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Dear Mr Walker

Submission for review of Australia's terrorism financing legislation and the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)

[1] Australian Lawyers for Human Rights (**ALHR**) thanks the Independent National Security Legislation Monitor (**INSLM**) for the opportunity to comment on the review of Australia's terrorism financing legislation[1] and of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).

[2] In summary, ALHR requests the INSLM's report to the Prime Minister:

(a) reinforce the central importance of human rights in designing and implementing measures to counter terrorism: see [9]-[10] & [17]-[18] below;

(b) explain the necessity for due process protections in relation to the implementation of UN Security Council listings: [44]-[45];

(c) recommend changes to the Minister's power in relation to listings: [53]-[59]; and

(d) recommend amendments to the law in relation to compensation for mistaken listing decisions, and injunction/freezing powers: [62]-[66].

ALHR has also responded to the issues raised by the INSLM in relation to *Criminal Code* terrorism financing offences (see [75]-[82]) and *National Security Information Act* ([83]-[100]).

[1] As contained in Chapter 5 of the *Criminal Code Act 1995* (Cth) and Part 4 of the *Charter of the United Nations Act 1945* (Cth).

CONTENTS

1 OVERVIEW

1.1 Introduction

[3] Almost immediately after the 11 September 2001 attacks on the World Trade Towers in New York, the global community mobilised to crackdown on terrorism including the financing of terrorism and alleged terrorist organisations.

[4] Within 11 days of the attacks, on 28 September 2001, Resolution 1373[2] was passed by the UN Security Council empowering it to proscribe individuals, entities and assets allegedly involved in the financing of terrorism. The process by which parties are proscribed is often termed 'listing'. The resolution, in its preambular text and under clause 1(c), obliges member States to domestically legislate to equal effect including criminalising the wilful provision or collection of funds for terrorist acts.

[5] The effect of this was that member States, including Australia, enacted legislation to mirror the aims of Resolution 1373 and in some cases, like Australia, by directly adopting the text of clause 1(c). Such legislation was enacted in a climate of fear and without necessarily any rigorous assessment of the domestic effect of such text within the local legal context.

[6] In the ensuing years it has come to pass that such measures to prevent the financing of terrorism have ultimately resulted in a negative impact on economic, social and cultural rights often having a significant on the basic human rights to non-discrimination, freedom of expression, privacy, and property.

1.2 Australian Laws Preventing the Financing of Terrorism

[7] The legal controls on terrorism financing in Australia are principally governed by two legislative acts, which are currently the subject of review by the INSLM:

[2] Available: http://www.un.org/News/Press/docs/2001/sc7158.doc.htm at 27 July 2013.

(e) Chapter 5 of the *Criminal Code Act 1995* (Cth)(**Code**);

(f) Part 4 of the *Charter of the United Nations Act 1945* (Cth) (**UN Charter Act**).

[8] The framework for best practice through which such laws should be enacted and implemented, both to comply with law and to properly achieve the desired counter-terrorism goals, is one which is consistent with international human rights law.

1.3 Human Rights & Countering Terrorism: A Complementary Approach

[9] The combatting of terrorism and the protection of human rights are not mutually exclusive. This has been noted by the Office of Democratic Institutions and Human Rights (ODIHR), the Organisation for Security and Cooperation in Europe (OSCE) and many other notable authoritative international human rights institutions, including the Monitor. Maintaining respect for human rights protections and international human rights norms in law are integral to effectively countering the threat of terrorism. Conversely, terrorism must be fought precisely because it so gravely threatens its victims' human rights.

[10] As the OSCE and ODIHR expressed in their 2008 Background Paper:[3]

> *Clearly, respecting human rights while countering terrorism is not only a matter of principle, but it is vital to the success of counter-terrorism measures. Indeed, far from being a hindrance, human rights provide useful guideposts to the development of an effective counter-terrorism strategy. There is thus no "dilemma" in the sense of an opposition between the aims of providing security and protecting human rights. Instead, both aims must be pursued simultaneously as integral components of counterterrorism strategy… [T]he challenges of doing so are considerable, but not insurmountable.*[4]

2 HUMAN RIGHTS IMPLICATIONS OF SUPRESSING THE FINANCING OF TERRORISM

2.1 The International counter-terrorism financing regime

[11] At the heart of the international counter-terrorism financing regime are the various international and national protocols for proscribing or "blacklisting" individuals and organisations allegedly involved in or associated with terrorism. These regimes were enacted post-911 pursuant to Resolution 1373. The consequences of proscription generally involves three main restrictions on the proscribed individual or members of the proscribed organisation:

(a) Freezing of assets;

(b) Prohibition on travel; and

(c) Prohibition the provision of any further resources (financial or otherwise)

[12] Such restrictions engage a spectrum of significant human rights protections including:

(a) non-discrimination and equality before the law (Arts 2 & 26 *International Covenant on Civil and Political Rights* (**ICCPR**));[5]

(b) freedom of movement (Art 12.1 ICCPR);

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[3] Office for Democratic Institutions and Human Rights, Combating the Financing of Terrorism While Protecting Human Rights: A Dilemma? (October 2008) Organization for Security and Co-Operation in Europe http://www.osce.org/odihr/36220 .

[4] Ibid, p 2.

[5] Signed by Australia on 18 December 1972 and ratified on 13 August 1980.

