

# THE CRIMINALISATION OF TERRORIST FINANCING IN AUSTRALIA

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## I INTRODUCTION

The commission of a terrorist act does not require a large amount of money. The devastating 9/11 terrorist attacks on New York and Washington are estimated to have cost Al Qaeda somewhere in the vicinity of only US\$400–500 000.<sup>1</sup> Nevertheless, even before 9/11, the international community identified the blocking of terrorist funding as being of critical importance to combating domestic and international terrorism.<sup>2</sup> The international counter-terrorism financing regime can best be described as a ‘patchwork’ of international instruments.<sup>3</sup> Whilst each of these instruments requires states to criminalise the financing of terrorism, there are important points of distinction in the detail. The scope of the offences under each of the instruments is slightly different; some offences are limited to funding for the purpose of facilitating or committing a terrorist act and others extend to the provision of funds, for any purpose, to an individual terrorist or terrorist organisation. The instruments also set out different mechanisms for identifying terrorist organisations and individual terrorists and allocate the responsibility for monitoring compliance to a range of entities.

This article will start by providing an overview of the international counter-terrorism financing regime (Part II). However, its primary purpose is to examine the manner in which the relevant international instruments have been implemented into Australian law.<sup>4</sup> There is a considerable body of academic scholarship about Australia’s anti-terrorism laws (which number 54 in total).<sup>5</sup>

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1 National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States* (July 2004) 172.

2 This article is written by a public lawyer, not a political scientist or security expert. Therefore, the vexed question of whether a focus on terrorist financing, modelled on the approach used to deal with money laundering, is effective in combating terrorism is beyond the scope of this article. For a discussion of these issues, see, eg, Alyssa Phillips, ‘Terrorist Financing Laws Won’t Wash: It Ain’t Money Laundering’ (2004) 23 *University of Queensland Law Journal* 81; John D G Waszak, ‘The Obstacles to Suppressing Radical Islamic Terrorist Financing’ (2004) 36 *Case Western Reserve Journal of International Law* 673; Şener Dalyan, ‘Combating the Financing of Terrorism: Rethinking Strategies for Success’ (2008) 1(1) *Defence Against Terrorism Review* 137.

3 Mark Pieth, ‘Criminalizing the Financing of Terrorism’ (2006) 4 *Journal of International Criminal Justice* 1074, 1079.

4 As a member state of the United Nations, Australia is obliged to implement United Nations Security Council resolutions adopted under ch VII of the *Charter of the United Nations* into domestic law. See arts 39 and 48. It is also required to implement international conventions that it has ratified.

5 George Williams, ‘A Decade of Australian Anti-Terror Laws’ 35 *Melbourne University Law Review* 1136, 1144.

However, comparatively little attention has been given to the Australian terrorist financing offences.<sup>6</sup> McCullough and Carlton suggest that this may be due to a perception that they ‘are relatively benign compared to, for example, interrogation/detention regimes’<sup>7</sup> or ‘unconnected to traditional criminal justice or global justice concerns’.<sup>8</sup> This article will fill the gap in the literature by closely examining the technical legal meaning of the three groups of terrorist financing offences in Australia; that is, two offences in s 102.6 of the *Criminal Code Act 1995* (Cth) (*‘Criminal Code’*), two offences in div 103 of the *Criminal Code* and two offences under the *Charter of the United Nations Act 1945* (Cth) (*‘UN Charter Act’*).

This examination will assist in answering three critical questions. First, whether the offences are consistent with the international instruments they were ostensibly enacted to comply with. Second, whether the offences are sufficiently tailored — in the sense that they are proportionate — to the threat of terrorism. Finally, whether the offences overlap in a manner that undesirably complicates and confuses the terrorist financing regime. To this end, Part III will examine the physical elements of the financing offences in div 103 of the *Criminal Code*. Part IV will then examine the physical elements of the remaining two groups of offences in s 102.6 of the *Criminal Code* and under the *UN Charter Act*. These two groups of offences are dealt with together because the offences hinge upon dealings with a proscribed organisation, person, asset or class of assets. The next part of the article, Part V, moves on to consider the fault elements that attach to the physical elements of the terrorist financing offences.

In addition to looking at the technical legal meaning of the offences, this article differs from the existing literature in that Part VI will examine how the offences have been applied in practice. The terrorist financing offences have been in place (in some form or another) for a decade. There is therefore sufficient data to determine which of the offences have been relied upon in criminal prosecutions and which have fallen by the wayside. An understanding of the application of the offences, as well as their technical legal meaning, is necessary before any recommendations can be made as to whether and if so, how, the terrorist financing

6 Much of the commentary on Australia’s terrorist financing regime (including the content of the offences) is contained in submissions to parliamentary and independent inquiries and in the reports of these inquiries. In terms of the academic literature, the only article to discuss the content of the terrorist financing offences in any detail is George Syrota, ‘Australia’s Counter-Terrorism Offences: A Critical Study’ (2008) 34 *University of Western Australia Law Review* 103, 128–37. The remaining literature on Australia’s terrorist financing regime falls into two categories. First, the importance of the counter-terrorism financing regime to Australia’s pre-emptive strategy for responding to the threat of terrorism (a strategy which has often been criticised as an overreaction). See, eg, Jude McCulloch and Bree Carlton, ‘Preempting Justice: Suppression of Financing of Terrorism and the “War on Terror”’ (2006) 17 *Current Issues in Criminal Justice* 397. Second, the obligations imposed on financial institutions to monitor and report on suspicious transactions, the operational costs of these obligations, and, more rarely, their implications for human rights. See, eg, Joo-Cheong Tham, ‘A Risk-Based Analysis of Australia’s Counterterrorism Financing Regime’ (2007) 34(2) *Social Justice: A Journal of Crime, Conflict and World Order* 138; Russell G Smith, Rob McCusker and Julie Walters, ‘Financing of Terrorism: Risks for Australia’ (2010) 394 *Trends and Issues in Crime and Criminal Justice* 1.

7 McCulloch and Carlton, above n 6, 397.

8 Ibid.

regime should be reformed. A number of recommendations as to the future of the terrorist financing regime are made in the final section of this article, Part VII.

## II INTERNATIONAL COUNTER-TERRORISM FINANCING REGIME

The development of a counter-terrorism financing regime was on the international agenda well before the 9/11 terrorist attacks. In the 1990s, General Assembly resolutions condemned all aspects of terrorism and called upon member states to implement appropriate domestic measures to prevent and respond to the threat of terrorism. These included measures aimed at blocking the financing of terrorism. The first reference to terrorist financing in international law was in General Assembly *Resolution 49/60*. This Resolution, which was adopted in December 1994, was concerned with state-sponsorship of terrorism and called upon member states of the United Nations to ‘refrain from organizing, instigating, facilitating, financing, encouraging or tolerating terrorist activities’.<sup>9</sup>

However, a substantial portion of the funds used for terrorist activities is now provided by private individuals and organisations rather than states.<sup>10</sup> This was recognised in General Assembly *Resolution 51/210* (*Resolution 51/210*), which was adopted in December 1996. Paragraph 3(f) of this Resolution called upon member 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

9 *Measures to Eliminate International Terrorism*, GA Res 49/60, UN GAOR, 49<sup>th</sup> sess, 84<sup>th</sup> plenmtg, Agenda Item 142, UN Doc A/RES/49/60 (17 February 1995) annex II para 5(a). State (rather than private) sponsorship of terrorism was the predominant concern of both the General Assembly and Security Council resolutions adopted in the 1990s: Security Council *Resolution 748* (called upon Libya, after its involvement in the Lockerbie bombing, to cease assisting terrorist groups); Security Council *Resolution 1044* (called upon the Sudanese government to cease assisting the terrorists that had attempted to assassinate the Egyptian President); Security Council *Resolution 1189* (following the bombings of the United States embassies in Tanzania and Kenya, called upon all states to refrain from assisting terrorist groups); and Security Council *Resolution 1214* (called upon the Taliban to cease sheltering bin Laden and Al Qaeda). See Ilias Bantekas, ‘The International Law of Terrorist Financing’ (2003) 97 *American Journal of International Law* 315, 316–17.

10 Nicholas Ryder, *Financial Crime in the 21<sup>st</sup> Century: Law and Policy* (Edward Elgar, 2011) 52–3.

the exchange of information concerning international movements of such funds ...<sup>11</sup>

There were two problems with this Resolution. First, it gave little guidance to member states as to what 'steps' they should take to achieve the general aim of 'prevent[ing] and counteract[ing] ... the financing of terrorists and terrorist organisations'. Second, General Assembly resolutions are not binding on member states of the United Nations.<sup>12</sup>

The adoption in October 1999 of United Nations Security Council *Resolution 1267* ('*Resolution 1267*') was a critical move towards countering the financing of terrorism.<sup>13</sup> This Resolution was a response to the sheltering by the Taliban of terrorists, such as Osama bin Laden, in Afghanistan. States were required by para 4(b) to '[f]reeze funds and other financial resources' belonging to, and ensure that these are not made available to, the Taliban, Al Qaeda or an associated entity, individual or undertaking. The task of designating an individual, entity or undertaking as associated with the Taliban or Al-Qaeda was given to the 1267 Sanctions Committee established by the Resolution.<sup>14</sup> States were also required by para 8 to 'bring proceedings against persons and entities within their jurisdiction that violate the measures imposed by paragraph 4 above and to impose appropriate penalties'.

*Resolution 51/210*, in addition to setting out counter-terrorism measures for member states to implement, also established an ad hoc committee with the purpose of developing a legal framework of conventions responding to international terrorism.<sup>15</sup> Whilst the development of a comprehensive convention on international terrorism is still ongoing,<sup>16</sup> the work of this committee did lead to the adoption of the *International Convention for the Suppression of the Financing*

11 *Measures to Eliminate International Terrorism*, GA Res 51/210, UN GAOR, 51<sup>st</sup> sess, 88<sup>th</sup> plenmtg, Agenda Item 151, UN Doc A/RES/51/210 (16 January 1997) ('*Resolution 51/210*'). General Assembly *Resolution 52/165* (adopted in January 1998) called upon member states to consider the implementation of the measures set out in *Resolution 51/210*.

12 This is clear from arts 10 and 14 of the *Charter of the United Nations*, which refer to General Assembly resolutions as 'recommendations'.

