

Chapter 10

Legal implications of negotiating and paying a ransom

10.1 The committee has considered the government's no-ransom policy. As noted earlier this stance is consistent with Australia's major allies and those of a number of other countries. Indeed, this policy aligns with the principle underpinning a number of international conventions. In this chapter, the committee considers the implications that the respective international conventions and Australia's domestic laws have for people considering the payment of a ransom.

United Nations

10.2 By way of a number of key instruments, the international community through the United Nations has denounced hostage-taking and expressed its objection to the payment of ransoms.¹

International Convention against the Taking of Hostages

10.3 The United Nations General Assembly adopted the *International Convention against the Taking of Hostages* on 17 December 1979, which entered into force on 3 June 1983. It requires member states to make hostage-taking an offence punishable by appropriate penalties and to take all appropriate measures to ease the situation of hostages and to facilitate their release.²

International Convention for the Suppression of the Financing of Terrorism

10.4 The United Nations General Assembly adopted the *International Convention for the Suppression of the Financing of Terrorism* on 9 December 1999 (resolution 54/109). At that time, the General Assembly expressed grave concerns about the financing of terrorism and noted further that existing multilateral legal instruments did not expressly address such financing. The convention, which entered into force on 10 April 2002, recognised the urgent need 'to enhance international cooperation among States in devising and adopting effective measures for the prevention of the financing of terrorism as well as for its suppression through the prosecution and punishment of its perpetrators'. It requires States parties to take steps to prevent or counteract the

1 See for example, United Nations Security Council, Resolution 1373 (2001), p. 1; United Nations, General Assembly, Summary of the Human Rights Council panel discussion on the issue of human rights in the context of action taken to address terrorist hostage-taking, prepared by the Office of the United Nations High Commissioner for Human Rights, A/HRC/18/29, 4 July 2011, paragraph 11.

2 See for example, United Nations, General Assembly, Summary of the Human Rights Council panel discussion on the issue of human rights in the context of action taken to address terrorist hostage-taking, prepared by the Office of the United Nations High Commissioner for Human Rights, A/HRC/18/29, 4 July 2011, paragraph 6.

financing of terrorism: to in effect, 'prevent such acts by "drying up" their sources of funding'.³

10.5 The convention imposes an obligation upon States to create the offence of providing or collecting funds, directly or indirectly, unlawfully and wilfully with the intention or knowledge that they are to be used, in full or in part, to carry out a terrorist act.⁴ The convention specifically:

- requires parties to take steps to prevent and counteract the financing of terrorists, whether directly or indirectly, and that under no circumstances are the such acts justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or similar nature;
- commits States to hold those who finance terrorism criminally, civilly or administratively liable for such acts and for such offences to be punishable by appropriate penalties; and
- provides for the identification, detection, and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. Bank secrecy is no longer an adequate justification for refusing to cooperate.⁵

10.6 It should be noted that the convention also covers attempts to commit such acts, to organise or direct others to commit them, participate as an accomplice or intentionally contribute to their commission.⁶ Australia is a party to this convention and as such the payment of a ransom in relation to an Australian citizen kidnapped overseas could raise issues about compliance with the convention.

Security Council resolution 1373 (2001)

10.7 In 2001, the Security Council called on states to 'work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism'.⁷ By

3 Article 2, *International Convention for the Suppression of the Financing of Terrorism*; Pierre Klein, *International Convention for the Suppression of the Financing of Terrorism*, United Nations Audiovisual Library of International Law, United Nations, 2009, p. 1.

4 Article 2, *International Convention for the Suppression of the Financing of Terrorism*; Attorney-General's Department, *Submission 11*, p. 5; P Klein, *International Convention for the Suppression of the Financing of Terrorism*, United Nations Audiovisual Library of International Law, United Nations, 2009, p. 1.

5 Articles 5, 6 and 8, *International Convention for the Suppression of the Financing of Terrorism*; Pierre Klein, *International Convention for the Suppression of the Financing of Terrorism*, United Nations Audiovisual Library of International Law, United Nations, 2009, p. 1.