(c) equality before courts and tribunals, and a fair and public hearing of criminal charges (Art 14 ICCPR)

(d) freedom of thought, conscience and religion (Art 18 ICCPR);

(e) freedoms of expression and association (Arts 19 & 22 ICCPR, and Art 8 *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**));[6]

(f) privacy (Art 17.1 ICCPR); and

(g) right to property (Art 17 *Universal Declaration of Human Rights* (**UDHR**).

2.2 International Law

[13] At the International level, the first attempts to enact targeted terrorism financing sanctions were U.N. Security Council Resolution in 1999 and 2000. These were Resolution 1267 (1999)(restricting the financing of the Taliban and establishing the 1267 Committee to maintain the Consolidated List of proscribed organisations and individuals) and Resolution 1333 (2000) (extending the operation of Resolution 1267 to the financing of Al Qaida).

[14] In 2001 the Security Council passed Resolution 1373 called for wide-ranging international cooperation in suppressing the financing of terrorism and established a Committee of the Council to monitor the resolution's implementation.

2.3 Australian Law

[15] In Australia, these international developments were enacted through part 4 of the *Charter of the United Nations Act 1945* (Cth) and its associated legislative instrument, the *Charter of the United Nations (Dealing with Assets) Regulation 2008.*

2.4 Human Rights

[16] As expressed above, respecting and protecting human rights while countering terrorism are by no means mutually exclusive endeavours and should instead be seen as mutually reinforcing goals.

[17] In a previous submission to the Monitor dated 21 September 2012, ALHR stated the following which is equally relevant and the Monitor's current review regarding terrorism financing:

> *8…..As the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism stated [that] 'Compliance with human rights while countering terrorism represents a best practice because not only is this a legal obligation of States, but it is also an indispensible part of a successful medium and long-term strategy to combat terrorism'.[7]…*
>
> *9. Measures to combat terrorism have the potential to prejudice the enjoyment of – and violate – human rights and the rule of law.[8] ALHR acknowledges that in performing the delicate balancing between two different objectives there may from time to time be some justified incursions upon fundamental freedoms, however, only in extreme circumstances and for a*

[6] Signed by Australia on 18 December 1972 and ratified on 10 December 1975.
[7] United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, "Ten areas of best practices in countering terrorism", (Human Rights Council, Sixteenth Session, 22 December 2010), para. [12], available <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf> 20 September 2012.
[8] See: United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, above n 8, para [8]: Human Rights Council (sixteenth session, 19 January 2011) *Report of the Working Group on Arbitrary Detention*, (A/HRC/16/47) para. [48].

temporary and limited time, such as national security in times of war.[9] Such laws become problematical in the current climate of the seemingly eternal "War on Terror" after the World Trade Tower attacks, because governments have sought to justify and transmute what was once an extreme and temporary measure to the status of a new norm.

10. The United Nations General Assembly has strongly and repeatedly expressed similar views to the Special Rapporteur …[and] "urges" States Parties, to fully comply with their international legal obligations, particularly human rights, including:

- *protecting all human rights bearing in mind that certain counter-terrorism measures may impact on the enjoyment of these rights.*
- *respecting safeguards concerning the liberty, security and dignity of the person and taking all necessary steps to ensure that persons deprived of liberty are guaranteed their international legal rights, including review of detention and fundamental judicial guarantees;*
- *respecting the right of persons to equality before the law, courts and tribunals and to a fair trial,*
- *ensuring that laws criminalising terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international human rights law;*
- *ensuring that interrogation methods used against terrorism suspects are consistent with international legal obligations and are reviewed to prevent the risk of violations of international law;*
- *ensuring due process guarantees, consistent with all relevant provisions of the Universal Declaration of Human Rights, and obligations under the International Covenant on Civil and Political Rights*
- *drafting and implementing all counter-terrorism measures in accordance with the principles of gender equality and non-discrimination.[10]*

[18] In terms of terrorism-financing laws, in a report issued in March 2007, the U.N. High Commissioner for Human Rights (**OHCHR**) summarised the procedural rights implicated by targeted sanctions at the U.N. level:

While the system of targeted sanctions represents an important improvement over the former system of comprehensive sanctions, it nonetheless continues to pose a number of serious human rights concerns related to the lack of transparency and due process in listing and delisting procedures. For example, at present, there is no mechanism for reviewing the accuracy of the information behind a sanctions committee listing or the necessity for, and proportionality of, sanctions adopted, nor does the individual affected have a right of access to an independent review body at the international level. The only recourse for review of individuals and entities that may be wrongly listed, for example, is for the individual or entity to approach the Security Council through their State of nationality or residence. While a full consideration of these human rights concerns is beyond the scope of this paper, in brief, they include questions related to:

*− **Respect for due process rights:** Individuals affected by a United Nations listing procedure effectively are essentially denied the right to a fair hearing;*

*− **Standards of proof and evidence in listing procedures:** While targeted sanctions against individuals clearly have a punitive character, there is no uniformity in relation to evidentiary standards and procedures;*

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[9] See for example: UN Commission on Human Rights, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN doc E/CN.4/1985/4, 28 Sep 1984. Geneva (CHE): United Nations. Available <www.unhcr.org/refworld/docid/4672bc122.html> 19 Sep 2012.

[10] Australian Lawyers for Human Rights, Submission to the Independent National Security Legislation Monitor (INSLM) dated 21 September 2012 re Inquiry into powers relating to questioning warrants, questioning and detention warrants, control orders and preventative detention orders.