13 SC Res 1267, UN SCOR, 4051<sup>st</sup> mtg, UN Doc S/RES/1267 (15 October 1999). See also Security Council *Resolution 1333* (adopted in December 2000), Security Council *Resolution 1390* (adopted in January 2002) and Security Council *Resolution 1617* (adopted in July 2005), which add to or modify the targeted sanctions regime. The *Resolution 1267* regime has been discussed extensively in the literature. See, eg, Eric Rosand, 'The Security Council's Efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions' (2004) 98 *American Journal of International Law* 745; Larissa van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual' (2007) 20 *Leiden Journal of International Law* 797; William Vlcek, 'Hitting the Right Target: EU and Security Council Pursuit of Terrorist Financing' (2009) 2 *Critical Studies on Terrorism* 275.

14 *Resolution 1267*, UN Doc S/RES/1267, para 6.

15 *Resolution 51/210*, UN Doc A/RES/51/210, para 9.

16 United Nations, *United Nations Action to Counter Terrorism* <<http://www.un.org/terrorism/instruments.shtml>>. For an overview of the work of the Ad Hoc Committee from 1998–2010 towards the development of a comprehensive international convention, see Centre for Nonproliferation Studies, *Draft Comprehensive Convention on International Terrorism* (5 October 2010) <<http://cns.miis.edu/inventory/pdfs/intlterr.pdf>>.

of Terrorism (*'International Convention'*) by the United Nations General Assembly in December 1999.<sup>17</sup>

The *International Convention* 'forms the cornerstone of the struggle against terrorism'.<sup>18</sup> For the purposes of this article, it is relevant to note that it did three things. First, it set out a broad definition of 'funds':

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.<sup>19</sup>

Second, it set out a definition of a 'terrorist act' (albeit only for the limited purpose of the counter-terrorism financing regime in the *International Convention*).<sup>20</sup> The definition is in two parts. The first part includes an act which violates any of the other international conventions set out in the Annex, for example, the *International Convention against the Taking of Hostages* (adopted in December 1979) or the *International Commission for the Suppression of Terrorist Bombings* (adopted in December 1997). This part of the definition is problematic because each of the conventions listed in the Annex deals only with a particular situation or set of circumstances, and thus there may be significant gaps in the definition.<sup>21</sup> Further, what constitutes a 'terrorist act' for a member state will depend upon which of these conventions that particular state has ratified.<sup>22</sup> This problem is remedied, to a certain extent, by the second part of the definition. This part aims to capture the essence of terrorism. It includes an act intended to cause death or serious bodily injury to a civilian, where the purpose of that act is to intimidate a population or to compel a government or an international organisation to do, or to abstain from doing, any act.

Third, art 2 establishes a distinct offence of terrorist financing. It is an offence for a person to, by any means, directly or indirectly, unlawfully and wilfully, provide or collect 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 'terrorist act'. It is not necessary for this offence to be committed that the funds were actually used

17 *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). The Ad Hoc Committee also negotiated the text of two other treaties: the *International Convention for the Suppression of Terrorist Bombings* (adopted by the General Assembly in December 1997) and the *International Convention for the Suppression of Acts of Nuclear Terrorism* (adopted by the General Assembly in April 2005). Work on a comprehensive convention on international terrorism is still ongoing.

18 Bantekas, above n 9, 323.

19 *International Convention* art 1(1).

20 Ibid art 2. There is no international consensus on the definition of a 'terrorist act' for the purposes of international criminal law generally (or even for the purposes of the international counter-terrorism financing regime generally). This has been one of the key stumbling blocks for the development of an effective international counter-terrorism strategy. See, eg, Ben Golder and George Williams, 'What is "Terrorism"? Problems of Legal Definition' (2004) 27 *University of New South Wales Law Journal* 270; Ben Saul, *Defining Terrorism in International Law* (Oxford University Press, 2006).

21 Phillips, above n 2, 85.

22 Bantekas, above n 9, 324; Pieth, above n 3, 1079.

to carry out such an act. The *International Convention* also made it an offence to attempt to commit the offence, participate as an accomplice, organise or direct others to commit the offence, or to contribute, as a member of a group acting with a common purpose, to the commission of, or an attempt to commit, the offence.<sup>23</sup> State parties were obliged by art 4 to establish these acts as criminal offences under their domestic law, and to make them punishable by appropriate penalties which take into account their grave nature.

Unsurprisingly, the impetus to deal with the financing of terrorist organisations increased significantly after 9/11. Just over two weeks after the terrorist attacks, the United Nations Security Council passed *Resolution 1373* (*Resolution 1373*).<sup>24</sup> Two points should be made about the relationship between *Resolution 1373* and its predecessors. First, *Resolution 1373* called upon member states to become parties to the *International Convention*. Bantekas notes that this provision must be regarded as somewhat ‘ironic’ given that ‘*Resolution 1373* imposes more or less the same obligations as the 1999 Convention’.<sup>25</sup> Article 1 relevantly requires member states of the United Nations to:

(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 ...

23 These inchoate offences, and also the issue of corporate liability, are discussed in Pieth, above n 3, 1082–4.

24 SC Res 1373, UN SCOR, 4385<sup>th</sup> mtg, UN Doc S/Res/1373 (28 September 2001). For a more detailed discussion of the terms and operation of *Resolution 1373*, see Eric Rosand, ‘Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism’ (2003) 97 *American Journal of International Law* 333.

25 Bantekas, above n 9, 326.

Despite the similarity between the terrorist financing offences,<sup>26</sup> the *International Convention* has one key advantage over *Resolution 1373*. That is, it contains a definition of a ‘terrorist act’. This possibly explains why the Security Council called upon states to ratify the *International Convention* (and not simply abide by the terms of *Resolution 1373*). As at September 2001, the *International Convention* had only four ratifications,<sup>27</sup> and it required a minimum of 22 to enter into force.<sup>28</sup> Australia, like many other countries, responded quickly to *Resolution 1373* by ratifying the *International Convention*.<sup>29</sup> The *International Convention* entered into force on 10 April 2002, and there are currently 181 state parties.<sup>30</sup>

The second point relates to the relationship between *Resolution 1373* and *Resolution 1267*. The latter requires states to criminalise the financing of Al Qaeda, the Taliban, and their associates. However, this obligation was significantly expanded by *Resolution 1373*, which requires member states to act against *all* terrorist organisations and their associates. Bantekas writes:

Although *Resolution 1373* was adopted in the aftermath of September 11, it makes no reference to Al Qaeda or bin Laden, which suggests that in sponsoring the resolution, the United States took advantage of the prevailing circumstances and international sentiment by imposing measures on states that the Council would not have adopted in other circumstances and states would not have agreed to be bound to by treaty.<sup>31</sup>

Further, in contrast to *Resolution 1267*, *Resolution 1373* did not create a mechanism for the identification of terrorist organisations. While *Resolution 1373* created a Counter-Terrorism Committee, the function of this Committee was to monitor the implementation of the obligations in the Resolution by states. It was not given the task of making determinations as to whether an organisation was a terrorist organisation, or of maintaining a consolidated list setting out the names of all terrorist organisations.<sup>32</sup> Instead, the onus of determining whether an organisation was a ‘terrorist organisation’ or an individual was a ‘terrorist’ was left to member states. This task is made particularly difficult by the absence of a definition of a ‘terrorist act’ in *Resolution 1373*.

The Organisation for Economic Co-Operation and Development’s (‘OECD’) Financial Action Taskforce (‘FATF’) also plays a significant role in the international community’s response to the financing of terrorism. The FATF was

26 Phillips notes that when the wording of the *International Convention* and *Resolution 1373* is examined in detail, some differences become apparent. This is particularly so in relation to the obligation placed on states to freeze funds. See Phillips, above n 2, 93–4.

27 Botswana, Sri Lanka, the United Kingdom, and Uzbekistan: *ibid* 84.

28 *International Convention* art 26.

29 Australia signed the *International Convention* in October 2001 and ratified it a year later.

30 United Nations, *International Convention for the Suppression of the Financing of Terrorism* (28 December 2012) United Nations Treaty Collection <<http://treaties.un.org/>>.

31 Bantekas, above n 9, 326.

32 Clunan notes that the United Kingdom would not support a proposal for the Committee to keep a consolidated list, and that the Committee has ‘adopted a neutral profile to generate as much responsiveness from UN members as possible’. See Anne L Clunan, ‘The Fight against Terrorist Financing’ (2006) 121 *Political Science Quarterly* 569, 578.

established in 1989 and comprises 34 states and two regional organisations.<sup>33</sup> The original aim of the FATF was to examine the techniques used to launder money, review the action which had already been taken at the national and international levels, and set out the measures that still needed to be taken to combat money laundering. In relation to the latter, the FATF issued a report in 1990 which contained 40 recommendations and set out a comprehensive plan of action for the fight against money laundering.<sup>34</sup> In October 2001, the FATF expanded its mandate to incorporate efforts to combat terrorist financing by issuing a further eight special recommendations. A ninth recommendation was added in October 2004.<sup>35</sup> Of most relevance to this article is Special Recommendation II:

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.<sup>36</sup>

The report elaborates that:

Terrorist financing offences should extend to any person who wilfully provides or collects funds by any means, directly or indirectly, with the unlawful intention that they should be used or in the knowledge that they are to be used, in full or in part: (a) to carry out a terrorist act(s); (b) by a terrorist organisation; or (c) by an individual terrorist.<sup>37</sup>

The recommendations of the FATF are not binding. Rather, as Bantekas points out, '[i]ts recommendations are regarded as extremely persuasive soft law with effect not only for OECD member states, but also for nonmembers'.<sup>38</sup> The FATF has traditionally kept a list of Non-Cooperative Countries and Territories. In 2001, there were 21 countries listed as non-cooperative.<sup>39</sup> The last country, Burma, was removed from the list in October 2006.<sup>40</sup> Therefore, the list is now effectively defunct.

33 For an overview of the activities undertaken by the FATF and a critique of its effectiveness in countering terrorist financing, see Jared Wessel, 'The Financial Action Task Force: A Study in Balancing Sovereignty with Equality in Global Administrative Law' (2006) 13 *Widener Law Review* 169; Kathryn L Gardner, 'Terrorism Defanged: The Financial Action Task Force and International Efforts to Capture Terrorist Finances' in David Cortright and George A Lopez (eds), *Uniting Against Terror: Cooperative Nonmilitary Responses to the Global Terrorist Threat* (Massachusetts Institute of Technology, 2007) 157.

34 Financial Action Task Force, 'FATF Standards: FATF 40 Recommendations' (Report, October 2003). This document incorporates all amendments to October 2004.

35 Financial Action Task Force, 'FATF Standards: FATF IX Special Recommendations' (Report, October 2001). This document incorporates all amendments to February 2008.

36 *Ibid* 2.

37 *Ibid* 5.

