4AA of the *Crimes Act 1914* (Cth) s4AA and the provisions for calculating the maximum fines in section 4B of that Act.

<sup>51</sup> Explanatory Memorandum, *Anti-Terrorism Bill (No. 2) 2005* (Cth) 12.

The newer provisions in sections 103.1 and 103.2 have been criticised for going further than required under international law.<sup>52</sup> Australia's obligations under UN Resolution 1373 and the *International Convention for the Suppression of the Financing of Terrorism* require specific intent when attributing criminal liability for terrorism financing offences.<sup>53</sup> Instead, the new offences fault element only requires that the person be reckless as to whether the funds provided be used to facilitate or engage in a terrorist act.

#### D *Application to the Families of Hostages*

Given the Australian legislative provisions, a family transferring a ransom to a terrorist organisation could easily attract liability under these provisions. An individual making the ransom payment is most likely to be charged under section 102.6 for making funds available directly or indirectly to a terrorist organisation. The higher offence under section 102.6(1) could be applicable if it is known to the family that it is a terrorist organisation, rather than a reckless disregard to the nature of the group. The defence under section 102.6(3) would not apply given the money is not for legal representation for a Division 102 crime nor to comply with Australian law.

The conduct could also fall under section 102.7 if the family intentionally provides support or resources which could help the group engage in a terrorist act. Again, if the family knows the nature of the terrorist organisation the higher offence under section 102.7(1) would apply. It is not necessary to know which terrorist act the money would fund nor is it necessary the terrorist act ever be carried out.<sup>54</sup> There is no specific defence to this provision. However, the most applicable provision if the family pays a monetary ransom appears to be section 102.6.

The prosecution may prefer a charge under section 103.2(1) if it is difficult to prove that support is made to a "terrorist organisation". A payment to a

<sup>52</sup> Law Council of Australia, Submissions to the Inquiry by the Independent National Security Legislation Monitor, *Inquiry into Financing Terrorism Offences*, 2 August 2013, 29-30.

<sup>53</sup> *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002).

<sup>54</sup> Australian Government Attorney General's Department, 'Australia's counter-terrorism laws' (Questions and Answers pamphlet, 2015) 5 available at <<https://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Documents/Australias%20counter%20terrorism%20laws.pdf>>.

person with a reckless or substantial and unjustifiable risk that it will be used for a terrorist act is all that is required.<sup>55</sup> According to the definition of “reckless”, families are arguably not reckless as to whether the money will be used to fund a terrorist act.<sup>56</sup> They may know there is a risk that the money will be used for terrorist purposes, whether it is substantial is questionable and it may be justifiable to them to take the risk.

From a review of the Commonwealth Criminal Code, it is apparent that a family member or supporter of a hostage who makes a ransom payment could be prosecuted in Australia, whether they are also in breach of international laws will be examined in section III.

### E *Likelihood of Prosecution*

Criminal liability exists when an individual pays a ransom to hostage takers who are deemed a terrorist organisation. The next consideration is the likelihood of a prosecution for such a crime.

The Commonwealth Director of Public Prosecutions exercises his discretion before deciding to lay charges, as not every offence under the Criminal Code is required to be prosecuted.<sup>57</sup> The Director will consider whether it is in the public interest to prosecute someone and what defences are available.<sup>58</sup> To date, no individual has been charged with financing terrorism offences for paying a ransom to release a hostage. A senior representative of the Attorney General’s Department when asked about the issue stated “[m]y feelings would be that it would probably be unlikely there would be a prosecution.”<sup>59</sup>

Whilst this is a positive indication, there is no guarantee that a family member would be safe from prosecution. Family members or supporters may not appreciate that at some future date, the Director of Public Prosecutions

<sup>55</sup> Explanatory Memorandum, Anti-Terrorism Bill (No. 2) 2005 (Cth) 12.

<sup>56</sup> *Criminal Code Act 1995* (Cth) s 5.3.

<sup>57</sup> Commonwealth Department of Public Prosecutions, *Prosecution Policy of the Commonwealth*, August 2014, 5.

<sup>58</sup> *Ibid*; Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 115.

<sup>59</sup> Mr. Geoffrey McDonald, First Assistant Secretary in the National Law and Policy Division of the Attorney-General’s Department. Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 116.



may use his discretion in their favour nor that defences are available for these offences.

Separate to the hostage and ransom scenario, the Commonwealth Director of Public Prosecutions has prosecuted individuals under the financing of terrorist organisations provisions before. In 2009, three Sri Lankan males pleaded guilty to offences under the UN Charter Act for providing resources including electronic equipment to detonate bombs to the LTTE.<sup>60</sup> The Director preferred to charge the individuals under the UN Charter Act because the LTTE was not a listed terrorist organisation under the Criminal Code. The Victorian Supreme Court accepted that the men were motivated partly by the intention to assist the Tamil community.<sup>61</sup> After being sentenced to terms of imprisonment, they were released on good behavior bonds.

The sentencing revealed some of the inherent problems with the laws designating organisations as “terrorist”.<sup>62</sup> Sentas argues that terrorist organisation laws have politicised Australian criminal law in pursuit of foreign policy ends, especially considering the prosecutions were pursued on request from the Sri Lankan Government who have long campaigned against the LTTE and there is evidence that Sri Lankan officials exerted undue influence and control over the proceedings.<sup>63</sup> The case also had the effect of criminalising the Tamil diaspora in Australia as a suspect community. This has serious ramifications for any migrant diaspora including Tamils, Kurds and Palestinians who are connected to struggles for self-determination.<sup>64</sup>

## F *Defences*

There are two defences available under the Commonwealth Criminal Code to individuals charged with financing terrorism offences when making a hostage payment; duress and self-defence. The specific defence in section 102.6(3) is not relevant to family members paying ransoms as the money is not for the purpose of legal representation nor to assist the hostage takers comply with an Australian law.