− ***Notification:*** *Member States are responsible for informing their nationals that they have been listed, but often this does not happen. Individuals have a right to know the reasons behind a listing decision, as well as the procedures available for challenging a decision;*

− ***Time period of individual sanctions:*** *Individual listings normally do not include an "end date" to the listing, which may result in a temporary freeze of assets becoming permanent. The longer an individual is on a list, the more punitive the effect will be;*

− ***Accessibility:*** *Only States have standing in the current United Nations sanctions regime, which assumes that the State will act on behalf of the individual. In practice, often this does not happen and individuals are effectively excluded from a process which may have a direct punitive impact on them; and*

− ***Remedies:*** *There is a lack of consideration to remedies available to individuals whose human rights have been violated in the sanctions process.* [11]

3 DUE PROCESS IN PROSCRIBING TERRORIST ORGANISATIONS

3.1 International Case Law Authorities

[19] The majority of jurisprudence relating to the proscribing of terrorist organisations has come out of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ).

[20] The ECtHR has not allowed governments to block individuals and organisations from accessing court processes on national security grounds. The ECtHR has rejected the proposition that the court is, for national security reasons, not capable of determining a dispute on the merits.

[21] However, in both criminal and civil cases, the ECtHR has accepted that the requirements of a 'fair trial' may be modified in anti-terrorism matters. It has allowed courts with a special composition, and the application of special procedures, to maintain secrecy.

[22] Although the inherent controls and balances of the traditional court structure have been allowed to 'bend' to accommodate anti-terrorism matters, the ECtHR has insisted that the court in question be independent, impartial and competent.

[23] One of the most importance cases in this area was the ICJ decision of *Kadi v Council of the European Union and Commission of the European Communities.*[12]

[24] Kadi's assets were frozen as a result of the United Nations Security Council Resolution 1267. Among other matters, UNSCR 1267 requires all states to 'freeze the funds and other financial assets of individuals and entities … as designated' by a Sanctions Committee, established under UNSCR 1267 with the task of designating funds derived or generated from, and property owned or controlled by, the Taliban, Osama bin Laden or Al Qaida.

[25] Kadi was designated by the Sanctions Committee and his assets in Europe were accordingly frozen under Article 2 of Regulation 881/2002, which was an EU regulation which implemented the UN Security Council's resolution.

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[11] U.N. High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism*, U.N. Doc. A/HRC/4/88, 9 March 2007, pp. 10-11, available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/117/52/PDF/G0711752.pdf?OpenElement

[12] Joined Cases C-402 & C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-6351.

[26] Kadi brought legal proceedings in what is now the General Court (formerly the Court of First Instance), seeking annulment of the EU Regulation as it applied to him. Kadi claimed that his fundamental rights had been violated, specifically, his right to be heard, his right to property, and his right to effective judicial protection.

[27] The General Court refused to review the EU regulation because it considered that would involve reviewing a measure of the UN Security Council.[13] Kadi appealed this decision to the ECJ.

[28] The ECJ allowed his appeal, ruling that there had been a violation of his right to be heard, his right to effective judicial protection, and his right to property.

[29] Notwithstanding the judgment, Kadi's assets remained frozen. The ECJ judgement required the European Council to offer Kadi some form of hearing compatible with EU law within three months of the judgement.

[30] Kadi was provided an outline of the case against him as to why his assets should be frozen and was invited to comment on the allegations. Kadi attempted to refute the allegations made in the narrative summary and asked the Commission to disclose the evidence supporting the assertions and allegations made there.

[31] The European Council refused to disclose any material and concluded 'the listing of Mr Kadi is justified for reasons of his association with the Al Qaida network' and decided that Kadi's assets should therefore remain frozen.'[14]

[32] Kadi brought fresh proceedings which were successful, the General Court held 'the mere fact of sending the applicant the summary of reasons cannot reasonably be regarded as satisfying the requirements of a fair hearing and effective judicial protection' The Court also stated that 'it is essential that the applicant be shown the inculpatory evidence used against him … , in such a way that he will have a fair opportunity to respond and to clear his name'

[33] The court concluded that Kadi's rights of defence have been "observed" only in the most formal and superficial sense'; that the procedure followed by the European Commission 'did not grant [Kadi] even the most minimal access to the evidence against him'; that 'no balance was struck between his interests … and the need to protect the confidential nature of the information in question'; and that 'the few pieces of information and the imprecise allegations in the summary of reasons appear clearly insufficient to enable the applicant to launch an effective challenge to the allegations against him'.

[34] In a similar case known as *E and F*, which was relied on in Kadi, the ECJ stated that such a lack of reasons frustrates the courts' function of carrying out an 'adequate review of the substantive legality' of a decision to list an organization in this manner, '*particularly as regards the verification of the facts, and the evidence and information relied upon in support of the listing*'. The possibility of such review, the court further stated, is 'indispensable' if fairness is to be ensured.

[13] J Kokott & C Sobotta (2012) 'The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?' 23(4) *European J International Law* 1015 at 1016. Available www.ejil.org/pdfs/23/4/2343.pdf accessed 14 Aug 2013.

[14] See Commission Regulation 1190/2008.

4 OTHER JURISDICTIONS

4.1 The United States - A Chilling Effect on Charities

[35] The negative impact of the listing resolution has been felt mostly by Muslim charities, which are led by Muslims and/or are working for Muslim communities in the United States and abroad. Since September 2001, a number of United States charities have been shut down because of laws against the financing of terrorism.[15]

[36] The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has reported that:

(a) Since 2001, over 40 charity groups have been investigated and their assets frozen, often without any evidence being available and without being prosecuted.