38 Bantekas, above n 9, 319.

39 Financial Action Task Force and Organisation for Economic Co-operation and Development, 'Developments in Non-Cooperative Countries and Territories' (Press Release, 7 September 2001) <[www.oecd.org/hungary/developmentsinnon-cooperativecountriesandterritories.htm](http://www.oecd.org/hungary/developmentsinnon-cooperativecountriesandterritories.htm)>.

40 Financial Action Task Force, 'Annual Review of Non-Cooperative Countries and Territories 2006–2007: Eighth NCCT Review' (Report No 8, 12 October 2007) 4–5.

### III FUNDING CONNECTED TO ACTS OF TERRORISM

The *Suppression of the Financing of Terrorism Act 2002* (Cth) introduced a new div 103 into the *Criminal Code*. Section 103.1 made it 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.<sup>41</sup> The Explanatory Memorandum to the Suppression of the Financing of Terrorism Bill 2002 states that '[t]he offence implements Article 2 of the *Convention for the Suppression of the Financing of Terrorism* and paragraph 1(b) of ... *Resolution 1373*, and draws on the language used in those international instruments'.<sup>42</sup> In its 2005 country evaluation report, the FATF noted that s 103.1 did not adequately cover the provisions of Special Recommendation II.<sup>43</sup> This Recommendation requires that terrorist financing offences extend to the provision of funds to, or the collection of funds for the use of, an 'individual terrorist'. The FATF therefore recommended that Australia 'specifically criminalise the collection or provision of funds for an individual terrorist, as well as the collection of funds for a terrorist organisation'.<sup>44</sup> It is important to keep in mind that, as discussed above, the recommendations of the FATF are not binding. Nevertheless, Australia responded to this instruction in the *Anti-Terrorism Act (No 2) 2005* (Cth):

This amendment is intended to better implement FATF's Special Recommendation II. Special Recommendation II in part requires that countries' terrorist financing offences explicitly cover the wilful provision or collection of funds intending or knowing that they will be used by an *individual terrorist*. The other characteristics of Special Recommendation II already exist under Australian law.<sup>45</sup>

Section 103.2 made it an offence to intentionally make funds available to 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.

There is a serious question about the necessity for this second offence. It is highly probable that the s 103.1 offence would have covered the situation where funds were provided to, made available to or collected for, or on behalf of, an 'individual terrorist'. It would therefore seem to be the case that, putting to one side the political pressure on Australia to respond to the FATF's recommendation, it was unnecessary for Australia to enact the second offence in s 103.2. The overlap between the two offences is considerable. First, each of the offences extends to the provision (or, in the language of s 103.2, the 'making available') and collection of funds. Section 103.2 also extends to the collection of funds 'on behalf of' another

41 This section was repealed and substituted, in the same terms, by the *Criminal Code Amendment (Terrorism) Act 2003* (Cth).

42 Explanatory Memorandum, *Suppression of the Financing of Terrorism Bill 2002* (Cth) 5.

43 Financial Action Task Force, 'Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: Australia' (Country Evaluation Report, 14 October 2005) 32–3.

44 *Ibid* 33 [115].

45 Explanatory Memorandum, *Anti-Terrorism Bill (No 2) 2005* (Cth) 13 (emphasis added).

person, however, this is a relatively insignificant point. Second, the provision or collection of funds must be done intentionally. Third, the defendant must also be reckless as to whether the funds will be used to facilitate or engage in a terrorist act. Finally, the offences in div 103 may be committed even if a terrorist act does not occur, or if the funds will not be used to facilitate or engage in a specific terrorist act, or if the funds will be used to facilitate or engage in more than one terrorist act.<sup>46</sup>

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. This discussion indicates that, if anything, the offence in s 103.2 is narrower than that in s 103.1.<sup>47</sup> Apart from its extension of the offence to the collection of funds ‘on behalf of’ another person, which could have been achieved by the simple addition of this phrase to the offence in s 103.1, s 103.2 does not seem to capture any conduct that is not also captured by s 103.1.

Even if one assumes that Australia had no choice but to implement the FATF’s recommendation, there is a lingering issue as to whether s 103.2 is in strict compliance with this recommendation and, further, whether the wording of this offence is sufficiently tailored to the threat of terrorism. The FATF’s recommendation referred to the criminalisation of funding to an ‘individual terrorist’. This wording was rejected by Australian governments (both the original drafters and subsequent governments). In 2008, the Rudd Labor Government stated:

The inclusion of the term ‘terrorist’ is not used in the *Criminal Code*. Also, the use of the term ‘terrorist’ instead of ‘person’ would pre-emptively suggest that it has already been established that the person the subject of the offence is a person who has engaged in a terrorist act.<sup>48</sup>

Instead of an ‘individual terrorist’, the s 103.2 offence refers to ‘a person’. In 2006, the Security Legislation Review Committee (‘SLRC’) identified a key problem with this wording. By referring to ‘a person’, the offence captures innocent third

46 This is consistent with the approach across the range of Australia’s terrorism offences.

47 Syrota, above n 6, 129.

48 Australian Government, ‘Australian Government Responses to Other Counter-Terrorism Reviews’ (December 2008) <[http://www.ag.gov.au/Nationalsecurityandcounterterrorism/Reviews/Documents/Government%20Response%20to%20the%20Review%20of%20Security%20and%20Counter-Terrorism%20Legislation%20PDF%2057KB%20\(2\).pdf](http://www.ag.gov.au/Nationalsecurityandcounterterrorism/Reviews/Documents/Government%20Response%20to%20the%20Review%20of%20Security%20and%20Counter-Terrorism%20Legislation%20PDF%2057KB%20(2).pdf)>.

parties who do ‘not intend to facilitate or engage in a terrorist act’.<sup>49</sup> Academics and other commentators agree with this criticism. They have emphasised that the s 103.2 offence, in particular, captures conduct that lacks a meaningful connection with terrorism-related activities.<sup>50</sup> For example, the Law Council has stated that:

this offence casts the net of criminal liability too wide and encroaches on everyday activities. It has the capacity to catch all financing transactions, including purchasing items, paying bills, banking transactions and charitable and other collections, many of which typically do not warrant or require an enquiry as to the purpose of the funds.<sup>51</sup>

Far more concerning than this, however, is the fault element of recklessness that attaches to the connection between the conduct and the facilitation or engagement in a terrorist act. The combination of the broad wording of the offences and the relatively low recklessness standard means that persons wishing, for example, to donate to a foreign charitable organisation, must conduct a rigorous investigation into the purpose for which those funds will be used. This may have the effect of reducing a person’s willingness to make such donations or, alternatively, result in the criminal prosecution of a person who does not know that he or she must, or how to, conduct such investigations. The problematic nature of the fault element of recklessness — which attaches to all but one of Australia’s terrorist financing offences — will be discussed in more detail in Part V below.

#### **IV FINANCING PARTICULAR INDIVIDUALS OR ORGANISATIONS**

The remaining two groups of offences adopt a very different approach to the problem of terrorist financing than do the offences in div 103. The div 103 offences focus upon the purpose for which the funding may be used, namely, that the defendant is aware there is a substantial risk that they will be used to facilitate or engage in a terrorist act. In contrast, the remaining two groups of offences criminalise the provision of funds to particular individuals or organisations. With a few limited exceptions discussed below, the purpose to which the funds will be put is irrelevant.

The first of these regimes is contained in s 102.6 of the *Criminal Code*. This regime was introduced by the *Security Legislation Amendment (Terrorism)*

49 Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006) 162 [12.15]. For further support for this recommendation, see Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) 89 (see Recommendation 21).

50 See, eg, Gilbert + Tobin Centre of Public Law, Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005*, 10 November 2005, 7.

51 Law Council of Australia, ‘Anti-Terrorism Reform Project: A Consolidation of the Law Council of Australia’s Advocacy in Relation to Australia’s Anti-Terrorism Measures’ (June 2009) 30.

*Act 2002* (Cth) as a response to *Resolution 1373*.<sup>52</sup> As originally enacted, this section contained two offences relating to the intentional receipt of funds from, or intentional making of funds available to, a terrorist organisation (whether directly or indirectly). The *Anti-Terrorism Act (No 2) 2005* (Cth) expanded the offences to also cover the situation where a person intentionally collects funds for, or on behalf of, a terrorist organisation (whether directly or indirectly). The Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2005 (Cth) stated that this amendment was ‘in response to the FATF requirement that the wilful *collection* of funds for terrorist organisations be explicitly covered by terrorist financing offences’.<sup>53</sup> There are only two differences between the s 102.6 offences. These relate to the fault element attaching to each offence and the maximum penalty available. The offence in s 102.6(1) is committed where a person *knows* that the organisation is a terrorist organisation, and the maximum penalty is 25 years imprisonment. The fault element attaching to the s 102.6(2) offence is one of recklessness. As this offence involves a lower level of culpability, the maximum penalty is only 15 years imprisonment.

The second set of terrorist financing offences is contained in the *UN Charter Act*. Prior to 9/11, terrorist financing was dealt with in the *Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001* (Cth). These Regulations were superseded by amendments made to the *UN Charter Act* by the *Suppression of the Financing of Terrorism Act 2002* (Cth) (which also introduced the div 103 offences). The Explanatory Memorandum to the original Bill indicates that the new pt 4 of the *UN Charter Act* was intended to implement para 1(c) of *Resolution 1373* concerning the freezing, seizure and confiscation of the assets of terrorists and terrorist organisations.<sup>54</sup> Section 20 of the *UN Charter Act* makes it an offence for a person or body corporate who holds a ‘freezable asset’ to use or deal with the asset, allow the asset to be used or dealt with, or facilitate the use or dealing with the asset, where the use or dealing is not in accordance with a s 22 notice. A ‘freezable asset’ is defined broadly as a listed asset, an asset owned or controlled by a proscribed person or an asset derived or generated from an asset in either of the previous two categories.<sup>55</sup> Section 21 makes it an offence for a person or body corporate to make an asset available to a ‘proscribed person or entity’,<sup>56</sup> where the making available of the asset is not in accordance with a s 22 notice. The maximum penalty for each of these offences is 10 years imprisonment.

52 Explanatory Memorandum, Security Legislation Amendment (Terrorism) Bill 2002 (Cth) 10. See also Nathan Hancock, Department of the Parliamentary Library (Cth) Law and Bills Digest Group, *Bills Digest*, No 126 of 2001–2002, 30 April 2002.

53 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth) 12 (emphasis added). In its 2005 country evaluation report, the FATF identified the absence of such a provision as a significant gap in Australia’s counter-terrorism financing regime and instructed Australia to remedy this: see Financial Action Task Force, ‘Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism: Australia’, above n 43, 7, 32–3.

54 The *UN Charter Act* is supplemented by the *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Cth).

55 *UN Charter Act* s 14.