<sup>60</sup> Victoria Sentas, ‘Terrorist Organisation Offences and the LTTE: *R v Vinayagamoorthy*’ (2010) 22(1) *Current Issues in Criminal Justice* 159, 162.

<sup>61</sup> *R v Vinayagamoorthy* [2010] VSC 148.

<sup>62</sup> Sentas, above n 58, 159.

<sup>63</sup> *Ibid* 165.

<sup>64</sup> *Ibid* 160.

The defence of duress provides that a person is not criminally responsible for an offence under the Criminal Code if the act is carried out under duress.<sup>65</sup> A person carries out an offence under duress if he or she believes that a threat has been made so that if the payment is not made the threat will be realised. The threat must not be reasonably rendered ineffective and the payment must be deemed a reasonable response to the threat.<sup>66</sup>

The other available defence is self-defence. A person cannot be held criminally responsible for an offence if it was carried out in self-defence.<sup>67</sup> The conduct will be deemed self-defence if he or she believes it necessary to defend himself or another person or to prevent or terminate the unlawful imprisonment of himself or herself or another person. The act constituting self-defence must be a reasonable response in the circumstances.

Senior representatives of the Attorney-General's Department have referred to these defences in the context of paying a ransom and it is more than likely that a family member would invoke particularly self-defence and in the alternative, duress.<sup>68</sup> Self-defence specifically covers terminating the unlawful imprisonment of another person.

Despite the applicability of these defences, they are only employed once charges have been laid. By this time, a family would have suffered emotional and financial distress in the face of legal action for trying to secure the release of a loved one. The measures the Australian Government could take to better manage this process and safeguard families of hostage victims are considered in section VI.

#### IV INTERNATIONAL FRAMEWORK AROUND RANSOM PAYMENTS

Hostage taking is prohibited under international law during armed conflicts. Common Article 3 of the 1949 Geneva Conventions prohibits the taking of hostages at any time and in any place whatsoever in a non-international armed conflict. Article 34 of the 1949 Geneva Convention IV prohibits hostage taking in an international armed conflict and Article 147 states that hostage taking is a

<sup>65</sup> *Criminal Code Act 1995* (Cth) s 10.2.

<sup>66</sup> *Criminal Code Act 1995* (Cth) s 10.2(2).

<sup>67</sup> *Criminal Code Act 1995* (Cth) s 10.4.

<sup>68</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 112.

grave breach of the Convention.<sup>69</sup> The 1998 Rome Statute which forms the basis of the International Criminal Court's jurisdiction states at Article 8(2)(a)(viii) and (c)(iii) that the "[t]aking of hostages' constitutes a war crime in both international and non-international armed conflicts."<sup>70</sup>

Irrespective of armed conflict, Australia is bound by a number of international instruments which underpin its international obligations to criminalise hostage taking and suppress the financing of terrorist organisations. The international community has collectively denounced hostage taking and expressly objected to the payment of ransoms.<sup>71</sup>

Australia is party to the *International Convention against the Taking of Hostages* which entered into force on 3 June 1983. The Convention requires state parties to make hostage taking an offence punishable by appropriate penalties and to take measures to facilitate the release of hostages.<sup>72</sup>

Australia is also party to the *International Convention for the Suppression of the Financing of Terrorism* (Financing Terrorism Convention), which entered into force on 10 April 2002 not long after the events of 9/11.<sup>73</sup> By being party to the Financing Convention, a state is obligated "to create the offence of providing or collecting funds, directly or indirectly, unlawfully and willfully with the intention or knowledge that they are to be used, in full or in part, to carry out a terrorist act."<sup>74</sup>

The Financing Terrorism Convention was created on the basis that existing multilateral legal instruments did not adequately address the financing of terrorism and the urgent need to increase international cooperation to prevent such financing as well as the prosecution and punishment of its perpetrators.<sup>75</sup> Article 9(2) requires states to take appropriate measures under its domestic law to ensure offenders are prosecuted. Australia's compliance with the Convention

<sup>69</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), opened for signature 12 August 1949 75 UNTS 287 (entered into force 21 October 1950) arts 34, 147.

<sup>70</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 8(2)(a)(viii) and (c)(iii).

<sup>71</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 105.

<sup>72</sup> *International Convention against the Taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

<sup>73</sup> *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002).

<sup>74</sup> *Ibid* Preamble.

<sup>75</sup> *Ibid*.

is in doubt if a ransom payment is made and the facilitator is not prosecuted, unless it is deemed an “appropriate measure” not to prosecute.

Australia also has an obligation to enforce Security Council Resolution 1373 (2001). Similarly to the Financing Terrorism Convention, the Resolution calls on states to urgently cooperate to prevent and suppress terrorist acts by implementing the relevant international conventions.<sup>76</sup>

Specifically, Australia has an obligation to criminalise the provision or collection of funds for terrorist acts, freeze funds and financial assets of those who facilitate the commission of a terrorist act, prohibit their nationals from making funds available to benefit the commission of terrorist acts and ensure that those who participate in such acts are brought to justice via serious criminal offences in domestic laws. Australia has implemented its international obligations through the *Security Legislation Amendment (Terrorism) Act 2002* and *Suppression of the Financing terrorism Act 2002* (Cth) which amended the Commonwealth Criminal Code to attribute criminal liability to individuals who pay ransoms to terrorist organisations.