(b) Many Muslims were afraid to give money to charity groups in case they were suspected of providing material support to terrorism.

[37] Consequently some Muslim organizations requested a "safe" list of charities to which it would be acceptable to donate from the authorities.

[38] However, the United States authorities did not draw up any such list, for fear that it could potentially be abused for financing terrorism.

[39] The significant and concerning consequence of this is the continued chilling effect on charity work: charity administrators and potential donors now harbour significant and not unrealistic fear that their actions may be classified as material support to terrorism, even retroactively.[16] This is well explained by the UN Special Rapporteur.[17]

> *43. Charities are often involved in activities and projects that enhance the enjoyment of economic, social and cultural rights. Hence, obstacles on charity work may often have a direct negative impact on the enjoyment of these and other human rights.*
>
> *44. In the United Kingdom of Great Britain and Northern Ireland, the independent Charity Commission has opened 20 inquiries into charity organizations, most of them related to Islam in some way, allegedly having links with terrorism. The Commission states that the abuse of charities by terrorists is rare….*[18]
>
> *46. The application of government measures to curtail charity work because of a perceived risk that the funds might end up in support of terrorism is not always based on evidence. Such counter-terrorism measures are unlikely to be effective because they do not rely on the reality of charity work. They can also undermine general confidence in charities and encourage less transparent ways to transfer funds, thereby producing counterproductive effects. Counter-terrorism legislation has created uncertainty about the provision of humanitarian aid in some parts of the world, for example in Iraq, Afghanistan and the Occupied Palestinian Territory, even though these humanitarian activities are needed for the development of these places."*

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[15] The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism conducted a visit to the United States of America in May 2007 and reported this (A/HRC/6/17/Add.3)

[16] Report of OMB Watch on "Muslim Charities and the War on Terror", 2006, available from www.ombwatch.org.

[17] Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Human Rights Council, Sixth session, Agenda item 3, A/HRC/6/17, 21 November 2007. Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/149/48/PDF/G0714948.pdf?OpenElement at 27 June 2013. (Emphasis added. Some footnotes omitted).

[18] See National Council for Voluntary Organizations, press briefing "Terrorism - charities part of the solution, not part of the problem", (January 2007), and "Security and Civil Society: the impact of counter-terrorism measures on civil society organizations", available from www.ncvo-vol.org.uk.

4.2 Canada – A Chilling Effect on Humanitarian Aid

[40] The *Canadian Anti-Terrorism Act* (bill C-36) prohibits the delivery of humanitarian assistance conflict zones where terrorist organisations are suspected of profiting from the assistance.

[41] The UN Special Rapporteur has referred to the significant and serious human rights implications of such laws.[19]

> *45…. One such zone is Northern Sri Lanka, where the needs of the poor, the marginalized and the displaced are the greatest. In this specific case, Canadian aid workers who have contacts with individuals and local organizations related to the Tamil Tigers run the risk of openly contravening the Act, accused of association with a terrorist organization. The Tamil Tigers, who control much of the affected area, are listed as a terrorist entity. Canadian donors who contribute to, for example, the Tamil Rehabilitation Organization, run a similar risk because that organization has helped victims in areas where the population is mainly Tamil, and the Tigers control much of the territory. The work of many national and international charity employees is also made difficult by the Sri Lankan Public Security Ordinance which was adopted in December 2006. The law prohibits all activities that might support terrorism, which in practice has made the aid work in Tamil areas risky."*
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> …
>
> *47. In countries like Iraq and Afghanistan, military action, armed insurgency and terrorist acts have led to a security situation whereby the delivery of even the most basic humanitarian assistance is hampered. The protection of rights, such as access to health care or to basic education, is severely endangered by the weakness of State institutions and the worsening social and economic situation, which cannot develop without effective delivery of humanitarian aid.*
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> *48. Another example of measures taken to prevent the financing of terrorism resulting in a negative impact on economic, social and cultural rights is the case of Al Barakaat, which was the main organization for money transfers into Somalia and also the country's largest private sector company, with financial involvement in other sectors. The company, which had become essential for the delivery of remittances sent from family members living abroad, was run by many brokers who lived in different parts of the United States and in other countries where people of the Somali diaspora had settled. Al Barakaat was closed down by the United States Government, even though it did not release any evidence that the money being sent to Somalia through the financial transfer system supported Al-Qaida. The Somalis who were, together with Al Barakaat, put on the terrorist list of the United States Treasury department were dropped from the list a year later. In 2002, the United Nations Development Programme stated that the closure of Al Barakaat had had a destabilizing effect on the economy of Somalia and a great humanitarian impact on the population of Somalia, who were unable to receive money from their relatives.*
>
> *49. Many Al Barakaat brokers, working in many different countries, ended up listed on the terrorist list of the 1267 Committee or on different national lists. For instance, Luxembourg listed Al Barakaat, but a national court nevertheless released its assets because it could not get further information from United States intelligence and therefore had no evidence that the money was used to support terrorism.*

4.3 ALHR Recommendation

[42] ALHR strongly urges that respecting and protecting human rights is essential for any long-term and comprehensive strategy for combatting terrorism. Such an approach should be adopted by the Australian Government in combatting the financing of terrorism. This should occur in any legislation the Parliament passes, and also in any Government measures or activities.