56 *Ibid.*

## A What Individuals and Organisations?

The s 102.6 and *UN Charter Act* offences apply to particular types of involvement with particular individuals and organisations. This section will discuss which individuals and organisations the offences apply to. The next section will then deal with the issue of the particular types of involvement that are covered by the offences.

The first point of distinction between the terrorist financing regimes under s 102.6 and the *UN Charter Act* is that the former regime only applies to involvement with organisations. The latter regime, by contrast, is broader in that it extends to individuals and assets (or classes of assets) as well as organisations. In another sense, however, the *UN Charter Act* regime is narrower than that under s 102.6. The *UN Charter Act* offences are proscription offences. That is, they apply only to organisations, individuals, assets or classes of assets that are proscribed. In contrast, the s 102.6 offences are more accurately described as ‘general organisation offences’.<sup>57</sup> This is because those offences apply to involvement with any organisation that falls within the definition of a ‘terrorist organisation’. There are two discrete ways in which an organisation may fall within this definition. First, an organisation may satisfy the statutory characteristics of a terrorist organisation, being that it ‘is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’.<sup>58</sup> Second, the organisation may be proscribed in regulations made by the Governor-General. The first of these mechanisms has been most commonly — in fact, exclusively — relied upon by the prosecution in Australia’s terrorism trials. To date, there have been five prosecutions brought under div 102 of the *Criminal Code*.<sup>59</sup> In each of these, the prosecution sought to prove that the relevant organisation in fact fell within the above definition of a terrorist organisation. The prosecution did not rely upon the fact that the organisation was proscribed.

It is nevertheless important to examine the proscription mechanisms under div 102 and the *UN Charter Act*. The key similarity between the mechanisms is that they are dominated by the executive branch of government. This, combined with an absence of procedural fairness and the limited avenues for independent review,

57 I thank the anonymous referee for this categorisation of the s 102.6 offences.

58 *Criminal Code* s 102.1(1).

59 As will be discussed in Part VI of this article, three of these prosecutions included financing offences under s 102.6. These were the prosecutions of Joseph Thomas, 13 men arrested as part of the Operation Pendennis raids in Melbourne (including Abdul Nacer Benbrika) and three Tamil men. These prosecutions — as well as the remaining prosecutions of Izhar Ul-Haque and Mohamed Haneef — also involved other terrorist organisation offences under div 102 of the *Criminal Code*, including directing the activities of a terrorist organisation (s 102.2), membership of a terrorist organisation (s 102.3), training with a terrorist organisation (s 102.5) and providing material support to a terrorist organisation (s 102.7).

has generated considerable concern amongst academics and practitioners.<sup>60</sup> It is not within the scope of this article to discuss these concerns in any detail. Suffice to say that any deficiencies in the proscription process inevitably compound any problems with the terrorist financing offences that hinge upon this process. There are also important points of distinction between the proscription mechanisms under div 102 and the *UN Charter Act*. These have resulted in the substantially different content of the proscription lists. The div 102 list currently contains 17 names.<sup>61</sup> The Consolidated List under the *UN Charter Act* contains over 1000 names.<sup>62</sup> The existence of two separate lists obviously increases the difficulties for a potential offender in identifying when and to whom it is an offence to provide funding.

Turning first to div 102, an organisation may be proscribed by regulation made by the Governor-General. The Attorney-General may advise the Governor-General to make a regulation if satisfied on reasonable grounds that the organisation either (a) 'is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act' or (b) 'advocates the doing of a terrorist act'.<sup>63</sup> The effect of such a regulation is to furnish conclusive proof in court proceedings that the organisation is a terrorist organisation. Under the *UN Charter Act*, there are in fact two separate proscription mechanisms. These mechanisms are narrower than those under div 102 in that the relevant decision-maker is bound by the terms of international instruments or decisions of the United Nations Security Council. Under s 15, the Minister for Foreign Affairs must (not *may* as under the div 102 proscription mechanism) proscribe an organisation or person if satisfied that it falls within paragraph 1(c) of *Resolution 1373*. Further, an asset or class of assets must be proscribed if the Minister is satisfied that it is owned or controlled by an entity or person falling within this paragraph.<sup>64</sup> Under s 18, the Governor-General (on the advice of the Attorney-General) may make regulations proscribing persons or entities if satisfied that the proscription would give effect to a decision: (a) that the Security Council has made under Chapter VII of the

60 See, eg, Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban "Terrorist" Organisations' (2004) 27 *University of New South Wales Law Journal* 482; Roger Douglas, 'Proscribing Terrorist Organisations: Legislation and Practice in Five English-Speaking Democracies' (2008) 32 *Criminal Law Journal* 90; Andrew Lynch, Nicola McGarrity and George Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1.

61 Attorney-General's Department, *What Governments are Doing: Listing of Terrorist Organisations* (17 August 2012) Australian National Security <<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>>.

62 See, eg, Department of Foreign Affairs and Trade, Australian Government, <[www.dfat.gov.au/icat/regulation8\\_consolidated.xls](http://www.dfat.gov.au/icat/regulation8_consolidated.xls)>.

63 *Criminal Code* s 102.1(2). The criteria of which the Attorney-General must be satisfied have been amended on a number of occasions since 2002. The *Security Legislation Amendment (Terrorism) Act 2002* (Cth) provided that the Attorney-General had to be satisfied on reasonable grounds that: (a) the Security Council of the United Nations has made a decision relating wholly or partly to terrorism; and (b) the organisation is identified in the decision, or using a mechanism established under the decision, as an organisation to which the decision relates; and (c) the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur). The current set of criteria was introduced by the *Anti-Terrorism Act (No 2) 2005* (Cth) sch 1 item 10.

64 *UN Charter Act* s 15; *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Cth) reg 20.

*Charter of the United Nations*; and (b) that Article 25 of the Charter requires Australia to carry out; and (c) that relates to terrorism and dealings with assets; and (d) under which the person or entity is identified (whether in the decision or using a mechanism established under the decision) as a person or entity to which the decision relates.

## **B Scope of the Offences**

As previously indicated, the s 102.6 offences and the *UN Charter Act* offences were enacted to comply with *Resolution 1373* (albeit different paragraphs of that Resolution). The first issue that needs to be examined is whether the two groups of offences are consistent with that international instrument.

The *UN Charter Act* is principally concerned with the freezing of assets. These assets may be directly identified in the Consolidated List or identified by virtue of their connection with a proscribed entity or person. The offences in ss 20 and 21 of the *UN Charter Act* exist for the purpose of enforcing the freezing regime or, in other words, as a means of penalising persons for dealing with freezable assets. There is little doubt, therefore, that the offences in ss 20 and 21 fall within the scope of paragraph 1(c) of *Resolution 1373*. This paragraph requires states to freeze the assets of persons involved in terrorism-related activities, of entities owned or controlled by such persons, and of persons and entities acting at the direction of such persons or entities.

A greater question mark hangs over the consistency of the s 102.6 offences with *Resolution 1373*. These are stand-alone terrorist financing offences; they are not part of a freezing regime. This means that para 1(c) of *Resolution 1373* cannot be relied upon. Instead, it is necessary to look to paras 1(b) and (d). Paragraph 1(b) of *Resolution 1373* directs states to criminalise the provision or collection of funds ‘with the intention that the funds should be used, or in the knowledge that they are to be used, *in order to carry out terrorist acts*’ (emphasis added). The provision of funding to a terrorist organisation for the purpose of committing a terrorist act, or the receipt of funds for this purpose, would undoubtedly be consistent with this paragraph. However, the offences in s 102.6 go considerably further in that they ‘capture conduct that goes far beyond the intentional funding of politically or religiously motivated violence’.<sup>65</sup> They do not distinguish between the provision of funds to a terrorist organisation for a purpose related to terrorism, such as to purchase weapons, and the provision of funds for an innocent purpose, such as to fund humanitarian activities in an area controlled by the terrorist organisation. Therefore, the s 102.6 offences do not appear to be consistent with para 1(b) of *Resolution 1373*. It is, however, probable that they fall within para 1(d). This paragraph requires states to not only prohibit the provision of funds to persons who commit or attempt to commit terrorist acts, but also to *any* entities owned or controlled by such persons. This paragraph does not distinguish between entities engaged in terrorism-related activities and those involved in ‘innocent’ activities.

<sup>65</sup> Commonwealth, *Parliamentary Debates*, Senate, 7 December 2006, 147 (Kerry Nettle).

In addition to the question of consistency with the relevant international instruments, there is a further issue as to whether the s 102.6 and *UN Charter Act* offences are necessary and proportionate to respond to the threat of terrorism. The focus of the s 102.6 offences — and also a major concern of the *UN Charter Act* offences — is to stem the flow of financial and human resources to terrorist organisations so that they will no longer be able to function. Davis writes:

There are several advantages to proscribing financing of terrorists as opposed to terrorist activities. For one, the former approach recognises the importance of targeting individuals who provide ‘blank cheques’ to terrorists by providing financing for terrorist organisations’ general purposes as opposed to specific activities. There is a second benefit to dispensing with proof that financing is connected to specific terrorist activities. Even where it is present, the existence of such a connection may be difficult for the prosecution to prove beyond a reasonable doubt. Thus, in some cases, the organisations approach to defining terrorism will, by reducing the burden on law enforcement agencies, facilitate the conviction of truly culpable actors.<sup>66</sup>

The opposing view, to which this author subscribes, is that the s 102.6 terrorist financing offences are based on an overly-simplistic view that all of the activities of terrorist organisations are in some way related to, or connected with, the commission of terrorist activities.<sup>67</sup> For example, Davis presents us with the case of ‘an organisation whose official activities encompass poverty relief and peaceful political engagement but which is also suspected of sponsoring terrorist acts’.<sup>68</sup> An offence which punishes the organisation or a person providing funding to that organisation regardless of the purpose to which the funds are to be put represents a disproportionate response to the threat of terrorism. Instead, the focus should be upon funds transfers that are related to preparing for, assisting with or the commission of a terrorist act.<sup>69</sup> Such offences would more closely mirror those in div 103 of the *Criminal Code*. Unfortunately, given the specific reference to prohibiting the financing of ‘terrorist organisations’ in not only *Resolution 1373* but also *Resolution 1267* and FATF Special Recommendation II, it is extremely unlikely that Australia will modify the offences in s 102.6 and under the *UN Charter Act* in this manner.

The problems associated with the broad range of conduct captured by these two groups of offences might be mitigated if certain categories of conduct were exempt (or, at the very least, a defence existed for these categories). However, such categories are extremely narrow. There is only one category of exempt conduct

66 Kevin Davis, ‘Legislating against the Financing of Terrorism: Pitfalls and Prospects’ (2003) 10 *Journal of Financial Crime* 269, 270 (citations omitted).