## V THIRD PARTIES

This section explores other actors, in addition to family members or supporters of hostages, who could be accused of providing material support or financing terrorist organisations. These actors include banking institutions, insurers, risk management consultants or kidnap and ransom firms, Australian charities or individuals donating to charities, Government officials paying consular loans and groups training terrorist organisations in the principles of conflict resolution or international humanitarian law.

### A *Banking Institutions*

If a family member intends to pay a ransom payment for the release of a hostage, the money will need to be transferred to the hostage takers through a financial institution. However, a bank may also be exposed to prosecution or sanction for handling a ransom transaction. Families of hostage victims, found

<sup>76</sup> *Resolution on threats to international peace and security caused by terrorist acts*, SC Res 1373, UN Security, UN Doc S/RES/1373 (2001).

dealing with banking institutions another hurdle in an already desperate situation.<sup>77</sup>

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) requires regulated businesses to detect and deter money laundering and provide financial intelligence to revenue and law enforcement agencies. Banks are required to have an anti-money laundering and counter-terrorism financing program to help them identify, mitigate and manage the risk.<sup>78</sup> The Australian Transaction Reports and Analysis Centre (AUSTRAC) is the regulatory body in Australia that monitors compliance with the Act.

The Act establishes a risk based approach so that the bank must assess the risk of providing a certain service. If a person seeks to make a ransom payment, the service provider must decide if the terrorism financing risk is too great and decide whether it will carry out the transfer.<sup>79</sup> The provisions attract civil penalties, usually financial in nature, as opposed to criminal penalties.<sup>80</sup>

It is an offence under section 103.1 of the Criminal Code to intentionally collect or provide funds and be reckless as to whether those funds would be used to facilitate or engage in a terrorist act. The maximum penalty for an individual is imprisonment for life. The maximum fine for a natural person is \$340,000 and \$1,700,000 for a body corporate such as a bank.<sup>81</sup>

The *Suppression of the Financing Terrorism Act 2002* (Cth) amended the *Financial Transaction Reports Act 1988* (Cth). Section 16(1A) requires cash dealers (including financial institutions, insurers, securities dealers, future brokers, trustees or people who transfer cash or non-cash funds) to report transactions that are suspected to relate to terrorist activities.<sup>82</sup> The Act also supplemented the freezing of suspected terrorist assets which were already in place under the UN Charter Act.

These provisions require banks to “thoroughly examine their accounts, have appropriate systems in place to ensure that they do not permit any

<sup>77</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 113.

<sup>78</sup> *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) pt 7.

<sup>79</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 111.

<sup>80</sup> See *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) pt 7.

<sup>81</sup> This is based on the existing penalty unit of \$170 listed in *Crimes Act 1914* (Cth) s 4AA and the provisions for calculating the maximum fines in section 4B of that Act.

<sup>82</sup> *Financing Transaction Reports Act 1988* (Cth) s 16(1A); Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 108.

dealings with freezable assets or make assets available to proscribed entities.”<sup>83</sup> The Act contains defences to body corporates who prove they took reasonable precautions and exercised due diligence to avoid contravening the provisions.<sup>84</sup> Observers are critical of this approach. By providing a defence to body corporates, they are being treated differently under the UN Charter Act to individuals. This contravenes the principle underlying Australian criminal law that body corporates be criminalised in ways as similar as possible to individuals.<sup>85</sup>

The United Nations Security Council has also sanctioned a number of regimes. The sanction regime implemented through the UN Charter Act imposes targeted financial sanctions against listed persons and entities. Australia also imposes autonomous sanctions under the *Autonomous Sanctions Act 2011* (Cth) and corresponding regulations. For contravening a sanction, individuals face up to 10 years imprisonment or a fine of \$425,000 (or three times the transaction value, whichever is greater). Body corporates face a fine of \$1.7 million or three times the value of the transaction, whichever is greater.<sup>86</sup>

Banks attract criminal liability for transmitting or collecting funds for alleged terrorist organisations and are understandably hesitant to facilitate ransom transactions. At the least, a ransom transfer will be subject to an investigation and potentially frozen pending its outcome.

Evidence suggests banks take an overly cautious approach to the asset freezing regulations. Commonwealth Bank froze the bank accounts of a Melbourne music business for 26 days because it shared the name with a terrorist organisation in Peru called the Shining Path.<sup>87</sup> The Shining Path had been proscribed by the Minister as a terrorist organisation in 2001. Despite advice from the Australian Federal Police that the business only shared the

<sup>83</sup> Law Council of Australia, Submissions to the Inquiry by the Independent National Security Legislation Monitor, *Inquiry into Financing Terrorism Offences*, 2 August 2013, 40.

<sup>84</sup> *Suppression of the Financing Terrorism Act 2002* (Cth) ss 20(3C) and 21(2C).

<sup>85</sup> Law Council of Australia, Submissions to the Inquiry by the Independent National Security Legislation Monitor, *Inquiry into Financing Terrorism Offences*, 2 August 2013, 40.

<sup>86</sup> *Autonomous Sanctions Act 2011* (Cth) s 16. The penalty is based on the existing penalty unit of \$170 listed in *Crimes Act 1914* (Cth) s 4AA and the provisions for calculating the maximum fines in section 4B of that Act. See Australian Government, ‘Terrorism financing in Australia 2014’ (Report, Australian Transaction Reports and Analysis Centre, 2014) 11.