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[19] *Ibid.*

[43] As evidenced above, UN Security Council listing decisions and their implications under the UN Charter Act can have a significant impact upon the human rights outlined above (see [12]). There are also implications in the criminal sanctions in place for breaching a listing declaration.

[44] Therefore, ALHR urges that significant due process rights must attach to the listing decision-making process and, at the very least, these should be subject to administrative review. The Administrative Appeals Tribunal is the appropriate forum for such review.

[45] ALHR urges INSLM to consider these issues, and reflect these concerns in his report to the Prime Minister.

5 THE "RELATED TO TERRORISM" CRITERION

5.1 The Legislation and Resolution 1373

[46] Part 4 of the UN Charter Act and its associated regulation, *Charter of the United Nations (Dealing with Assets) Regulation 2008* (Cth) **(the Regulation),** are concerned with listing decisions of the UN Security Council that are merely *related* to terrorism.

[47] The Regulation expressly refers to UN Security Council Listing Resolution 1373 as the source of the prescribed basis for listing persons, entities and assets.

[48] Subsections 20 (1) and (2) of the Regulation set out the requirement to list persons or entities if prescribed matters (in the UN Charter Act) are met. The power to list assets if prescribed matters are met are set out at ss 5 (1) and (3), respectively.

[49] It is notable that the UN's listing resolution:

(a) was passed in a very short space of time (within 11 days of the attacks in New York, Washington DC and Pennsylvania to which its preamble refers); and,

(b) contains no definition of "terrorism" (nor, for that matter, is the term defined in any other international treaty).

[50] In these circumstances ALHR finds it concerning that the Australian Parliament enacted legislation using the exact wording of paragraph 1(c) of the listing resolution, rather than incorporating it aims and objectives into the particulars of Australian legal language.

[51] The difficulties of importing such loose language, with such wide-reaching consequences are illustrated in the 2010 Victorian case of *R v Vinayagamoorthy*.[20]

[52] The case involved three Tamil men who were sentenced to terms of imprisonment (but released on good behaviour bonds) in respect of UN Charter Act offences. The charges regarded the supply of more than a million dollars to the LTTE. The LTTE was a proscribed "terrorist" group under the UN Charter Act. The case shows a significant incongruity between the impugned conduct and the goals of listing resolution 1373. The risk is that groups, considered by the relevant national authorities to be a political challenge, may be targeted through diplomatic pressure regardless of whether the group has engaged in activities which the listing processes addresses. Numerous examples can be considered, both historically and in current situations, eg. Tibet, West Papua, East Timor, Burma, Chechnya, and Egypt.

[20] [2010] VSC 148.

5.2 ALHR Recommendation

[53] ALHR strongly recommends that the process of proscribing and listing persons, entities and assets under the UN Charter Act (Cth) must be considerably tightened in order to fairly balance the objective of the listing resolution and human rights. A practical amendment would be to change the Ministerial obligation to list a person or entity, to instead be a discretion to list.

[54] Additionally, and in all circumstances, the legislation should expressly direct the Minister have regard to Australia's International human rights law obligations in exercising such discretion.

[55] ALHR urges INSLM to consider these issues, and reflect these concerns in his report to the Prime Minister.

6 MINISTERIAL REVOCATION OF LISTING

[56] Section 16 of the UN Charter Act provides the Minister with a discretion to revoke a listing declaration once the circumstances that led to their creation no longer exist. The Monitor has suggested such discretion has no legal or moral basis.

[57] ALHR strongly agrees with the Monitor's assessment and urges that the discretion be amended into an obligation on the part of the Minister to revoke a declaration of listing where the conditions for such declaration no longer exist.

[58] The requirement to act could be limited to where an application is made. This would the relieve the Minister from having to actively monitor whether it is appropriate to continue listings for what is otherwise quite an extensive list.

[59] ALHR urges INSLM to consider these issues, and reflect these concerns in his report to the Prime Minister.

7 COMPENSATION FOR MISTAKEN LISTING DECISIONS

[60] Section 25 of the UN Charter Act provides:

> ***Compensation for persons wrongly affected***
> *If:*
> *(a) the owner or controller of an asset instructs a person holding the asset to use or deal with it; and*
> *(b) the holder refuses to comply with the instruction; and*
> *(c) the refusal was in good faith, and without negligence, in purported compliance with this Part; and*
> *(d) the asset was not a freezable asset; and*
> *(e) the owner of the asset suffered loss as a result of the refusal;*

[61] ALHR is concerned that there is no provision for compensation in respect of listing orders made by mistake or in bad faith. Such significant limitation appears to reflect the problematic obligatory and unreviewable nature of the Minister's listing power which can serious curtail human rights (see [12]).

[62] ALHR urges that the section should be properly amended to provide for broader circumstances under which compensation is payable including where listing declarations are made by mistake or in bad faith.

[63] This provision effectively only works to provide compensation where a person refuses to deal with an asset on the basis that it is freezable, where it is actually not

freezable.[21] This offers no protection where an asset is incorrectly frozen by the Commonwealth.

[64] ALHR urges INSLM to consider these issues, and reflect these concerns in his report to the Prime Minister.

8 INJUNCTIONS AND FREEZING POWERS

[65] Freezing and injunction powers with respect to assets are potentially open to abuse and these should have stronger safeguards. This is particularly so where the provision under ss 26(7)(a) and 26(7)(b) require the court to disregard the absence of any evidence that a party presents a real threat or is likely to engage in some conduct contrary to the Charter of Nations Act.