67 The failure to distinguish between ‘innocent’ and terrorism-related activities of a terrorist organisation is common to many of the terrorist organisation offences in div 102 of the *Criminal Code*. For example, the offence of providing training to or receiving training from a terrorist organisation in s 102.5 does not require the training to be for a purpose related to terrorism.

68 Davis, above n 66, 271.

69 Cf Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (2006) [5.85].

for the s 102.6 offences. This category is only available to a lawyer and only if he or she received funds from a terrorist organisation solely for the purpose of legal representation for a person in proceedings relating to div 102 of the *Criminal Code* or assisting the organisation to comply with a law of the Commonwealth, a state or a territory.<sup>70</sup> It will be extremely difficult in practical terms for a defendant to rely on this exemption. This is because he or she bears the legal burden (or onus) of proving that the legal representation or assistance was for one of the aforementioned purposes. Therefore, in essence, this is a defence rather than a category of exempt conduct. To prove this ‘defence’, it will often be necessary for the lawyer to present information to the court about the nature, and possibly also the content, of the advice that he or she provided. This is problematic given that such information is protected by client-lawyer privilege,<sup>71</sup> and the power to determine whether to waive client-lawyer privilege rests with the client (not the lawyer).<sup>72</sup>

It would be an improvement for the legal burden to be reduced to an evidential one.<sup>73</sup> An evidential burden would require the lawyer to point to evidence suggesting a reasonable possibility that he received funds solely for one of the purposes set out in (a) and (b). The onus of proof would then shift to the prosecution to prove on the balance of probabilities that this was not the case.<sup>74</sup> However, far better would be to extend the categories of exempt conduct to the ‘provision of legal representation or assistance’ generally.<sup>75</sup> This would avoid the problems generated by the client-lawyer privilege because it would no longer be necessary to prove the purpose of the legal representation or advice. It would be sufficient for the defendant to point to evidence that the funds were paid in consideration for legal assistance, for example, by way of the trust account entries that solicitors are required to keep.<sup>76</sup>

The *UN Charter Act* offences (although not in so many words) exempt conduct that is done in accordance with a s 22 notice. Under s 22, the Minister for Foreign Affairs may give written notice to use an asset in a certain way or to permit an asset to be made available to a proscribed person or entity. The Regulations set out the broad categories of expense for which a s 22 notice may be sought. They include, for example, ‘a basic expense dealing’, such as payments for household

70 *Criminal Code* s 102.6(3).

71 *Evidence Act 1995* (Cth) ss 118–19.

72 *Ibid* s 122 (client may consent to the confidential communication or document being adduced as evidence in court). See also Security Legislation Review Committee, above n 49, [10.46].

73 Security Legislation Review Committee, above n 49, [10.48].

74 *Criminal Code* s 13.3.

75 Lex Lasry, Submission No 12 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation*, 17 July 2006, [28]. This recommendation was supported by the Parliamentary Joint Committee on Intelligence and Security. See Parliamentary Joint Committee on Intelligence and Security, above n 49, [5.85]. Cf Security Legislation Review Committee, above n 49, [10.47]–[10.48]. The SLRC recommended that category (a) be extended to legal representation for any proceedings under pt 5.3 of the *Criminal Code* and not simply div 102. It would then include legal assistance for a range of conduct related to the s 102.6 offences, in particular, an application for an organisation to be de-listed, prosecution for an individual terrorism offence and proceedings for a control order or preventative detention order.

76 Lasry, above n 75, [28]–[29].

expenses and legal services, and ‘a contractual dealing’, such as interest or other earnings due on frozen accounts.<sup>77</sup> However, in reality, the possibility of conduct being exempt under a s 22 notice is considerably narrower than this suggests. First, the decision whether to issue a s 22 notice is solely within the discretion of the Minister. Second, the Explanatory Memorandum to the Suppression of the Financing of Terrorism Bill 2002 provides that ‘[t]his power would only be exercised in exceptional circumstances, for example, to protect the rights of third parties’.<sup>78</sup> In addition to this category of exempt conduct, it is a defence to ss 20 and 21 if a body corporate took reasonable precautions, and exercised due diligence, to avoid committing the offence.<sup>79</sup> This defence is nothing unusual; it is generally available to a body corporate for breaches of Australian law.<sup>80</sup> There is also one exceptionally narrow defence to s 20 for an individual, namely, it is a defence if the use or dealing with the asset was solely for the purpose of preserving the value of the asset.<sup>81</sup>

## V FAULT ELEMENTS OF THE OFFENCES

### A *Strict Liability*

The *UN Charter Act* offences are different from the s 102.6 offences and div 103 offences in that strict liability applies to one physical element of each offence. This means that no fault element attaches to the physical element. Subsections 20(1)(d) and 21(1)(c) of the *UN Charter Act* require that the use, dealing or making available of the asset ‘is not in accordance with a notice under s 22’. As strict liability attaches to this element,<sup>82</sup> the prosecution need only prove that the physical element existed. It is not required to prove that the defendant knew that a s 22 notice was not in effect or even that he was reckless as to this fact.<sup>83</sup>

This is not the only anti-terrorism offence that could be described as one of strict liability. Subsection 102.5(2) of the *Criminal Code* provides that it is an offence to intentionally provide training to, or receive training from, an organisation specified as a terrorist organisation in the Regulations. Strict liability applies to the circumstance that the organisation is so specified.<sup>84</sup> This is similar to the United States offence of knowingly providing material support or resources to an organisation designated by the Secretary of State as a foreign terrorist organisation.<sup>85</sup> Such offences have been vehemently criticised as divorcing

77 *Charter of the United Nations (Dealing with Assets) Regulations 2008* (Cth) reg 5.

78 Explanatory Memorandum, Suppression of the Financing of Terrorism Bill 2002 (Cth) 18.

79 *UN Charter Act* s 20(3E)(b).

80 See, eg, *Competition and Consumer Act 2010* (Cth) s 44ZZO; *Migration Act 1958* (Cth) s 493; *Native Title Act 1993* (Cth) s 203FH.

81 *UN Charter Act* ss 20(3), 20(3E)(a), 21(2E).

82 *Ibid* ss 20(2), 21(2).

83 *Criminal Code* s 6.1.

84 *Ibid* s 102.5(3).

85 18 USC s 2339(a)(1).

criminal punishment from the traditional requirement of culpability (or fault).<sup>86</sup> This requirement

is one of the most fundamental protections in criminal law [and] reflects the premise that it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these resulted from an unjustified risk (ie recklessness).<sup>87</sup>

Therefore, strict liability should only be imposed where there is ‘a pressing and compelling need’.<sup>88</sup> In the anti-terrorism context, Stacy argues that such a need can only be demonstrated where the strict liability offence would significantly advance the security of the nation.<sup>89</sup>

The ‘Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Orders’ issued in September 2011 draws a distinction between the circumstances in which strict liability may be attached to a *particular* physical element and the — considerably narrower — circumstances in which it may be attached to the offence as a whole.<sup>90</sup> The problem with this approach is that it treats all physical elements as being of equal weight to an assessment of culpability. On the one hand, it may be appropriate to attach strict liability to physical elements that ‘are preconditions or jurisdictional factors and the defendant’s state of mind has little, if any, bearing on their culpability’.<sup>91</sup> However, the same cannot be said of physical elements that go to the heart of what is harmful or wrong about the action. As already discussed, the criminal law has traditionally included fault elements in criminal offences to ensure that only those who are culpable (or at fault) are punished. The prospect of an innocent person being captured by an offence is minimised if a fault element — even if it is one of recklessness only — is attached to the physical elements that encapsulate what is harmful or wrong about the action.

In respect of the *UN Charter Act* offences, strict liability attaches to only one physical element, namely, that the conduct was not done in accordance with a s 22 notice. A fault element is attached to each of the remaining physical elements. The prosecution must, for example, prove that the defendant was reckless as to whether ‘the asset is a freezable asset’ (s 20(1)(c)) or ‘the person or entity to whom the asset is made available is a proscribed person or entity’ (s 21(1)(b)). An argument could be made that it is these physical elements that are at the heart of what makes the action harmful or wrongful. However, a more convincing

86 Tom Stacy, ‘The “Material Support” Offence: The Use of Strict Liability in the War Against Terror’ (2004–2005) 14 *Kansas Journal of Law & Public Policy* 461, 471.

87 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) 22.

88 See, eg, Civil Liberties Australia, Submission No 1 to the Standing Committee on Legal Affairs, Legislative Assembly for the Australian Capital Territory, *Inquiry: Strict and Absolute Liability Offences*, 2 April 2006, 8.

89 Stacy, above n 86, 477.

90 Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, above n 87, 23.

91 Standing Committee on Legal Affairs, Legislative Assembly for the Australian Capital Territory, *Inquiry: Strict and Absolute Liability Offences* (2008) 13–14 (Simon Corbell).

argument is the harm or wrong lies in the fact that the conduct is not in accordance with a s 22 notice.

A vast range of conduct is captured by the *UN Charter Act* offences. The list of proscribed persons and entities contains over 1000 names. A freezable asset includes not only listed assets but any asset derived or generated from such, or from an asset owned or controlled by a proscribed person or entity. This means that the conduct may be far removed from any connection with the commission of a terrorist act. This is recognised in the breadth of the categories of expense for which a s 22 notice may be sought. The real harm or wrong in the *UN Charter Act* offences lies in the fact that the action is done without a s 22 notice being issued. In other words, that the use or dealing with the freezable asset or the provision of an asset to a proscribed person or entity is done without authorisation. Given this, the possibility of an innocent person being captured by the offences would be reduced if a fault element was attached to this physical element. Such an amendment would also bring the offences into line with the principles set out in parliamentary reports on the drafting of criminal offences. In particular, these inquiries have insisted that strict liability should be rarely used (and generally only in respect of regulatory offences that do not carry a term of imprisonment).<sup>92</sup>

In considering what fault element to attach to this physical element, there are two principal options: knowledge or intention, and recklessness. An intention or knowledge standard would be far too difficult for a prosecutor to establish. The prosecution is unlikely to obtain evidence about the defendant's knowledge as to the existence or otherwise of a s 22 notice through human surveillance, telecommunications intercepts or eavesdropping devices. The adoption of such a standard would therefore render the *UN Charter Act* offences virtually meaningless. Instead, a recklessness standard should be adopted. The prosecution should be required to prove that the defendant was reckless as to whether the action was in accordance with a notice under s 22. This change would accord with academic scholarship<sup>93</sup> as well as the report of the SLRC into Australia's anti-terrorism legislation.<sup>94</sup> The meaning of 'recklessness' will be discussed in more detail in the following section.