<sup>87</sup> Law Council of Australia, Submissions to the Inquiry by the Independent National Security Legislation Monitor, *Inquiry into Financing Terrorism Offences*, 2 August 2013, 42.

name with the terrorist organisation and nothing else, it was up to the bank what action they would take.<sup>88</sup>

Nigel Brennan's family found a bank that would assist only if the Australian Government approved. Seeking approval further added to the risk of assets being frozen and possible prosecution for contravening Australian laws.<sup>89</sup> Banking issues only compound the difficulties faced by families who need to act with a sense of urgency.

## B *Insurers*

With the global increase in kidnappings for ransom, companies are fueling a growing demand in K&R insurance policies. In the US, it was reported that 75% of Fortune 500 companies hold K&R insurance policies with policies topping USD\$250,000 a year for companies working in high risk areas.<sup>90</sup>

Employees will often never know they are covered by K&R insurance. Companies don't want employees trying to negotiate their own release given the likelihood that something may go wrong.<sup>91</sup> Insurers also keep settlements confidential to prevent hostage takers knowing the monetary value of their targets.

Insurers face the same criminal liability under Divisions 102 or 103 of the Criminal Code as other body corporates like banks if they finance or support terrorist organisations in order to negotiate a hostage release. This includes paying out a claim to a company or third party with insurance coverage who has already paid a ransom to a terrorist organisation. It is irrelevant if the third party is overseas and paid the ransom in a country where paying ransoms to terrorist organisations are not illegal. They also have reporting obligations under section 16(1A) of the *Financial Transaction Reports Act 1988* (Cth) to report transactions that are suspected to be for terrorist acts.

<sup>88</sup> Ibid.

<sup>89</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 114.

<sup>90</sup> Derek Kravitz and Colm O'Molloy, 'The murky world of hostage negotiations: is the price ever right?', *The Guardian* (online), 26 August 2014 <<http://www.theguardian.com/world/2014/aug/25/murky-world-hostage-negotiations-price-ever-right-insurance>>.

<sup>91</sup> SBS, 'Kidnapped', *Insight*, 10 September 2013 <<http://www.sbs.com.au/news/insight/tvepisode/kidnapped>>.

### C *Kidnap and Ransom (K&R) Consultants*

Many families without insurance policies may consider whether to engage a K&R consultant, sometimes referred to as risk management consultants or security and crisis response firms. This was the experience of Nigel Brennan's family who engaged London based security and crisis response consultancy, AKE Group, after they felt the Government's no-contact policy with the kidnappers was not working.<sup>92</sup>

As potential cash dealers and body corporates, K&R consultants in Australia face the same criminal liability as banks or insurers if they are found to be financing terrorist organisations. Given the nature of their dealings with criminal and terrorist groups and the confidentiality agreements released hostages are often asked to sign, there is little transparency around the work of K&R consultants. Other ethical issues also arise when engaging their services, including how they handle situations of multiple hostages when only one of the hostages has engaged their services.

### D *Benevolent Purposes or Charity Donations*

Another issue raised by the legislation is the transfer of money for benevolent purposes. This arose in the case of Australian engineer, Douglas Wood who was kidnapped on 30 April 2005 by the Shura Council of the Mujahadeen of Iraq. During his captivity, Mr. Wood's family had pre-empted a ransom demand and offered a charitable donation to the people of Iraq, conditional on Mr. Wood's release. Fortunately, Mr. Wood was rescued by Iraqi forces during an operation on 15 June 2005.<sup>93</sup>

After his release, his family kept their commitment to make a donation to an Iraqi charity. Dr. Malcolm Wood, Douglas Wood's brother, encountered considerable difficulties transferring funds overseas despite the money being intended for "benevolent purposes". When Dr. Wood asked the bank how to transmit the money to Baghdad, "the bank's heavy-handed response...caused him trauma and potential financial embarrassment: it reported his approach and placed a monitor on his accounts. Consultations of solicitors and of

<sup>92</sup> Ibid 15.17 minutes.

<sup>93</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 25-6.



Government lawyers followed.”<sup>94</sup> Later, following Mr. Wood’s release, the family was able to make the donation without difficulty.<sup>95</sup>

More broadly, Australian individuals or Australian charities must also be aware of where their charitable donations are being sent to avoid attracting liability under the financing of terrorism legislation. It is possible for a receiving organisation to have connections to terrorist organisations that are not recognised by the general public. Charitable organisations can be used to disguise international funds transfers for illegal means.

The Attorney General’s Department determined that if a person making a donation is aware that there is a substantial risk that the donation will be used for terrorism purposes and it is unjustifiable to take that risk, that person could be convicted of financing terrorism.<sup>96</sup>

The same logic applies to Australian charitable or aid organisations supporting groups overseas with links to a terrorist organisation. In 2012, World Vision suspended its financial support of the Union of Agricultural Work Committees (UAWC) after allegations the UAWC had links to the Popular Front for the Liberation of Palestine (PFLP).<sup>97</sup> The PFLP is a proscribed terrorist group under the UN Charter Act.

After an AusAID investigation and legal advice from the Australian Government Solicitor and the Australian Federal Police it was determined that no offence under section 21 of the UN Charter Act had been committed and there would be no further criminal investigation. World Vision, along with a number of other international aid organisations, have since continued to support the UAWC despite the allegations.<sup>98</sup>

The risk of charities or not-for-profits misleading donors for the benefit of overseas terrorist groups should be considered in the “context of the relatively

<sup>94</sup> Ibid 113.