[66] The absence of such evidence should inform the court's decision. This section should be appropriately amended. ALHR urges INSLM to consider these issues, and reflect these concerns in his report to the Prime Minister.

9 TERRORISM FINANCING AND THE RIGHT TO PRIVACY

[67] The right to privacy is a fundamental human rights recognised in a number of legally binding international human rights instruments perhaps the most important of which is Article 17 of the ICCPR.[22]

[68] In his 2009 Report on the Right to Privacy, the Special Rapporteur on the protections of human rights while countering terrorism explained the importance of the right to privacy.

> *Privacy is a fundamental human right that has been defined as the presumption that individuals should have an area of autonomous development, interaction and liberty, a "private sphere" with or without interaction with others and free from State intervention and free from excessive unsolicited intervention by other uninvited individuals. The right to privacy has evolved along two different paths. Universal human rights instruments have focused on the negative dimension of the right to privacy, prohibiting any arbitrary interference with a person's privacy, family, home or correspondence, while some regional and domestic instruments have also included a positive dimension: everyone has the right to respect for his/her private and family life, his/her home and correspondence, or the right to have his/her dignity, personal integrity or good reputation recognized and respected. While privacy is not always directly mentioned as a separate right in constitutions, nearly all States recognize its value as a matter of constitutional significance. In some countries, the right to privacy emerges by extension of the common law of breach of confidence, the right to liberty, freedom of expression or due process. In other countries, the right to privacy emerges as a religious value. The right to privacy is therefore not only a fundamental human right, but also a human right that supports other human rights and forms the basis of any democratic society.*[23]

[69] However, the right to privacy is not absolute. Where an individual or organisation is being formally investigated or screened by a security agency, personal information is shared among security agencies for reasons of countering terrorism and the right to privacy is almost automatically affected. Therefore, there are specific situations where States have a legitimate power to limit the right to privacy under international human rights law.

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[21] *Charter of the United Nations Act 1945* (Cth) s 25.
[22] The Covenant has been ratified by 165 States and signed by another 6 States.
[23] Martin Scheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Human Rights Council, Thirteenth session, Agenda item 3, A/HRC/6/17. 28 December 2009. Available: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/178/04/PDF/G0917804.pdf?OpenElement at 27 June 2013.

[70] Notwithstanding such qualification, the Special Rapporteur has emphasised that:

> *[C]ountering terrorism is not a trump card which automatically legitimates any interference with the right to privacy. Every instance of interference needs to be subject to critical assessment.*[24]

[71] There is a need for careful oversight of the reach of information surveillance, particularly with the global rise of surveillance of digital communications via interception by intelligence and security agencies. This, when combined with the goals of the international community in combatting terrorism financing and money laundering, has raised concerns of the UN Special Rapporteur. In his 2009 report, the Special Rapporteur noted various areas requiring attention.

(a) "Under the of countering terrorism, States have expanded initiatives to identify, scan and tag the general public through the use of multiple techniques which might violate an individual person's right to privacy. When surveillance occurs of places and larger groups of people, the surveillance is typically subject to weaker regimes for authorization and oversight. Human rights standards have been tested, stretched and breached through the use of stop-and-searches; the compilation of lists and databases; the increased surveillance of financial, communications and travel data; the use of profiling to identify potential suspects; and the accumulation of ever larger databases to calculate the probability of suspicious activities and identify individuals seen as worthy of further scrutiny. More advanced techniques are applied as well, such as the collection of biometrics or the use of body scanners that can see through clothing".[25]

(b) Many of the new surveillance technologies allow for the intrusions into people's lives which can remain permanent, as people's physical and biographical details are frequently centralised in databases.[26]

(c) "Many of the investigative powers given to law enforcement agencies under anti-terror laws are granted to these agencies to conduct investigations unrelated to terrorism. Meanwhile, States are following each other's lead on policy without considering the human rights implications. Many of the policies outlined above were introduced first as extraordinary, but then soon became regional and international standards. Collectively, such interference is having significant negative impacts on the protection of the right to privacy, as there is limited access to legal safeguards. Without a rigorous set of legal safeguards and a means to measure the necessity, proportionality, or reasonableness of the interference, States have no guidance on minimizing the risks to privacy generated by their new policies. The Special Rapporteur has identified the legal safeguards that have emerged through policymaking, jurisprudence, policy reviews and good practice from around the world."

10 CONCLUSION ON TERRORISM FINANCING LAWS

[72] Terrorism financing laws have, and have had, a significantly detrimental and deleterious effect on the enjoyment of human rights. This has included thehampering of

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[24] Ibid, at [13].
[25] Ibid, at [22].
[26] Ibid, at [22]. By way of example, the Special Rapporteur identifies that: *"With the goal of combating terrorism financing and money laundering, States have obliged the financial industry to analyse financial transactions in order to automatically distinguish those "normal" from those "suspicious". For instance, the European Union established a directive in 2005 on "the prevention of the use of the financial system for the purpose of money laundering and terrorist financing" requiring that financial institutions follow due diligence by reporting suspicious and "threshold" activities to financial intelligence units (FIUs). The additional processing of this information by the FIUs remains opaque, but States like Australia and Canada are processing millions of transactions each year through advanced data-mining tools."*

charitable organisations from conducting humanitarian aid work in conflict zones where terrorist organisations might also be suspected of operating. Unfortunately, often these places are severely impoverished and whose residents are in dire need of such aid and human rights protections such as Northern Sri Lanka, Afghanistan, Iraq and Somalia.

