



11/23994

15 September 2011

Secretary
Senate Foreign Affairs, Defence and Trade References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Dr Dermody

Inquiry into Kidnapping of Australian Citizens Overseas

The purpose of this submission is to outline to the Committee the role played by the Attorney-General's Department in relation to situations of kidnap for ransom overseas, as well as the applicable domestic and international law in this context. I understand the Committee has a particular interest in the law applicable to the payment of any ransom.

Role of the Attorney-General's Department

The Attorney-General's Department is responsible for administering relevant criminal and counter-terrorism laws, including the offences of financing and providing support to terrorist organisations. As such, the Department is responsible for the provision of legal policy advice in relation to these offences.

In addition, the Attorney-General's Department provides international law advice to the Government in situations involving Australian citizens who are kidnapped and held for ransom overseas. These situations may arise in various contexts, including armed conflict, failed states, terrorist acts and piracy.

Domestic Legal Context

The following sets out the relevant legal framework that could apply in situations where a person is seeking to make a ransom payment. Whether any relevant offences could be applicable would depend on the individual circumstances of each case.

Criminal Code Act 1995 (Cth)

Subdivision B of Division 102 of Part 5.3 of the Criminal Code contains offences related to 'providing support or resources to' and 'getting funds to, from or for' a 'terrorist organisation'. These offences could be applicable in the context where a kidnapping takes place in a political context.

A 'terrorist organisation' is defined in section 102.1 as an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs), or an organisation that is listed under the Regulations.

Under section 102.6, a person commits an offence if:

- (a) the person intentionally:
 - (i) receives funds from, or makes funds available to, an organisation (whether directly or indirectly); or
 - (ii) collects funds for, or on behalf of, an organisation (whether directly or indirectly); and
- (b) the organisation is a terrorist organisation

Under section 102.7, a person commits an offence if:

- (a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division; and
- (b) the organisation is a terrorist organisation

To be guilty of an offence under section 102.6 or 102.7 the person must also either know or be reckless to the fact that the organisation is a terrorist organisation. Accordingly, for the purposes of the above offences, paying a ransom may constitute an offence only if the person knows or is reckless to the fact that the organisation to which the ransom is paid is a terrorist organisation.

Under section 102.8, a person commits an offence if:

- (a) on 2 or more occasions:
 - (i) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
 - (ii) the person knows that the organisation is a terrorist organisation; and
 - (iii) the association provides support to the organisation; and
 - (iv) the person intends that the support assist the organisation to expand or to continue to exist; and
 - (v) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation.

This offence only applies in the case of listed terrorist organisations. It is possible that this offence could be relevant to circumstances of kidnap for ransom.

For completeness, I note that Division 103 of the Criminal Code contains offences related to financing terrorism and terrorists. Under section 103.1, a person commits an offence if:

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

Under section 103.2, a person commits an offence if:

- (a) the person intentionally:
 - (i) makes funds available to another person (whether directly or indirectly); or

- (ii) collects funds for, or on behalf of, another person (whether directly or indirectly); and
- (b) the first-mentioned person is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act.

The offences are intended to ensure that innocent conduct is not criminalised. This is made clear in the explanatory memorandum to the *Anti-Terrorism Act (No. 2)* (2005), which states the following in relation to the offences in Division 103:

The proposed offence will not apply to a person who provides or collects funds believing those funds will be used for an innocuous purpose, irrespective of whether the funds are in fact used for a terrorist act.

Defences may be available in relation to offences in the Criminal Code; these are outlined in Division 10. Relevantly, the defence of duress provides, at section 10.2:

(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.

(2) A person carries out conduct under duress if and only if he or she reasonably believes that:

- (a) a threat has been made that will be carried out unless an offence is committed; and
- (b) there is no reasonable way that the threat can be rendered ineffective; and
- (c) the conduct is a reasonable response to the threat.

...

The defence of self-defence relevantly provides, at section 10.4:

(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

- (a) to defend himself or herself or another person; or
- (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person;

...

and the conduct is a reasonable response in the circumstances as he or she perceives them.

Charter of the United Nations Act 1945

As a member of the United Nations, Australia has obligations to enforce UN Security Council resolutions, including those relating to targeted financial sanctions (see below). Obligations relating to targeted financial sanctions are implemented under the *Charter of the United Nations Act 1945* (Cth) and are aimed at preventing the direct or indirect provision of assets to individuals or entities including, for example, terrorist organisations, that are listed pursuant to UN Security Council resolutions. The Department of Foreign Affairs and Trade is responsible for administering this legislation.

Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Cth)

The *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (AML/CTF Act) applies to a range of services provided by entities including financial institutions, bullion dealers and alternative remittance dealers. The AML/CTF Act imposes four key obligations on regulated businesses to detect and deter money laundering, and to provide financial intelligence to revenue and law enforcement agencies:

1. **customer due diligence** - identification and verification of identity and ongoing monitoring of transactions
2. **reporting** - suspicious matters, threshold transactions and international funds transfer instructions
3. **record keeping**, and
4. **establishing and maintaining the AML/CTF program** – designed to identify, mitigate and manage the ML/TF risks a particular business may face.

The AML/CTF Act establishes a risk based approach. This means that regulated businesses must identify the risks associated with providing certain services, and take action proportionate to that risk. As such, in situations where a person is seeking to make a ransom payment it is possible that extra controls will be applied by money transfer service providers, or the transaction will not be carried out if the transfer provider considers under its AML/CTF program that the money laundering or terrorism financing risk is too great.

Additionally, the transaction will be reported to AUSTRAC if the transfer provider considers that the transaction is suspicious, is for an amount of \$10,000 or more, or is an international transfer. This information assists AUSTRAC to build financial intelligence which is available to federal and state law enforcement authorities to assist them with their investigations.

The Financial Action Task Force (FATF) is the global standard setting body for AML/CFT. The FATF have developed the 40+9 Recommendations for combating money laundering and terrorist financing. As part of the 9 Special Recommendations on combating terrorism financing, FATF members are required to have laws to criminalise terrorist financing and have measures in place to freeze and confiscate terrorist assets, and to require those subject to AML/CTF regulation to report suspicious matters relating to terrorism to competent authorities.

International Legal Context

There are several international law instruments that may prohibit payments to certain individuals and organisations in ransom situations.

In particular, UN Security Council sanctions often require UN Member States to ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any persons or entities within their territories, to, or for, the benefit of designated persons or entities.

Existing sanctions regimes include those directed at individuals or entities associated with terrorism, based on UN Security Council Resolution 1373. Separate UN sanctions are also in place directed against Al Qaida and associated individuals and entities. Finally, there are UN sanctions targeted at individuals and entities in particular countries (including Cote d'Ivoire, Democratic People's Republic of Korea, Democratic Republic of Congo, Eritrea, Iran, Lebanon, Liberia, Libya, Somalia and Sudan). Depending on the specific circumstances, payment of a ransom in relation to an Australian citizen kidnapped overseas could raise issues about compliance with these sanctions regimes.

Also, the International Convention for the Suppression of the Financing of Terrorism, to which Australia is a party, imposes an obligation upon States to create the offence of providing or collecting funds, directly or indirectly, with the intention or knowledge that they are to be used, in full or in part, to carry out a terrorist act. Again, depending on the specific circumstances, payment of a ransom in relation to an Australian citizen kidnapped overseas could raise issues about compliance with this Convention.

Yours sincerely



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