6 Article 2, *International Convention for the Suppression of the Financing of Terrorism*.

7 *Resolution on threats to international peace and security caused by terrorist acts*, SC Res 1373, UN Security, UN Doc S/RES/1373 (2001), p. 1.

adopting resolution 1373 (2001), the Council requires all States to take responsibility for preventing and punishing the financing of terrorism by making it a criminal offence for a national to provide funds to be used to carry out terrorist acts. More specifically, it requires the States to:

- criminalise the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals in 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;
- freeze 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;
- prohibit their nationals or any persons within their territories from making funds or financial assets or services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorists acts; and
- ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and such acts are established as serious criminal offences in domestic laws.⁸

10.8 As a member of the United Nations, Australia has obligations to enforce this resolution.

Australia's compliance with UN conventions and resolutions

10.9 Consistent with the conventions and the resolution, Australia has taken the necessary measures under its domestic legislation to establish criminal offences relating to kidnapping, the financing of terrorist activities and to make those offences punishable by appropriate penalties.

10.10 Firstly, Australia has enacted legislation that makes hostage-taking a criminal offence. Under section 115.3 of the *Criminal Code Act 1995 (Commonwealth)* a person is guilty of an offence if:

- (a) the person engages in conduct outside Australia; and
- (b) the conduct causes serious harm to another person; and
- (c) the other person is an Australian citizen or a resident of Australia; and
- (d) the first-mentioned person intends to cause serious harm to the Australian citizen or resident of Australia or any other person by the conduct.

8 *Resolution on threats to international peace and security caused by terrorist acts*, SC Res 1373, UN Security, UN Doc S/RES/1373 (2001), p. 2; 'Security Council unanimously adopts wide-ranging anti terrorism resolution', media release, SC/7158.

10.11 Secondly, the Australian Government has established a domestic legal framework that applies to the financing of terrorist acts which has direct relevance to the payment of ransoms. The following legislation is relevant—the *Criminal Code Act 1995 (Commonwealth)*, *Anti-Terrorism Act (No. 2) 2005 (Commonwealth)*, *Anti-Money Laundering and Counter Terrorism Financing Act 2006 (Commonwealth)*.

Suppression of the Financing Terrorism Act 2002 (Commonwealth)

10.12 The Australian Government implemented its obligations under the Convention for the Suppression of the Financing of Terrorism and resolution 1373 by passing the *Suppression of the Financing Terrorism Act 2002 (Commonwealth)*. The Act was passed with amendments on 27 June 2002 and received assent on 5 July 2002.

10.13 This legislation inserted a new financing of terrorism offence into the Australian Federal Criminal Code.⁹ It also supplemented the freezing of suspected terrorist assets which were already in place under the *Charter of the United Nations Act 1945* and amended the *Financial Transaction Reports Act 1988*. The legislation among other things:

- creates an offence directed at those who provide or collect funds with the intention that they be used to facilitate terrorist activities; makes it an offence for a person to provide or collect funds where the person is reckless as to whether those funds would be used to facilitate or carry out a terrorist act;¹⁰
- requires cash dealers (financial institutions, financial corporations, insurers, securities dealers, future brokers, trustees and persons who collect, hold, exchange, remit or transfer cash and non-cash funds on behalf of others) to report transactions that are suspected to relate to terrorist activities.¹¹

10.14 The term 'funds' is defined as property and assets of every kind and legal documents or instruments in any form. Terrorist act is defined to mean a specified action or threat of action that is made with the intention of advancing a political, religious or ideological cause. The types of actions covered by the definition include actions involving serious harm to persons, serious damage to property, endangers life, creates a serious risk to the health or safety of the public or a section of the public, or is designed to interfere with essential electronic systems.¹²

9 D Williams, Attorney-General, *House of Representatives Hansard*, 12 March 2002, p. 1043.

10 *Criminal Code Act 1995*, s. 103.1.

11 *Financial Transaction Reports Act 1988*, s. 16(1A).

12 *Criminal Code Act 1995*, ss 100.1 (1) (2); *Suppression of the Financing of Terrorism Bill 2002*, Explanatory Memorandum, p. 4.

Criminal Code Act 1995 (Commonwealth)

10.15 Subdivision B of Division 102 of Part 5.3 of the *Criminal Code Act 1995 (Commonwealth)* contains offences related to 'getting funds to, from or for a terrorist organisation',¹³ 'providing support to a terrorist organisation'¹⁴ and 'associating with terrorist organisations'.¹⁵ As noted in the Attorney-General's Department submission 'these offences could be applicable in the context where a kidnapping takes place in a political context'.¹⁶ Under section 102.6 of the *Criminal Code Act 1995*

(1) A person commits an offence if:

(a) The person intentionally:

- (i) receives funds from, or makes funds available to, an organization (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; and

(c) the person knows the organisation is a terrorist organisation.