[73] The provision of humanitarian aid being significantly hampered by terrorism financing laws was taken up by the Special Rapporteur in his November 2007 Report.

[74] ALHR fully endorses the conclusions of the OHCHR in the March 2007 report in regards to respecting and protecting human rights while suppressing the financing of terrorism. The High Commission explained the central role for human rights.

> *International cooperation is vital to ensuring respect for human rights standards in relation to sanctions against individuals suspected of involvement in terrorist activity. With regard to the United Nations sanctions regime, further improvements are needed to ensure a listing process which is transparent, based on clear criteria, and with an appropriate, explicit, and uniformly applied standard of evidence, as well as an effective, accessible and independent mechanism of review for individuals and concerned States. Fair and clear procedures must include the right of an individual to be informed of the measures taken and to know the case against him or her; the right of such a person to be heard within a reasonable time by the relevant decision-making body; the right to effective review by a competent, independent review mechanism; the right of such a person to representation with respect to all proceedings; and the right of such a person to an effective remedy.*[27]

11 CHAPTER 5 OF CRIMINAL CODE - TERRORISM FINANCING OFFENCES.

11.1 Are the offences of preparation and planning for a terrorist act, including by a sole person, too early in the course of wrongdoing to justify the prescribed punishment?

[75] If one of the purposes of having substantial penalties is deterrence, there should be a graduated response, which recognises the severity of planning or preparing for a terrorist act, but also provides stronger deterrence for actually engaging in a terrorist act itself.

[76] The offence under Division 101.6 is also alone amongst terrorism offences under the the *Criminal Code Act 1995* (Cth) ('Code'), in that it doesn't require the offence to attach to a specific act, a specific organisation or some other concrete threat.

[77] In *R v Fattal*[28] this charge was made against a number of men, who discussed whether Islam might permit terrorism. They were convicted under this offence. There was no evidence provided at trial that the individuals charged presented a real danger to the community. This offence relies too heavily on prosecutorial discretion. Particularly in the context of difficulties with obtaining evidence under the *National Security Information (Criminal & Civil Proceedings) Act 2004* (Cth), this offence ought to be constrained to the scope of activities it is intended to capture, or removed in its entirety.

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[27] U.N. High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the protection of human rights and fundamental freedoms while countering terrorism*, U.N. Doc. A/HRC/4/88, 9 March 2007, para [33], available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/117/52/PDF/G0711752.pdf?OpenElement

[28] *R v Fattal and Ors* [2011] VSC 681.

11.2 Does the offence of preparing for or planning terrorism comprehend too broad a range of conduct for one offence?

[78] In addition to the comments in relation to the previous question, ALHR notes that this offence is very broad and has, in practice, been applied to conduct which might not warrant a maximum sentence of life imprisonment.

[79] The elements of the offence may be better maintained as separate offences themselves, which would allow more specific provisions to be drafted, which could provide useful guidance on what might constitute planning within the scope of the code, or on what preparatory conduct is intended to be criminalised. Such a split could also provide an opportunity to adjust the sentences attached to each offence.

11.3 Are the penalties provided for training and possession offences, knowingly or recklessly committed, appropriately weighted?

[80] No. Particularly in relation to training, consideration ought to be given to both the nature of the training given and the association of the trainer with the organisation or individuals in question.

11.4 Does the definition of membership of a terrorist organisation extend too broadly?

[81] The knowledge element in Division 102.3(1)(c) may alleviate most issues with the provision, but may still potentially be too broad where a person engages in some of the proto-state roles which a proscribed organisation might play (particularly in countries effected by civil war), including healthcare or education. Necessarily, supporting these goals mean that any money which would be expended by the proscribed organisation to support them will otherwise be free to engage in harmful behaviours.

11.5 Does the definition of advocacy of terrorism in relation to praise of conduct permit too lose or slight a connexion?

[82] The definition uses terms like “might” and “indirect”[29] and has no regard for the mental capacity of the person who actually acts on the behaviour alleged to have advocated for terrorism. Regard should be had for the capacity of the person who acts on these actions, as well as for whether there is any realistic threat presented by the praise or advocacy. If there is no such threat, the penalty for this offence is very severe.

12 NATIONAL SECURITY INFORMATION ACT 2004

12.1 Has the Operation of the NSI Act excessively impeded terrorism trials?

[83] ALHR considers there are two strands of impediment to the accused which stem from the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ('NSI Act'). These are:

(a) The impediment where the Attorney-General issues a certificate; and

(b) The impediment where there is a delay to proceedings despite no certificate being issued by the Attorney-General.

Where a certificate is issued

[29] *The Criminal Code Act 1995* (Cth) Division 102(1)(1A).

[84] Under section 26, the Attorney-General is empowered to issue a certificate which may have the effect of limiting the disclosure of evidence where such a disclosure would be prejudicial to national security.[30]

[85] Importantly, this is distinguishable from the public interest immunity, on the basis that rather than merely limiting disclosure, the certificate itself may include a summary or general indication of some set of evidence or even set out what the document is likely to prove.[31]

[86] It is also required under the NSI Act that the court have give "greatest weight" to the effect which disclosure of information under a certificate would have.[32]

[87] The confluence these factors has substantial prejudice to the accused. In terrorism trials, it is highly likely that at least some elements of the offence have an impact on national security which would require disclosure to the Attorney-General. Should the Attorney-General issue a certificate in respect of some information, this might limit the accused's ability to respond to evidence adduced against them, or to adduce their own evidence that might aid in demonstrating they are not guilty.