<sup>95</sup> Ibid.

<sup>96</sup> Australian Government Attorney General’s Department, ‘Australia’s counter-terrorism laws’ (Questions and Answers pamphlet, 2015) 13 <<https://www.ag.gov.au/NationalSecurity/CounterterrorismLaw/Documents/Australias%20counter%20terrorism%20laws.pdf>>

<sup>97</sup> Australia Government, Department of Foreign Affairs and Trade, *Union of Agricultural Work Committees* (31 May 2012), <[http://www.foreignminister.gov.au/releases/2012/bc\\_mr\\_120531.html](http://www.foreignminister.gov.au/releases/2012/bc_mr_120531.html)>

<sup>98</sup> Ibid.

low incidence of terrorism financing in Australia and the low value of funds considered to have been raised in Australia to date”.<sup>99</sup>

### E *Consular Loans*

The Australian Government paid a \$100,000 consular loan to the family of Nigel Brennan which allegedly “it knew was going straight into the ransom basket”.<sup>100</sup> Nigel Brennan’s family with the assistance of a security and crisis response consultancy firm secured the release of their son and fellow Canadian hostage Amanda Lindhout. On 25 November 2009, a payment of around USD\$600,000 was made to the kidnappers which included the \$100,000 consular loan payment made available by the Australian Government. Mr. Brennan, has since asked DFAT to waive the \$100,000 loan due to their failings in handling his case.<sup>101</sup>

DFAT has not made publicly available its consular loan scheme in the case of a kidnapping for ransom. It is possible that Mr. Brennan’s case fell under its “Special Circumstances Scheme” where assistance is provided on a financial means basis only where “no other scheme of legal financial assistance applies, but there is a moral obligation on the Commonwealth to make a grant.”<sup>102</sup>

However, assisting families to transfer funds to groups with potential terrorist links is at odds with the Australian Government’s no-ransom policy and legal position. Nigel Brennan questioned the legality of the Australian Government’s decision to provide the consular loan at the Senate Inquiry.<sup>103</sup> A response from the Government was not forthcoming.

The Australian Government refused to allow the family to use the diplomatic pouch to move money in East Africa due to fear of its complicity in the commission of a crime. However, providing a consular loan to help make a ransom payment is a more direct infringement of its no-ransom policy.

<sup>99</sup> Australian Government, ‘Terrorism financing in Australia 2014’ (Report, Australian Transaction Reports and Analysis Centre, 2014) 15.

<sup>100</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 115.

<sup>101</sup> Nick Sorbello, ‘Brennan speaks at inquiry’, *News Mail* (online), 13 October 2011 <<http://www.news-mail.com.au/news/brennan-speaks-at-inquiry/1135460/>>.

<sup>102</sup> Australia Government, Department of Foreign Affairs and Trade, Smart Traveller, *Arrested or in jail*, <<http://www.smarttraveller.gov.au/tips/arrest-jail.html#assistance>>.

<sup>103</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 115.

Mr. Brennan's case also demonstrates how different each hostage scenario can be and how the Government can become involved to varying degrees dependent on the circumstances. As discussed earlier, a multitude of cases would never reach Australian intelligence services as they are negotiated abroad by private parties including insurers and risk management consultants.

F *Organisations Providing Support to Terrorist Organisations in the  
Form of Training*

In addition to financing, there are other ways to support terrorist organisations. Some aid organisations have the opportunity to sit down with representatives of terrorist organisations or rebel groups and provide training in conflict resolution or the principles of international humanitarian law.

The International Committee for the Red Cross (ICRC) for example, promotes the dissemination of principles of international humanitarian law with all armed forces and arms bearers, regardless on their side in any conflict. In 2013, the ICRC engaged in dialogue and training with armed groups in more than 30 countries including with field commanders in Syria and rebels in the Democratic Republic of Congo.<sup>104</sup> The conduct of groups such as the ICRC would be questionable under the counter-terrorism provisions in Australia.

Other organisations have faced legal action for attempts to provide training to armed groups. The Humanitarian Law Project in the United States sought to provide training to the LTTE in Sri Lanka and the Kurdistan Worker's Party in Turkey on how to peacefully resolve conflicts and how to petition groups like the United Nations for relief.

In June 2010, the United States Supreme Court applied the *USA Patriot Act 2001* and found the conduct of the Humanitarian Law Project constituted providing material support to a foreign terrorist organisation.<sup>105</sup> The Court found that Congress intended the material-support law to include assistance in the form of "training", "expert advice or assistance", "service" or "personnel".<sup>106</sup> Chief Justice Roberts found that any support would bolster the activities of a

<sup>104</sup> International Committee of the Red Cross, 'ICRC Annual Report, 2013, Volume 1' (Annual Report, ICRC, 2013) 68 <<https://www.icrc.org/fre/assets/files/annual-report/icrc-annual-report-2013.pdf>>.

<sup>105</sup> *Holder, Attorney General v Humanitarian Law Project*, 561 US 1 (2010), 130 S Ct 2705.