10.16 The offence under section 102.6(1) carries a maximum penalty of 25 years imprisonment. To be guilty of an offence under section 102.6 the person must either know or be reckless to the fact that the organisation is a terrorist organisation. 'Knowledge' and 'recklessness' are defined in sections 5.3 and 5.4 respectively of the Criminal Code. Section 5.3 provides that a person has knowledge of a circumstance (in this case that an organisation is a terrorist organisation) if they are aware that the circumstance exists or will exist in the ordinary course of events. Section 5.4 provides that a person is reckless with respect to a circumstance if (a) they are aware of a substantial risk that the circumstance exists or will exist, and (b) having regard to the circumstances known to them, it is unjustifiable to take the risk.¹⁷ Accordingly, 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.¹⁸

10.17 Notably section 102.6(1) of the *Criminal Code Act 1995* criminalises the collection of funds for or on behalf of a terrorist organisation. The Financial Action Task Force on Money Laundering (FATF) recommended that the wilful collection of funds for terrorist organisation be explicitly covered by terrorist financial offences.¹⁹

13 *Criminal Code Act 1995*, s. 102.6.

14 *Criminal Code Act 1995*, s. 102.6.

15 *Criminal Code Act 1995*, s. 102.8.

16 Attorney-General's Department, *Submission 11*, p. 2.

17 See for example Anti-Terrorism Bill (No. 2) 2005, Explanatory Memorandum, p. 12.

18 Attorney-General's Department, *Submission 11*, p. 2.

19 See for example Anti-Terrorism Bill (No. 2) 2005, Explanatory Memorandum, p. 12.

10.18 Under section 102.7 of the *Criminal Code Act 1995* 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; and
- (c) the person knows the organisation is a terrorist organisation.

10.19 Under section 103.2(1) of the *Criminal Code Act 1995*:

(1) 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 funds to facilitate or engage in a terrorist act.

10.20 The offence in subsection 103.2(1) deals with financing terrorism and explicitly requires that the funds be made available to or collected for, or on behalf of, another person: 'If the person providing or collecting the funds is reckless as to whether that other person will use the funds to facilitate or engage in a terrorist act, the offence will be made out'.²⁰

10.21 Under section 103.2(2) of the *Criminal Code Act 1995*

(1) A person commits an offence under section (1) even if:

(a) a terrorist act does not occur; or

(b) the funds will not be used to facilitate or engage in a specific terrorist act; or

(c) the funds will be used to facilitate or engage in more than one terrorist act.

10.22 The effect of this provision is that as long as the elements of the offence can be proven it does not matter whether a terrorist act actually occurs.²¹

Charter of the United Nations Act 1945 (Commonwealth)

10.23 Under the *Charter of the United Nations Act 1945 (Commonwealth)* there are financial sanctions aimed at preventing the direct or indirect provision of assets to individuals or entities that are listed pursuant to UN Security Council resolutions. Part

20 See for example Anti-Terrorism Bill (No. 2) 2005, Explanatory Memorandum, p. 12.

21 See for example Anti-Terrorism Bill (No. 2) 2005, Explanatory Memorandum, p. 12.

4 of the Act created new offences directed at those who provide assets to, or deal in the assets of persons and entities involved in terrorist activities.

10.24 Section 20 provides that a person who holds a freezable asset is guilty of an offence if the person uses or deals with the asset, or allows or facilitates a use or dealing, and is reckless as to whether the asset is a freezable asset, and the use or dealing is not in accordance with a notice under section 22. The maximum penalty for dealing with a freezable asset is 5 years imprisonment. A freezable asset means an asset that listed by the Minister for Foreign Affairs or owned or controlled by a person or entity listed by the Minister or proscribed by regulations, or is derived or generated from such an asset.

10.25 The part also contains associated provisions that, amongst other things, provide for the Minister for Foreign Affairs to list persons and entities for the purpose of the offences, to revoke a listing and to permit a specified dealing in a freezable asset.²² Section 22 provides that the owner of an asset may apply in writing to the Minister for Foreign Affairs for permission to make the asset available to a proscribed person or entity or, if the asset is a freezable asset, to use or deal with the asset in a specified way.

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

10.26 The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) imposes obligations on regulated businesses to detect and deter money laundering, and to provide financial intelligence to revenue and law enforcement agencies. As the Attorney-General's Department's submission outlines, the AML/CTF Act establishes a risk based approach. This means that regulated business 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 programs that the money laundering or terrorism financing risk is too great.