[88] Given that some penalties under the Commonwealth Criminal Code reverse the onus of proof or extend to preparatory conduct in the most broad sense, this is particularly important.

[89] These issues are particularly apparent in *R v Lappas*,[33] which led to the genesis of this act. In that case, the public interest immunity claim presented a problem for both the prosecution and the defence. In these proceedings Justice Gray articulated a range of issues faced by the accused that mean the refusal of the Government to produce documents (or, more relevantly to the NSI Act, where the Government would seek to adduce a type of summary statement) impinges on the accused's right to a fair trial and principles of open justice.[34]

Where a certificate is not issued

[90] There is an offence for the disclosure of information on which the Attorney-General may provide a certificate before the Attorney-General has advised of their decision whether or not to issue a certificate.[35]

[91] By creating such an offence, there is an effective delay to proceedings, whether or not the Attorney-General issues a certificate.

[92] In high interest cases, this delay may further media and public interest in the proceedings and increase the likelihood that the accused will be unable to receive a fair trial.[36]

[93] The current reporting framework is insufficient to assess whether this has happened. While the Attorney-General is obligated to inform parties of a decision on whether or not to issue a certificate (no such certificate has been issued in at least the last two years), there is no report which sets out how many applications were made to the

[30] *National Security Information (Criminal and Civil) Proceedings Act 2004* (Cth) s 26.
[31] *National Security Information (Criminal and Civil) Proceedings Act 2004* (Cth) ss 26(2)(a)(i) and 26(2)(a)(ii).
[32] *National Security Information (Criminal and Civil) Proceedings Act 2004* (Cth) s 31(8).
[33] *R v Lappas* [2001] ACTSC 115.
[34] *R v Lappas* [2001] ACTSC 115 at [14] and [24].
[35] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ss 40-46.
[36] *R v Connell (No 3)* (1993) 8 WAR 542.

Attorney-General, nor any timing on the response provided to persons notifying the Attorney-General.[37]

12.2 What, if any, resort would be appropriate to security clearance for defence counsel and to special defence counsel?

[94] Under ss 39(3) and 39(4) of the NSI Act,[38] there is an opportunity for ordinary legal counsel to apply for a security clearance, but no accompanying obligation to make a decision on whether counsel will gain security clearance within a specified timeframe.

[95] This could have the effect of increasing costs for the accused, extending the time taken to conduct a trial and hampering the accused's ability to obtain alternative counsel.

[96] By creating an offence for the disclosure of information likely to prejudice national security,[39] and construing national security on broad and imprecise terms,[40] the government is exacerbating the tension that exists in such proceedings between the rights of the accused to choose their own counsel and the duties of counsel to the court and their clients.

[97] In conjunction with requirements as to security clearance, the scope that a legal representative (whether ordinary or special defence counsel) has to discuss proceedings with the accused, to take instructions or to engage with potential witnesses may be very seriously constrained. It is difficult to see how this represents a systematic improvement over the issue of certificates under the NSI Act alone.

12.3 Final Comments on the effect of the NSI Act

[98] The NSI Act extends substantially further than just criminal proceedings. It gives the Attorney-General similar powers for other civil proceedings, which may also include refugee and migration review proceedings.

[99] The intersection of ASIO adverse security assessments with this particular set of powers is largely unexplored. Howevere, those potentially present an enormous difficulty for persons who might be involved in proceedings in conjunction with a visa revocation or a change in their status as a refugee, as in a recent matter for a Sri Lankan refugee which is yet to be put before the High Court.[41]

[100] The intervention of the executive arm of government in individual criminal and civil proceedings is troubling. Coupled with ample opportunities to avoid production of documents or to selectively produce apparent conclusions on the probative value of documents, these powers are a substantial concern for a range of matters., Their potential worst effect will occur in the most politicised cases, where there are already difficulties in the accused obtaining a fair trial.

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[37] *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 47.
[38] *National Security Information (Criminal and Civil) Proceedings Act 2004* (Cth) ss 39(3) and 39(4).
[39] *National Security Information (Criminal and Civil) Proceedings Act 2004* (Cth) s 46.
[40] *National Security Information (Criminal and Civil) Proceedings Act 2004* (Cth) ss 8, 9, 10 and 11.
[41] Hamish Fitzsimmons, "Sri Lankan refugee launches High Court challenge against detention based on ASIO assessment" (2013) <http://www.abc.net.au/news/2013-07-05/sri-lanka-refugee-launches-high-court-challenge-against-detentio/4802750> retrieved on 1 August 2013.

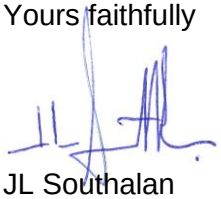
13 ABOUT AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

[101] ALHR was established in 1993, and has extensive experience and expertise in the principles and practice of international law, and human rights law in Australia. ALHR is a network of nearly 3,000 Australian lawyers, barristers, judicial officers and law students active in practising and promoting awareness of international human rights. ALHR has National, State and Territory committees through which it conducts training, information dissemination, submissions and networking related to human rights both within, and external to, the legal profession.

[102] We would like to make this letter available through our website. This is a standard practice for all our work, wherever possible. If you do not want this letter to be made publically available, please can you advise us within 10 business days of receipt of this letter.

[103] If you have any questions regarding this submission, please contact ALHR's President John Southalan, at john@southalan.net

Yours faithfully



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