<sup>106</sup> *Ibid* 16-17.

terrorist group by freeing up resources within the organisation that could be used for a violent end and help legitimise the group whilst straining the United States' relationships with its allies.<sup>107</sup>

This situation has not arisen in Australia but it raises the question of whether a similar aid group would be in breach of Australian legislation if it attempted to provide training to a terrorist organisation. The conduct could be in breach of section 102.7 of the Criminal Code which criminalises the intentional provision to a terrorist organisation of support or resources that would help the organisation engage in a terrorist act.

The same argument might be submitted by Australian prosecutors that by providing training or expert advice, it frees up other resources in the organisation to be used for a violent end. Security Council Resolution 1373 (2001) also requires States to prohibit the provision of services for the benefit of persons who commit or facilitate the commission of terrorist acts. Therefore, the conduct is arguably also contrary to international law.

## VI COMPARATIVE STATE APPROACHES

Australia's no-ransom policy is consistent with most of its major allies.<sup>108</sup> Most states have also implemented their international obligations into domestic law and prohibit the financing or material support of terrorist organisations. This section will also examine the treatment of ransom payments as tax deductions in India and the US.

### A *United States*

President Obama ordered a comprehensive internal review in late 2014 of "US Government policy on overseas terrorist-related hostage cases, with specific emphasis on examining family engagement, intelligence collection, and diplomatic engagement policies."<sup>109</sup> The review came after months of

<sup>107</sup> Ibid 25, 27, 31.

<sup>108</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 33.

<sup>109</sup> Department of Defense, 'Letter from Ms. Christine E. Wormuth to the Honorable Duncan Hunter' (Official correspondence, 11 November 2014) <<https://s3.amazonaws.com/s3.documentcloud.org/documents/1363080/scan001-1.pdf>>.

complaints from families of hostages killed and kidnapped by Islamic State.<sup>110</sup> Similarly to Australia, legislation in the US exposes family members who wish to pay a ransom to kidnappers to prosecution under the *USA Patriot Act 2001*. James Foley, an American citizen, was kidnapped and killed by the Islamic State in August 2014. His family accused a military officer working for the President's National Security Council of threatening the family several times with criminal charges if they paid a ransom to Islamic State.<sup>111</sup>

On 24 June 2015, Presidential Policy Directive- Hostage Recovery Activities (PPD-30) was released and for the first time directed the US Government not to threaten families of hostages with prosecution under the Act if they attempt to pay ransoms.<sup>112</sup> Whether this will make US citizens more lucrative hostage targets is yet to be seen. PPD-30 also makes recommendations to improve interagency coordination and strengthen the whole-of-government approach.<sup>113</sup>

Whilst US families paying ransoms may not face criminal liability, individuals who finance terrorist organisations may be civilly liable to victims of terrorism in the US. Australia does not have equivalent legislation. In the US, a provision of the *Anti-terrorism Act 1992* allows US nationals injured by an act of international terrorism to sue for damages. The legislation was used in the case of David Boim, a 17-year-old American boy killed in Israel. On 13 May 1996, whilst standing at a bus stop, David was shot and killed by two alleged Hamas gunmen in a drive-by shooting.<sup>114</sup>

The Hamas group had been declared by the Clinton administration as a terrorist group in 1995.<sup>115</sup> In April 1996, a law was passed making it illegal for Americans to finance terrorist groups, even if the money is sent to support "humanitarian" works of terrorist groups.<sup>116</sup> In February 2008, the last living

<sup>110</sup> Shane Harris, 'No One's Really in Charge' in Hostage Negotiations', *Foreign Policy*, 9 October 2014 <<http://foreignpolicy.com/2014/10/09/no-ones-really-in-charge-in-hostage-negotiations/>>.

<sup>111</sup> Roberta Rampton and Jason Szep, 'Foley family says was 'threatened' by U.S. official over ransom: ABC', *Reuters*, 12 September 2014 <<http://www.reuters.com/article/2014/09/12/us-iraq-crisis-foley-mother-idUSKBN0H72J120140912>>.

<sup>112</sup> The White House, President Barack Obama, Presidential Memoranda, *Presidential Policy Directive- Hostage Recovery Activities PPD-30* (24 June 2015) <<https://www.whitehouse.gov/the-press-office/2015/06/24/presidential-policy-directive-hostage-recovery-activities>>.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Stanley Boim v Holy Land Foundation for Relief and Development*, 511 F 3d 707; 2007 US App (Lexis 29864) Pt 1(B).

<sup>115</sup> *Violent Crime Control and Law Enforcement Act 1995* (US) s 3.

<sup>116</sup> *Comprehensive Terrorism Prevention Act of 1995* (US) s 735.

perpetrator of David Boim's murder admitted his crime and was sentenced by a Palestinian Authority Court to 10 years imprisonment. In June 1998, FBI seized USD\$1.4 million in assets in Illinois from Mohammad Salah and the Quranic Literacy Institute, a Muslim organisation. Both were accused of laundering money for Hamas.<sup>117</sup>

On 12 May 2000, David Boim's parents filed a civil suit against their son's killer, Salah, Quranic Literacy Institute and other high-ranking officials of Hamas and front organisations in the US whom they identified as Hamas affiliates. These organisations included research associations, think tanks, charities and not-for-profits.<sup>118</sup>

In 2004, a US Magistrate awarded David Boim's parents USD\$156 million after finding Salah and a number of the other organisations aided and abetted Hamas in killing David Boim.<sup>119</sup> In 2007, the decision was reversed on the basis that the Boim's had failed to prove the causal link between the financial contributions to Hamas and David's death.<sup>120</sup> The case was reheard in 2008, and the US Court of Appeals ruled in favour of the Boims.<sup>121</sup> A petition for writ of certiorari was filed with the United State Supreme Court in May 2012 but denied later that year. It was ultimately held that those who make donations to a known terrorist group are responsible under US law for the group's actions, even if the money is only intended for "humanitarian" activities.