Defences

10.27 The Attorney-General's Department's submission outlined two defences that may be available in relation to offences in Division 10 of the Criminal Code.²³ Firstly, at section 10.2 of the *Criminal Code Act 1995*, the defence of duress provides:

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

22 Charter of the United Nations Amendment Bill 2002, Explanatory Memorandum.

23 Attorney-General's Department, *Submission 11*, p. 3.

- (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.

10.28 Secondly, at section 10.4 of the *Criminal Code Act 1995*, the defence of self-defence provides:

- (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.

10.29 Mr Geoffrey McDonald, First Assistant Secretary in the National Law and Policy Division of the Attorney-General's Department, explained the relevance of these defences to the payment of a ransom that could breach Commonwealth law. With regard to duress, he noted:

If you commit an offence in response to a threat that will be carried out unless you do so, as long as there is no reasonable way to render the threat ineffective and your conduct is reasonable in response to the threat, even though it would otherwise be criminal, you can rely on that defence.²⁴

10.30 According to Mr McDonald, people often do not appreciate that self-defence 'covers defending someone else'. He also referred to terminating the unlawful imprisonment of another person as a recognised defence.²⁵ These defences are considered later in this chapter.

24 *Committee Hansard*, 6 October 2011, p. 27.

25 *Committee Hansard*, 6 October 2011, p. 27.

Paying a ransom and the law

10.31 Both the Wood and Brennan family were surprised and distressed to learn of legal impediments and possible criminal offences associated with transferring funds overseas.

10.32 According to Dr Wood, his family formed the view that at some stage it would be prudent for them to have some money available in Baghdad for possible use by their chosen intermediary. He noted, however, that they found it very difficult to get money into Baghdad and their first attempt was 'stymied by the somewhat heavy-handed provisions of the criminal code'.²⁶

10.33 The family was aware that there were limits on the amount of money that an Australian could take out of the country. In Dr Wood's view, family members may have been somewhat naïve in that they did not think that their attempt to transfer their own money through the banks for what they believed was a benevolent purpose could invoke the criminal code.²⁷ Dr Wood explained in greater detail the family's efforts to move funds to Baghdad.

Once the family had gathered its money together to make a charitable donation, Vernon [Wood], stating his purpose in connection with the well-publicised case, asked his bank how to transmit money to Baghdad...Relying on the Criminal Code, the bank's heavy-handed response to Vernon caused him trauma and potential financial embarrassment: it reported his approach and placed a monitor on his accounts. Consultations of solicitors (for both the bank and Vernon, which the bank funded) and of government lawyers followed.²⁸

10.34 In his submission, Dr Wood stressed that nobody had forewarned his family about the counter-terrorism provisions of Australia's Criminal Code that can trap people involved in trying to transmit money that 'could conceivably be converted to terrorist ends'.²⁹ He then noted that belatedly and quietly, DFAT informed the family that certain international corporations, with risk assessment, security and financial transaction functions, 'might be able to transmit money in circumstances such as ours'.³⁰ But, he found that the relationship between DFAT and Vernon Wood's bank with these corporations, and between the corporations and the family lacked transparency. Indeed, for him, the fact that the relationships were meant to be secret was disconcerting. With a change in circumstances, the family later made a donation to a charity in Iraq, without difficulty.³¹ Dr Wood explained that:

26 *Committee Hansard*, 6 October 2011, p. 2.

27 *Committee Hansard*, 6 October 2011, p. 7.

28 M Wood, *Submission 3*, p. 3.

29 M Wood, *Submission 3*, p. 3.

30 M Wood, *Submission 3*, p. 3.

31 M Wood, *Submission 3*, pp. 3–4.

I felt then and still feel that someone in government, perhaps not DFAT but possibly the Attorney-General's Department, might have and perhaps should have alerted us to the possible implications of what we felt we needed to do as a family.³²

10.35 He suggested that DFAT, the AFP or government lawyers should 'guide the family, proactively, through "the minefield"'.³³ In his view, relevant government agencies should advise a family in similar circumstances of relevant provisions of Australia's Criminal Code so that it also would not unwittingly be in breach of the law.³⁴

10.36 Furthermore, Dr Wood was not reassured by the Attorney-General's Department's reference to an Explanatory Memorandum which mentioned 'the presumption of innocence, or something'.³⁵ From Dr Wood's perspective, if there is not something in the law which provides a protection, then 'there is a vulnerability'.³⁶ He was of the view that the Criminal Code needed to be reviewed in light of his family's experiences in trying to transfer funds to Iraq:

I think the provisions, particularly the use of the word 'recklessly', which is a very broad word, could conceivably lead an entirely innocent party, such as I felt we were, being taken through a court and found guilty because of the limited scope for exceptional circumstances in those provisions.³⁷

10.37 The Brennan family experienced the same difficulties and anxieties as the Wood family. Mr Brennan explained that the banks were willing to help, but they needed government clearance. Having decided to pay the ransom, his family had to:

...firstly find a bank that would assist with and was capable to make the transfer. Secondly, the Australian Government's approval had to be obtained for this to occur—the latter being the most difficult because of the threat of assets being frozen if my family paid this ransom and possible prosecution in Australia and overseas, for criminal breaches of Australian and UN laws.³⁸

10.38 Mr Brennan, in his submission, stated further:

The Australian Government would not give my family immunity from prosecution or even let them use the Australian diplomatic bag system to move funds safely to Nairobi, where my sister and AKE [the private

32 *Committee Hansard*, 6 October 2011, p. 2.

33 M Wood, *Submission 3*, p. 4.

34 M Wood, *Submission 3*, p. 4.

35 *Committee Hansard*, 6 October 2011, p. 7.

36 *Committee Hansard*, 6 October 2011, p. 7.

37 *Committee Hansard*, 6 October 2011, p. 7.

38 N Brennan, *Submission 12*, p. 18.

contractor assisting the family], were waiting to close the ransom-release deal.³⁹

10.39 As previously noted, Mrs Bonney was of the view that the government was well aware that her family was paying a ransom. The banks, however, were reluctant to handle the transaction because they feared being liable to prosecution or sanction. Mrs Bonney explained that the banks were extremely concerned that the money:

...would actually be withdrawn from circulation when it left the country, before it actually got to Somalia. So that was a major concern for the banks because they had to report that movement. I believe, certainly with Bank of Queensland, that was them trying to quite clearly say to us, 'This may not make it over there'.⁴⁰

10.40 Mr Brennan informed the committee that the operator of the money transfer company they used was at risk of having his business shut down and his assets frozen.⁴¹ He noted further the same concerns related to generous individuals as well: that they would possibly face prosecution.⁴² He wanted to know whether the Australian government was in the same seat by giving his family a \$100,000 consular loan, which it knew was going straight into the ransom basket.⁴³ Mr Brennan also noted that he could not understand being told six months after his return by government officials that they believed that a criminal gang was involved in the kidnapping and that 'there is no possible prosecution towards the family'. He asked, 'When did they know that? How do they know that? And if they knew that as a fact before the ransom was paid, why did they not facilitate it?'⁴⁴

Defences and likelihood of prosecution

10.41 The committee has noted that there are two defences that may be available in relation to offences in the Criminal Code—duress and self-defence. Mr McDonald informed the committee that the Director of Public Prosecutions would always take into account whether it was in the public interest to prosecute and that decisions were often made not to prosecute because the public interest is not served by it for various reasons:⁴⁵

...the Director of Public Prosecutions has prosecutorial discretion and would take into account whether it was in the public interest to prosecute someone or not. It would also take into account what defences are available.

39 N Brennan, *Submission 12*, p. 18.

40 *Committee Hansard*, 11 October 2011, p. 6.

41 *Committee Hansard*, 11 October 2011, p. 6.

42 *Committee Hansard*, 11 October 2011, p. 6.

43 *Committee Hansard*, 11 October 2011, p. 6.

44 *Committee Hansard*, 11 October 2011, p. 6.

45 *Committee Hansard*, 6 October 2011, p. 27.

There are defences in relation to duress and the like. No-one has been prosecuted for these sorts of offences in these circumstances. My feelings would be that it would probably be unlikely there would be a prosecution.⁴⁶

10.42 In support of this opinion, Mr Bill Campbell, General Counsel, indicated that he was not aware of any action that has been taken against a person for securing the release of a kidnapping victim by paying a ransom.⁴⁷

10.43 The committee understands that the prosecution would need to give careful consideration to the defences available to a family paying a ransom and whether to prosecute.⁴⁸ As noted previously, however, people who get caught out by this law are not in a position to appreciate that at some future date the Director of Public Prosecutions may use his or her discretion in their favour or that they have defences of duress and self-defence available to them. People seeking to transfer money overseas in order to secure the release of a loved one are focused on the immediacy and urgency of their predicament.