## **B Recklessness**

In the previous section, I recommended that a recklessness (rather than a knowledge or intention) standard replace the strict liability element of the *UN Charter Act* offences. However, it will not always be appropriate for such a standard to be

92 See, eg, Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002); Legislation Review Committee, Parliament of New South Wales, *Strict and Absolute Liability: Responses to the Discussion Paper* (2006) 1–2, 6, 8–9. For an overview of the inquiries on this topic to date, see Standing Committee on Legal Affairs, Legislative Assembly for the Australian Capital Territory, *Inquiry: Strict and Absolute Liability Offences* (2008).

93 Stacy, above n 86, 476. This recommendation was made by Stacy in respect of the United States material support offence.

94 Security Legislation Review Committee, above n 49, [12.23].

adopted. In the vast majority of the terrorist financing offences discussed in this article, recklessness (rather than knowledge or intention) attaches to at least one of the physical elements. ‘Recklessness’ means the defendant is aware of a substantial risk of a particular circumstance or result and, having regard to circumstances known to him or her, it is unjustifiable to take that risk.<sup>95</sup> The only exception is s 102.6(1). This section will first provide an overview of how the recklessness standard applies to the various terrorist financing offences before considering whether (and, if so, why) this is problematic.

In respect of the offence in s 102.6(2), the recklessness standard attaches to the physical element that the organisation is a terrorist organisation (whether proscribed or satisfying the definition in s 102.1(1)). Similarly, for the offences in the *UN Charter Act*, the recklessness standard attaches to the physical element that the asset is a freezable asset or that the person or organisation is proscribed.<sup>96</sup> As has already been discussed above, the div 103 offences are not proscription or organisation offences. Instead, they capture conduct that is connected with a terrorist act. The fault element that attaches to this connection is, once again, recklessness. The prosecution need only prove that the defendant was aware of a substantial risk that the funds would be used to facilitate or engage in a terrorist act.

Each of the terrorist financing offences was ostensibly adopted to comply with Australia’s obligations under a number of international instruments. However, the Attorney-General’s Department stated in evidence to the Senate Legal and Constitutional Affairs Committee that ‘[i]t was decided in framing the offence that it was preferable to apply fault elements that accord with the general principles of the Criminal Code than to adopt the precise terms of the [*International Convention*]’.<sup>97</sup> The ‘precise terms’ to which this comment refers is the imposition of an intention or knowledge standard. Paragraph 1(b) of *Resolution 1373* and art 2 of the *International Convention* clearly indicate that the offender must *intend* that the funds be used, or *know* that they were to be used, to carry out terrorist acts.<sup>98</sup> This fault element has been adopted by other jurisdictions in implementing the international instruments. In Canada, for example, it is an offence to collect, provide or invite another person to provide, or make available property or financial services ‘intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such

95 *Criminal Code* s 5.4(2).

96 Recklessness is the default fault element for a physical element that consists of a circumstance or result: *ibid* s 5.6. See also *R v Vinayagamoorthy* [2010] VSC 148 (31 March 2010) 3 [6].

97 Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 (No 2); Suppression of the Financing of Terrorism Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002; Telecommunications Interception Legislation Amendment Bill 2002* (May 2002) 66 (Attorney-General’s Department (Cth)).

98 See Pieth, above n 3, 1081–2.

an activity'.<sup>99</sup> It is also an offence to engage in such conduct 'knowing that, in whole or part, they will be used by or will benefit a terrorist group'.<sup>100</sup>

The argument of the Attorney-General's Department that recklessness best accorded with the default principles for fault in s 5.6 of the *Criminal Code*<sup>101</sup> is, at best, a weak justification for significantly lowering the fault element set out in the relevant international instruments. The Senate Committee concluded:

The Committee does not consider that sufficient reasons have been put forward to justify the exclusion of specific intent from the proposed offence of financing terrorism, particularly as it is based on United Nations instruments which contain the element of specific intent.<sup>102</sup>

In defending the inclusion of a recklessness standard in the United States material support offences, Ward argues that 'the [*International Convention*] represents a floor, and not a ceiling, of liability for terrorism prevention'.<sup>103</sup> He is correct in this; states may, in implementing international instruments, criminalise conduct that goes beyond the terms of the *International Convention*. However, it is important not to dismiss the terms of these international instruments out of hand. There are important reasons why a knowledge or intention element (rather than a recklessness element) was included in these international instruments.

First, a knowledge or intention fault element is crucial to ensuring that the terrorist financing offences do not capture conduct that is unworthy of criminalisation.<sup>104</sup> A brief hypothetical suffices to demonstrate this. This hypothetical concentrates on the div 103 offences, which criminalise the collection or provision of funds where the defendant is aware of a substantial risk that the funds may be used to facilitate or engage in a terrorist act. Imagine that Person A makes a \$100 donation to Charity X. Person A knows at the time of making the donation that Charity X is based in a Taliban-controlled area of Afghanistan. This is enough to give rise to an awareness on Person A's part of a substantial risk that Charity X would use the funds to facilitate or engage in a terrorist act.<sup>105</sup> Person A would be guilty under the div 103 offences even though no terrorist act ultimately eventuates.<sup>106</sup> He or she would be guilty even though Charity X had no intention of using the funds to facilitate or engage in a terrorist act.

99 *Criminal Code*, RSC 1985, c C-46, s 83.03

100 *Ibid.*

101 Senate Legal and Constitutional Legislation Committee, above n 97, 66 (Attorney-General's Department (Cth)).

102 *Ibid* 66 and Recommendation 6.

103 James J Ward, 'The Root of all Evil: Expanding Criminal Liability for Providing Material Support to Terror' (2008) 84 *Notre Dame Law Review* 471, 488–9.

104 Ward disagrees with this argument, stating that 'the "low-hanging fruit" defendants are precisely those who should be prosecuted, because their contributions fund suicide bombings just as surely as those who knowingly contribute': *ibid* 486.

105 'Substantial risk' is sometimes defined as a 'possibility'. See, eg, Attorney-General's Department (Cth), *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 75: 'Other academic treatises are more circumspect, though most appear to accept that recklessness extends to "possible" risks in offences other than murder', citing Simon Bronitt and Belinda McSherry, *Principles of Criminal Law* (Lawbook, 2001).

106 Attorney-General's Department (Cth), *The Commonwealth Criminal Code*, above n 105, 79.

The second reason is that the use of a recklessness standard generates a considerable amount of uncertainty for potential offenders. The *Bills Digest* to the Suppression of the Financing of Terrorism Bill 2002 states:

the fault element of recklessness rather than intention may make the operation of the law uncertain. It is possible to imagine a scenario where it is alleged in the press that an organisation that claims to be a charity is in fact diverting funds to a terrorist organisation. In such circumstances, would a person who donated money to the charity despite knowledge of the allegations be taking an unjustifiable risk? The allegation is unproven and may well be false. According to the *Criminal Code*, the question whether taking a risk is unjustifiable is one of fact.<sup>107</sup>

This statement focuses upon the justifiability aspect of the recklessness standard. However, as pointed out in the practitioners' guide to the *Criminal Code*, '[t]he twin filtering devices of prosecutorial discretion and the pre-emptive role of excuses', such as necessity, duress and sudden or extraordinary emergency, mean that the justifiability aspect is almost never going to be relevant.<sup>108</sup> This does not mean that the general claim of uncertainty made in the *Bills Digest* is unfounded. The error simply lies in the basis for this uncertainty. It is the substantial risk — rather than the justifiability — aspect of the recklessness standard that is the main problem.

The statement in the *Bills Digest* refers to allegations made by the media that a particular charity is diverting funds to a terrorist organisation. However, as the hypothetical set out above demonstrates, it is not necessary that the person be aware of either the actual diversion of funds or even of allegations to this effect. A person may be aware of a substantial risk that an organisation may use funds to facilitate or engage in a terrorist act simply because he or she knows that the organisation is located in the same geographical area as a terrorist organisation. It may even be that the provision of funds to a charity, knowing that it is a Muslim charity, is sufficient to give rise a substantial risk that the funds will be used to facilitate or engage in a terrorist act.

The effect of this seems to be that a person must conduct rigorous investigations as to the background of the individual or organisation to whom they are providing funds and the purposes to which those funds may be put. This places a very heavy burden — in terms of time, money and resources — upon the person wishing to provide funds. As the Gilbert + Tobin Centre of Public Law stated in a submission to the Senate Legal and Constitutional Affairs Committee:

This proposed offence extends criminal liability too far, and makes it impossible for any person to know the scope of their legal liabilities with any certainty. Terrorists obtain financing from a range of sources, including legitimate institutions (such as money laundering through banks), and employ a variety of deceptive means to secure funding. This offence

107 Department of the Parliamentary Library, *Bills Digest*, No 127 of 2001–02, 1 May 2002, 6–7.

108 Attorney-General's Department (Cth), *The Commonwealth Criminal Code*, above n 105, 77.

would require every Australian to vigilantly consider where their money might end up before donating to a charity, investing in stocks, depositing money with a bank, or even giving money as birthday present.<sup>109</sup>

It is not only individuals who are affected by the use of a recklessness standard. It is also of considerable concern to institutions involved in funds transfers. Platinum Asset Management, Australia's largest international equities investment funds manager, stated that '[w]e are simply not in a position for a great proportion of the time to know who are the underlying investors in our funds or to what use the money will be put'.<sup>110</sup> The offences criminalise 'ordinary financial market activities' and may 'produce an environment that is potentially very unfriendly to economic performance'.<sup>111</sup>

Even after rigorous investigations have been conducted, these are unlikely to yield any definite answers. It will be almost impossible for the person or institution to be confident of the purposes to which the funds will be put. As a consequence, their obligations under the criminal law will remain unclear. It may even be that conducting such investigations has a counter-productive effect. That is, the more information a person possesses about the person or institution to whom they plan to provide funds, the more likely it is that they are aware of a connection (however vague) between that person or institution and terrorism. Therefore, by conducting investigations into the person or institution, the person may actually be increasing the prospect that he or she will be found to have an awareness of a substantial risk that the funds will be used to facilitate or engage in a terrorist act. The other option — to conduct no investigations — is equally unsatisfying. In these circumstances, a court might find that the person was wilfully blind to the consequences of his or her actions. This might, once again, lead to a finding that the person was aware of a substantial risk that the funds will be used to facilitate or engage in a terrorist act.