Currently, Australian legislation does not allow individuals to sue sponsors of terrorism for damages in respect of injury or death arising from a terrorist act. However, if the legislative framework was to change, civil and criminal liability could arise to families of hostage victims.

<sup>117</sup> Daniel Pipes, *Miniatures: Views of Islamic and Middle Eastern Politics* (Transaction Publishers, 2004) 17.

<sup>118</sup> *Boim v Quranic Literacy Institution*, 340 F Supp 2d 885, 2004 US Dist (Lexis 22745) ND Ill, 2004, Pt A Factual Background.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Stanley Boim v Holy Land Foundation for Relief and Development*, 511 F 3d 707; 2007 US App (Lexis 29864) Pt 1(B).

<sup>121</sup> *Stanley Boim v Holy Land Foundation for Relief and Development*, 2008 US App (Lexis 12925) (7<sup>th</sup> Cir Ill, 16 June 2008).

## B *United Kingdom*

The United Kingdom has a strong anti-ransom policy and led the call for a cohesive international anti-ransom approach to kidnappings at the Group of Eight Summit in 2014. The UK is a founding member of an inter-governmental body called the Financial Action Task Force (FATF) which sets international standards on preventing terrorist financing, working closely with the European Commission on the subject.<sup>122</sup> It is a criminal offence to finance or facilitate the financing of terrorism under Part III of the *Terrorism Act 2000 (UK)*.

The *Counter Terrorism and Security Act 2015 (UK)* received royal assent on 12 February 2015 prohibiting UK-based insurance companies from paying out claims connected to ransom payments to terrorist organisations.<sup>123</sup> Whilst there is no evidence that UK insurance firms have paid out on ransom claims linked to terrorist groups, the Act clears up any uncertainty about insurance payments and preempts future claims. The international nature of the insurance market meant a London based insurance company might be asked to cover a ransom paid in another country which is softer on ransom policy.

## C *Europe*

Some European countries are more open to ransom payments. Italy for example, in the early 1990s when faced with multiple Mafia kidnap cases, established legislation to freeze the assets of the families of hostages, in order to prevent them from paying ransoms. When these measures failed to stop families paying ransoms, the policy was reversed. Today, Italy is alleged to have paid behind closed doors for the release of its citizens taken hostage in countries in the Sahel, as is France, Germany, Spain and Switzerland.<sup>124</sup>

<sup>122</sup> UK Government, 'Preventing Money Laundering' (Policy Paper, HM Treasury, 5 June 2013) <<https://www.gov.uk/government/publications/preventing-money-laundering/preventing-money-laundering>>.

<sup>123</sup> *Counter Terrorism and Security Act 2015 (UK)* s 42.

<sup>124</sup> Adjoa Anyimadu, 'Why don't the US and UK pay ransoms for hostages?', *The Guardian* (online), 22 August 2014 <<http://www.theguardian.com/commentisfree/2014/aug/22/paying-ransoms-nicolas-henin-james-foley>>.

#### D *Ransoms as Tax Deductions*

The payment of ransoms has become commonplace enough for some countries to go as far as providing tax exemption status. This is not however in the context of ransoms paid to terrorist organisations. The Internal Revenue Service in the US, responsible for the collection and enforcement of taxes, declared money paid in the event of a kidnapping for ransom as “theft loss” and therefore qualifies as a tax deduction.<sup>125</sup> Similarly, in India, the Madhya Pradesh High Court ordered on 23 August 2011 that money paid as a ransom to save a life was tax exempt.<sup>126</sup> Equivalent provisions do not exist in Australia.

### VII SUGGESTIONS FOR REFORM

Suggestions for reform of the financing of terrorism legislation must balance Australia’s counter-terrorism agenda with safeguarding individuals not intended for prosecution under the terrorism legislation, whilst ensuring that Australian law is compatible with its international obligations. This section examines some of the judicial and non-judicial measures available to the Australian Government to better protect families in this predicament.

First, families should be warned at the earliest opportunity of their legal liabilities. Dr. Wood reported that during his family’s ordeal, nobody “forewarned his family about the counter-terrorism provisions of Australia’s Criminal Code that can trap people involved in trying to transmit money that ‘could conceivably be converted to terrorist ends’.”<sup>127</sup> He felt that government lawyers should guide a family proactively through “the minefield”.<sup>128</sup>

Kidnapping for ransom is a lucrative business and has attracted a large industry of insurers, crisis response consultants, negotiators, lawyers and security contractors.<sup>129</sup> Families considering paying a ransom also need guidance and support on how to proceed and whom to trust.

<sup>125</sup> Internal Revenue Service, ‘Publication 17 (2014), Your Federal Income Tax’ (Report, IRS, 2014) chapter 25 (Nonbusiness Casualty and Theft Losses) <[http://www.irs.gov/publications/p17/ch25.html#en\\_US\\_2014\\_publink1000173539](http://www.irs.gov/publications/p17/ch25.html#en_US_2014_publink1000173539)>.

<sup>126</sup> Vibhuti Agarwal, ‘Pay Ransom, Save Income Tax’, *Wall Street Journal: India* (online), 5 September 2011 <<http://blogs.wsj.com/indiarealtime/2011/09/05/pay-ransom-save-income-tax/>>.

<sup>127</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 113.

<sup>128</sup> *Ibid* 114.

<sup>129</sup> *Ibid* 45.



Second, is the issue of legislative reform. Professor Saul argues that Australia has adopted some of the largest counter-terrorism laws of comparable democracies in the absence of a bill of rights and adequate judicial safeguards.<sup>130</sup> The families of hostage victims represented at the Senate Committee are of the view that the Criminal Code should be reviewed. In particular, Dr. Wood felt that the “recklessly” element could lead an entirely innocent party to be found guilty because of the limited scope for exceptional circumstances to the provisions.<sup>131</sup>

The Senate Inquiry recommended that the Australian Government investigate thoroughly the options for making special allowances for people seeking to transmit money overseas in order to save the life of another Australian being held hostage. They also recommended that the Government consider changes to relevant sections of the Criminal Code and the United Nations Charter Act to allow the minister at his discretion to grant exemptions in exceptional circumstances.<sup>132</sup>

However, if legislators inserted into the legislation an “exceptional circumstances” provision to capture families such as the Woods or Brennans, they face other ramifications. Such a provision may be counterproductive and be manipulated by terrorist organisations.<sup>133</sup> It may increase the likelihood that Australians are targeted in kidnapping cases. A change in the legislation may also place Australia in breach of its international obligations which require the safe release of hostages without ransoms and prevent the financing of terrorism. Australia’s international obligations could not be overcome by a change in domestic law and it is not suggested that Australia retreat from its international commitments. This paper argues that legislative amendment is not appropriate in these circumstances.

The third suggestion is that families be given immunity from prosecution when paying a ransom.<sup>134</sup> The Australian Government was unwilling to do this with the Nigel Brennan case in Somalia. It is not known on what grounds the Government declined the family’s request for immunity. Whilst there is an

<sup>130</sup> Professor Ben Saul, Submissions to the Parliamentary Joint Committee on Intelligence and Security, *Submission 2 Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 1 October 2014, 2.

<sup>131</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 114.

<sup>132</sup> *Ibid* 118.

<sup>133</sup> *Ibid* 117.

<sup>134</sup> *Ibid* 114.

indication that families caught in this conundrum would not be prosecuted because it is not in the public interest to do so, there is no guarantee.<sup>135</sup>

Guarantees of immunity from prosecution would still put Australia in breach of its international obligations which require a blanket prohibition on the financing of terrorist organisations regardless of the circumstances. Any concessions made on ransom payments would only act as an incentive to terrorist organisations to conduct further kidnappings. It cannot therefore be suggested that international instruments are amended to include special circumstances for families.

A fourth recommendation to emerge from the Senate Inquiry, is that the Government assist families by allowing use of the Australian diplomatic bag system to safely move funds around the world.<sup>136</sup> Diplomatic bags are protected by the *Vienna Convention on Diplomatic Relations* and shall not be “opened or detained” provided the contents is for “official” purposes.<sup>137</sup> The Australian Government did not allow the Brennan family to use the bag and it is unlikely that the Government would put itself in a position where it could be complicit in a criminal act.<sup>138</sup> This is an unrealistic recommendation for the Australian Government.

Considering these recommendations, Australian legislation leaves families in a difficult predicament. If it were to make legislative exceptions for their circumstances, it will fall foul of international law and send the wrong message to hostage takers; that in some circumstances ransoms will be paid.

The best course of action is not to amend Australia’s counter-terrorism laws but improve the response and communication between Government agencies and families. The Senate Inquiry confirmed that families were often left in the dark and unsure about their legal liabilities.<sup>139</sup> Families need to be aware that paying ransoms to terrorist groups is a contravention of Australian criminal law. However, the government should offer reassurances that no one in their position has been prosecuted before, nor would it be in the public interest to do so now. If this position was to change for an unforeseen reason,

<sup>135</sup> Ibid 115-16.

<sup>136</sup> Ibid 114.

<sup>137</sup> *Vienna Convention on Diplomatic Relations*, opened for signature 18 April 1961, 500 UNTS 91 (entered into force 24 April 1964) art 27.

<sup>138</sup> Senate Foreign Affairs, Defence and Trade References Committee, above n 7, 114.

<sup>139</sup> Ibid 113-15.

families should be aware of the legal defences available to them in Australian courts.

Government agencies should not threaten families with legal prosecution if they choose to engage risk management consultants or pay ransoms. This choice should be one for families to make fully informed without undue pressure. If they choose to embark on this path, Australian representatives should distance their involvement to avoid complicity in any criminal acts. However, Government agencies are still in a unique position to explain the experiences of other families who have engaged risk management consultants and offer the contact information of such companies who have facilitated successful outcomes in the past.

## VIII CONCLUSION

Kidnapping for ransom has received more attention in recent years after a number of high profile kidnapping cases at the hands of the Islamic State. When a hostage is taken, the outcome often turns on their nationality and whether they have K&R insurance. However, the general international policy response is clear, ransoms will not be paid to hostage takers and payments to terrorist organisations who have kidnapped hostages are criminalised.

The consequence of this counter-terrorism stance is Australia's national and international legal frameworks attribute liability to family members who are doing what anyone would do in their situation; trying to negotiate the release of a loved one be it by paying a ransom. Australia and the international community should not alter their no-ransom policy, instead family members in this situation should be given the full support of government departments. This includes a clear dialogue about their legal liability, defences and prosecution strategies which recognise that the prosecution of family members does not satisfy the public interest.