The application of a recklessness standard to any of Australia's terrorist financing offences raises alarm bells. However, the application of this standard to the div 103 offences is of particular concern. The maximum penalty for the financing offences in div 103 is life imprisonment. This is the same penalty that applies to the offence of actually engaging in a terrorist act.<sup>112</sup> No one could doubt that engaging in a terrorist act is, and should be treated by the law as, far more serious than the financing of terrorism. This is certainly the approach that has been taken in other jurisdictions. In the United Kingdom, the equivalent provision to the

109 Gilbert + Tobin Centre of Public Law, above n 50, 7.

110 Kerr Neilson, Managing Director, Platinum Asset Management, Submission No 138 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 4.

111 Ibid.

112 *Criminal Code Act 1995 (Cth)* s 101.1.

div 103 offences carries a maximum penalty of 14 years imprisonment and,<sup>113</sup> in Canada, 10 years.<sup>114</sup> It is clearly disproportionate for the financing of terrorism — especially that which is reckless rather than knowing or intentional — to carry a maximum penalty of life imprisonment.

## VI APPLICATION OF THE TERRORIST FINANCING OFFENCES<sup>115</sup>

The above analysis demonstrates that there is considerable overlap between the terrorist financing offences. This overlap has the potential to cause confusion and undesirable complexities in the terrorist financing regime. Furthermore, the breadth of the offences and the applicable fault elements are fundamentally problematic. The final Part of this article will examine the possible reforms that could be made to narrow and simplify the terrorist financing offences. However, before doing so, it is important to understand how these offences have been applied in practice and to consider what lessons can be drawn from this experience. To date, no person has been charged with an offence under s 103 of the *Criminal Code*. Therefore, this section will examine the charges that have been laid under s 102.6 of the *Criminal Code* and the *UN Charter Act*.

The most frequently prosecuted of Australia's terrorist financing offences is the offence in s 102.6(1). Seven individuals have been charged with this offence. No one has been charged with the offence in s 102.6(2). The first person to be charged was Joseph 'Jihad Jack' Thomas. Thomas was arrested in November 2004, and charged with three terrorism-related offences.<sup>116</sup> One of these offences related to Thomas' receipt of \$3500 from a terrorist organisation, being Al Qaeda or another organisation associated with Khaled bin Attash or Osama bin Laden, knowing that it was a terrorist organisation.<sup>117</sup> Although, as discussed above, the purpose for which the funds were to be put is not part of the offence, the prosecution specified that the funds were to enable Thomas to return to Australia from Pakistan in January 2003.<sup>118</sup> In February 2006, Thomas was convicted of

113 There are four offences set out in ss 15–18 of the *Terrorism Act 2000* (UK) c 11:

(a) to invite anyone to provide money or property, to receive money or property, or to provide money or property for the purpose of terrorism; (b) use and possession of money or property for the purposes of terrorism; (c) enters into or becomes concerned in arrangements whereby money or property is made available to another [for terrorism]; and (d) facilitating the retention or control of terrorist property in any way (including concealment, removal from the jurisdiction, or transfer to nominees).

Each of these offences carries a maximum term of imprisonment of 14 years.

114 *Criminal Code*, RSC 1985, c C-46 s 83.03.

115 For a comprehensive overview of the prosecution of terrorism generally in Australia, see Nicola McGarrity, "Testing" Our Counter-Terrorism Laws: The Prosecution of Individuals for Terrorism Offences in Australia' (2010) 34 *Criminal Law Journal* 92.

116 *DPP (Cth) v Thomas* [2006] VSC 120 (31 March 2006) [3].

117 *Ibid* [1].

118 *Ibid*.

this offence and sentenced to five years imprisonment.<sup>119</sup> However, on appeal, Thomas' conviction was overturned.<sup>120</sup> The Victorian Court of Appeal held that admissions made by Thomas during an interview with the Australian Federal Police in Pakistan in March 2003 had not been made voluntarily.<sup>121</sup> At his retrial, Thomas was acquitted of the offence of receiving funds from a terrorist organisation.<sup>122</sup>

In late 2005 and early 2006, 13 men were arrested in Melbourne, and charged with a range of terrorism offences under divs 101 and 102 of the *Criminal Code*. These offences related to their support of an informal terrorist organisation based in Melbourne. The prosecution alleged that this organisation was a terrorist organisation because its intention was to engage in a holy jihad in order to persuade the then Howard government to withdraw Australian troops from Iraq.<sup>123</sup> Three of the men, Aimen Joud, and Ahmed and Ezzit Raad, were charged with attempting to make funds available to the terrorist organisation, knowing that it was a terrorist organisation. They did this by engaging in a scheme whereby stolen cars were purchased and stripped, and the resulting parts sold to provide funds for the jemaah.<sup>124</sup> All three men were convicted at trial. Aimen Joud and Ahmed Raad were each sentenced to eight years imprisonment and Ezzit Raad to four.<sup>125</sup>

In May 2007, Aruran Vinayagamoorthy and Sivarajah Yathavan were arrested and charged with four terrorism-related offences.<sup>126</sup> A third man, Arumugan Rajeevan, was arrested in July, and charged with the same four offences.<sup>127</sup> Three of these offences related to their support of the Liberation Tigers of Tamil Eelam ('LTTE'). The final charge related to the *UN Charter Act* (discussed below). Relevantly, the prosecution alleged that the LTTE was a terrorist organisation and charged the men with making funds available to a terrorist organisation in violation of s 102.6(1).<sup>128</sup> The prosecution case was that the three men used the Melbourne-based Tamil Co-ordination Committee to raise monies — amounting to at least \$700 000 — for the LTTE under the guise of fundraising

119 Ibid [18]. Gani notes that '[g]iven that the maximum penalty for the s 102.6 offence is imprisonment for 25 years, the sentence was very much at the lower end of those available': Miriam Gani, 'How Does it End? Reflections on Completed Prosecutions under Australia's Anti-Terrorism Legislation' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (ANU E Press, 2008) 269, 288.

120 *DPP v Thomas* (2006) 14 VR 475, 509 [120].

121 Ibid 491–3 [51].

122 Milanda Rout, 'Joseph Thomas Acquitted on Al-Qa'ida Charge but Guilty of Falsifying Passport', *The Australian* (online), 23 October 2008 <<http://www.theaustralian.com.au/news/thomas-acquitted-on-al-qaida-charge/story-e6frg6n6-1111117833279>>.

123 *R v Benbrika* (2009) 222 FLR 433, 439 [24].

124 Ibid 451–2 [102].

125 Ibid 472 [248], 473 [251]–[252].

126 *Vinayagamoorthy v DPP (Cth)* (2007) 212 FLR 326, 327 [1].

127 Ibid.

128 Ibid.

for tsunami relief.<sup>129</sup> However, the terrorist organisation charges were withdrawn in March 2009.

Although the prosecution did not make a public statement setting out its reasons for withdrawing the charges, it is probable that this was because of difficulties faced by the prosecution in proving that the LTTE ‘is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’.<sup>130</sup> The LTTE had not, at the time the men were charged, been proscribed under div 102 of the *Criminal Code* as a terrorist organisation. Therefore, it was necessary for the prosecution to produce evidence that the LTTE in fact fell within this definition. At the bail hearing in July 2007, Bongiorno J commented that ‘the Crown case is not without its problems in that area’.<sup>131</sup> His Honour noted that the LTTE has not been regarded as a terrorist organisation in Sri Lanka since 2002, when a truce between it and the government of Sri Lanka was first brokered.

There has only been one prosecution of the terrorist financing offences in the *UN Charter Act*.<sup>132</sup> As noted above, the terrorist organisation charges against Vinayagamoorthy, Yathavan and Rajeevan were withdrawn prior to trial. However, one charge remained — that of making an asset available to a ‘proscribed entity’ in violation of s 21 of the *UN Charter Act*. Proof of this charge did not face the same difficulties as the terrorist organisation offences. This is because the LTTE was included by the Minister for Foreign Affairs on the list of proscribed entities and persons in December 2001.<sup>133</sup>

Vinayagamoorthy pled guilty to two counts — one relating to making monies, and the other to making electronic components worth \$97 000, available to the LTTE — and Yathavan and Rajeevan each pled guilty to one count of making monies available to the LTTE.<sup>134</sup> At the time that the men were sentenced, the maximum penalty available was five years. The sentencing judge, Coghlan J, commented that the offences committed by Yathavan and Rajeevan ‘probably falls at the lower end of seriousness of offences of this kind’.<sup>135</sup> They were therefore

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

130 *Anti-Terrorism Act (No 2) 2005* (Cth) sch 1 item 10.

131 See *Vinayagamoorthy v DPP (Cth)* (2007) 212 FLR 326, 329 [9]; see also *R v Vinayagamoorthy* [2010] VSC 148 (31 March 2010) [10]–[12], [17]–[18]; Natasha Robinson, ‘We are “Soft” on Tamil Tigers’, *The Australian* (online), 4 October 2007 <<http://www.theaustralian.com.au/news/we-are-soft-on-tamil-tigers/story-e6frg6no-111114564876>>.

132 Although this is, strictly speaking, outside the scope of this article, it is worth mentioning that there has also only been one publicly reported case of an Australian person or entity having its assets frozen in accordance with the procedures in the *UN Charter Act*. On 27 August 2002, three bank accounts held by the ISYF totalling \$2196.99 were frozen. The ISYF had been listed by the Minister for Foreign Affairs at the same time as the LTTE. See, Parliamentary Joint Committee on Intelligence and Security, above n 49, 90. A bank account in the name of ‘Shining Path Records’ had been frozen by the Commonwealth Bank of Australia in January 2002 under the superseded *Charter of the United Nations (Anti-Terrorism Measures) Regulations 2001* (Cth). The Peruvian terrorist organisation, Shining Path, had been listed in December 2001. The bank account was frozen for 26 days before it became apparent that it belonged to a small Melbourne-based music business, and was not associated with the listed entity. See Brian Toohey, ‘A-G’s War Swings from Tragedy to Farce’, *Australian Financial Review*, 9 March 2002, 51.

133 *United Nations (Anti-Terrorism Measures) Regulations 2001* (Cth).

134 *R v Vinayagamoorthy* [2010] VSC 148 (31 March 2010) [1]–[3].

135 *Ibid* [68].

each sentenced to one year imprisonment.<sup>136</sup> There was no explicit comment by Bongiorno J about the seriousness of Vinayagamoorthy's offences. However, the headnote refers to '[o]ffending in *middle* range of seriousness' (emphasis added), and Vinayagamoorthy was sentenced to 18 months imprisonment.<sup>137</sup> Coghlan J further determined that it was appropriate in the circumstances to suspend the sentences for all three men. He released the men on a recognisance release order in the sum of \$1000 to be of good behaviour for four years in the case of Vinayagamoorthy and three years for the other two men.<sup>138</sup>

A decade has elapsed since the enactment of Australia's first piece of anti-terrorism legislation. In my opinion, it is reasonable to infer that terrorism offences that have not been prosecuted in this period are either unworkable in a practical sense or are ill-adapted to respond to the threat of terrorism. Albeit that Australia does not have a constitutional or statutory Charter of Rights, our legal system is nevertheless based upon the notion that human rights should only be restricted to the extent that it is necessary to fulfil an overriding public purpose. Therefore, offences which are exceptionally broad in scope and carry severe penalties should only remain on the statute books if a case can be made that they are of assistance in reducing the threat of terrorism in Australia and to Australians.

The very infrequent use of the terrorist financing offences raises considerable doubts about their necessity to respond to the threat of terrorism. However, even if the necessity of terrorist financing offences is accepted, it is arguable that the failure to rely upon the terrorist financing offences in s 102.6(2) and div 103 reflects the fact that the remaining offences (in s 102.6(1) and under the *UN Charter Act*) are sufficient to prosecute people involved in terrorist financing. The only charges to be laid relate to the financing of terrorist organisations (as opposed to the financing of terrorism or individual terrorists). This is possibly because the movement of funds to a terrorist organisation is easier for financial institutions, intelligence and law enforcement agencies to identify.

The future for the prosecution of the terrorist financing offences is, however, uncertain. The limited application of the offences means that it is difficult to draw any definite lessons. However, three tentative points may be made. The first is that the withdrawal of the s 102.6(1) charges against three Tamil men highlights just how difficult it is to prove that an unlisted organisation is a terrorist organisation. It is possible that s 102.6 will, from now on, only be used against people who provide funds to or receive funds from a listed terrorist organisation. Such cases are likely to be extremely rare given that only 17 organisations are listed for the purposes of div 102 of the *Criminal Code*. Furthermore, even where an organisation is listed, this does not say anything about the fault element of the offence. The prosecution must still prove that the defendant either knew that, or was reckless as to whether, the organisation was listed in the regulations. There are significant difficulties in so proving. In its submission to the 2006

136 Ibid [67]–[68].

137 Ibid [69]–[73].

138 Ibid.

Security Legislation Review Committee, the Commonwealth Director of Public Prosecutions ('CDPP') stated that:

Unless it can be established that the defendant knew the organisation was specified in the regulations, which is unlikely in the majority of 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. ... [T]o prove knowledge on the part of the defendant it will be necessary to not only prove that the defendant was aware the organisation was engaged in preparing, planning, assisting in or fostering the doing of a terrorist act but also that the organisation was *in fact* engaged in preparing, planning, assisting in or fostering the doing of a terrorist act. ... The effect of this is to negate any assistance that might otherwise have been provided by specifying an organisation in the regulations.<sup>139</sup>

The list of organisations and individuals in the *UN Charter Act* is considerably longer than that under div 102 of the *Criminal Code*. However, the second point to be made is that the maximum term of imprisonment attaching to the *UN Charter Act* offences is considerably shorter than that attaching to the offences in s 102.6. Prosecutors may therefore be reluctant to rely upon the *UN Charter Act* offences. This is reinforced by the short sentences imposed on the three Tamil men. It should, however, be noted that at the time Vinayagamoorthy and his co-accused were charged, the maximum penalty was only five years imprisonment. It has since been increased to 10.<sup>140</sup> The decision by prosecutors to charge seven people under s 102.6(1) and none under s 102.6(2) suggests that the potential sentence that a defendant might receive if convicted has been a factor in deciding what charges should be laid. The s 102.6(2) offences place a considerably lower evidentiary burden on the prosecution — adopting a recklessness, rather than a knowledge or intention, fault element — but the maximum penalty is also lower: 15 years.

Finally, and in the alternative, the difficulties in proving that an organisation is in fact a terrorist organisation and the relatively low maximum penalty for the *UN Charter Act* offences may result in prosecutors beginning to rely upon the div 103 offences. However, as discussed above, these offences also pose evidentiary difficulties (albeit different ones) for the prosecution. In particular, it is necessary for the prosecution to prove that the defendant was reckless as to whether the funds will be used to facilitate or engage in a terrorist act. Further, the absence of any charges under s 102.6(2) may also suggest a reluctance to charge people with offences that rely upon a recklessness standard. Juries may steer away from convicting an individual for a serious terrorism offence where they regard that offence as capturing what they regard as 'innocent' conduct.

139 Commonwealth Director of Public Prosecutions, Submission No 15 to Security Legislation Review Committee, 31 January 2006, 10.

140 *International Trade Integrity Act 2007* (Cth) sch 1 item 22.

## VII WHERE TO FROM HERE? REFORM OF AUSTRALIA'S FINANCING OFFENCES

The first of Australia's terrorist financing offences was enacted a decade ago. Since then, parliamentary and independent reviews have considered individual offences or aspects of those offences. However, to date, there has been no holistic review. This article sought to remedy this deficiency by considering not only the technical legal meaning and operation of each of the offences but also the relationship between them. My overall assessment is that the existence of six separate terrorist financing offences is both unnecessary to combat the financing of terrorism and undesirable. A central tenet of the 'rule of law,' which is a governing principle of the Australian legal system, is that the law must be, 'so far as possible, intelligible, clear and predictable'.<sup>141</sup> However, in the context of terrorist financing, the fact that there are six separate offences, which overlap in some respects and are contradictory in others, makes it difficult for laypersons to understand their legal obligations. Given this conclusion, it is necessary to examine how the offences could best be simplified and streamlined. In undertaking this task, the fundamentals of the international offences must be kept in mind. This is because, at the very least, Australia is obliged to implement Security Council *Resolutions 1267* and *1373* and the *International Convention* into domestic law. Australia should also, so far as possible, implement Special Recommendation II of the FATF.

The first requirement of these international instruments is that Australia must criminalise the provision of funds to, or the collection of funds for, or on behalf of, a terrorist organisation. There are four Australian offences which deal with this subject matter — the two offences in s 102.6 of the *Criminal Code*, and the offences in ss 20 and 21 of the *UN Charter Act*. In my opinion, one or other of these sets of offences should be repealed. Given that each of the four offences extends to the provision of funds to a terrorist organisation for *any* purpose, it is critical that potential offenders be able to access clear information about which organisations have been listed. The existence of different mechanisms in each of div 102 and the *UN Charter Act* for the proscription of organisations (with different criteria, different decision-makers and different lists) undermines this.

There are several reasons why I suggest that the s 102.6 offences, rather than those in the *UN Charter Act*, should be repealed. First, the listing of an organisation under s 18 of the *UN Charter Act* is tied to the listing of an organisation by the United Nations. The Australian government is therefore less likely to be criticised for making a politically-motivated decision. Such a criticism was made of the government for listing the Kurdish Workers' Party shortly in advance of the Turkish Prime Minister's visit to Australia in 2006.<sup>142</sup> Second, the *UN Charter*

141 Lord Bingham of Cornhill, 'The Rule of Law' (Paper delivered at the Centre for Public Law, University of Cambridge, 16 November 2006).

142 See, eg, Australian Muslim Civil Rights Advocacy Network, Submission No 14, Parliamentary Joint Committee on Intelligence and Security, *Review of the Re-Listing of the Kurdistan Workers Party (PKK) as a Terrorist Organisation under the Criminal Code Act 1995 (Cth)*, February 2007, 1.

*Act* offences apply only to organisations that are currently listed. In contrast, it is possible for charges to be laid under s 102.6 on the basis that the organisation, although not listed, does in fact satisfy the definition of a terrorist organisation. This increases the difficulties for a person in understanding their obligations under the terrorist financing regime. There is no conclusive list that a person can consult to determine whether an organisation is a terrorist organisation. Third, the offences in the *UN Charter Act* are subject to more appropriate penalties — 10 (as opposed to 15 or 25) years. This does not mean, however, that the *UN Charter Act* offences are flawless. The two different listing processes in ss 15 and 18 are a cause of significant confusion. It would be highly beneficial for these processes to be merged and, at the same time, for the avenues for a person or organisation to challenge a listing to be strengthened. Further, there is a strong case for replacing the recklessness fault element with a fault element of knowledge.

The second category of terrorist financing offences that Australia is required to implement into domestic law are those relating to the provision or collection of funds with the knowledge or intention that the funds will be used to facilitate or commit a terrorist act. This is addressed by the two offences in div 103 of the *Criminal Code*. These offences — in ss 103.1 and 103.2 — are in substantially the same terms and, as discussed in the body of this article, the necessity for both is questionable. Section 103.1 was enacted in 2002. The subsequent enactment of s 103.2 was a response to the 2005 country evaluation report of Australia issued by the FATF. This report suggested that there was a gap in Australia's counter-terrorist financing regime that needed to be remedied. However, the discussion in Part III demonstrates that the FATF's assessment was almost certainly wrong. The offence in s 103.1 would in fact have covered the so-called gap identified by the FATF, namely, that Australia must criminalise the provision of funds to, or collection of funds for, or on behalf of, *another person*. Unlike the provisions of the Security Council Resolutions or the *International Convention*, the recommendations of the FATF are not binding on Australia. Therefore, as long as a case can be presented for not following the FATF's recommendations, Australia is not required to (and should not) implement these recommendations.

To simplify the counter-terrorism financing regime, s 103.2 of the *Criminal Code* should be repealed. This would leave the original offence — s 103.1 — in effect. However, this offence still requires a couple of amendments before it can be regarded as sufficiently tailored to the threat of terrorism. First, the fault element attaching to the connection with terrorism-related activities should be altered, in accordance with the terms of the relevant international instruments, to knowledge or intention. Second, if this proposal is rejected, the penalty attaching to the offence should be significantly reduced. The current term of life imprisonment attaching to each of the div 103 offences is not proportionate to the gravity of the unlawful conduct. My recommendation would be that, in keeping with the penalties attaching to analogous 'preparatory' offences in div 101 of the *Criminal*

*Code*,<sup>143</sup> the penalty should be reduced to 15 years imprisonment (at the very most). Even if my proposal in relation to the fault element is accepted, the penalty attached to the offence should *still* be reduced. Twenty-five years imprisonment would seem to be appropriate.<sup>144</sup>

143 The offences of providing or receiving training (s 101.2), possessing a thing (s 101.4), and collecting or making a document (s 101.5) connected with preparation for, the engagement of a person in, or assistance in a terrorist act, where the person is *reckless* as to the existence of the connection, carry maximum terms of imprisonment of 15, 10 and 10 years respectively.

144 The offences listed in n 143 above carry maximum terms of imprisonment of 25, 25 and 15 years respectively where the person *knows* of the connection.