Need for criminal offences relating to the payment of a ransom

10.44 Dr Wood questioned the need for such draconian provisions. He stated the major lesson for him was 'that relevant provisions of Australia's Criminal Code...make no allowance for exceptional circumstances such as a family member's kidnapping for ransom'.⁴⁹ He argued that in circumstances such as his family's:

Australia's Criminal Code should not imperil citizens initiating action with their bank, reasonably, openly and in good faith, to withdraw or transmit their own money...⁵⁰

10.45 He suggested that perhaps a clause could be inserted in the legislation that would 'allow a government minister or delegate to authorise a bank in special cases to do what the Code would ordinarily prohibit'.⁵¹

10.46 The committee asked the officers from the Attorney General's Department to comment on possible changes to Australian law that would assist families of a kidnapped victim such as allowing an independent officer or minister the discretion in

46 *Committee Hansard*, 6 October 2011, p. 23. Mr McDonald discussed the prosecutorial discretion that exists in countries with a legal tradition similar to Australia: 'That would apply in, say, the UK and the United States. Prosecution systems are different from ours in, say, European countries. But I would expect that they would have some discretion in relation to what matters they examine and what they do not'. *Committee Hansard*, 6 October 2011, p. 29.

47 *Committee Hansard*, 6 October 2011, p. 26.

48 *Committee Hansard*, 6 October 2011, p. 27.

49 *Committee Hansard*, 6 October 2011, p. 1.

50 M Wood, *Submission 3*, p. 4.

51 M Wood, *Submission 3*, p. 4.

special circumstances to permit the transfer of money.⁵² In response, Mr McDonald explained that some policy issues were relevant to any exemption:

One has to be very, very careful about the way it is framed to ensure that it is not counterproductive and able to be manipulated by some of the terrorist organisations and the like. You would not want a secondary consequence to be that, knowing there was this capacity, Australians became more targeted. Certainly what you are talking about is something that could be examined. Of course it would be a policy decision for the government.⁵³

10.47 In the same context, the officers were asked about the merits of a legislative model such as subsection 22(1) of the *Charter of the United Nations Act 1945* which allows the owner or holder of a freezable asset to apply in writing to the minister for permission to use or deal with the asset in a specified way.⁵⁴ This power would only be exercised in exceptional circumstances, for example, to protect the rights of third parties.⁵⁵ In regards to this suggestion, Mr Campbell stated:

...if what you are getting at is whether you could have a provision which said a minister in other circumstances in relation to the payment of a ransom could give an authorisation, it is partly a question of policy about whether that would be done—in the sense of putting that provision in.⁵⁶

10.48 Mr Campbell, however, cited another major consideration—Australia's obligation to comply with its international obligations.⁵⁷ Asked where it would be legally possible to pay a ransom, he answered:

If there were no laws in place which prevented the payment of the ransom and there were no international obligations that bore on the payment of the ransom. That is as a matter of law.⁵⁸

10.49 According to Mr Campbell, by changing the law you might well be able to overcome an issue under domestic law, but you cannot by changing the law overcome Australia's international obligations in the area:

...there are certainly two levels of law that apply: there are the international obligations, which our domestic law implements; and there is the domestic law. What I am saying is: if you have an international obligation, you

52 *Committee Hansard*, 6 October 2011, p. 24.

53 *Committee Hansard*, 6 October 2011, p. 24.

54 *Committee Hansard*, 6 October 2011, pp. 27–28.

55 Charter of the United Nations Amendment Bill 2002, Explanatory Memorandum.

56 *Committee Hansard*, 6 October 2011, p. 28.

57 *Committee Hansard*, 6 October 2011, p. 24. He referred to and also drew attention to the reporting mechanisms to the UN about compliance with sanctions. *Committee Hansard*, 6 October 2011, p. 26.

58 *Committee Hansard*, 6 October 2011, p. 25.

cannot generally overcome that international obligation by changing the domestic law.⁵⁹

10.50 In his view, the position remains that no payment should be made if it is going to place Australia in breach of its international obligations—that 'is one aspect to it that would need to be taken into account if you were going to amend the law'.⁶⁰ Mr McDonald noted that countries all over the world have similar offences relating to the financing of terrorism, for example in the UK and United States:

In fact, Australia has been one of many countries that have been encouraging other countries to deal with the financing of terrorism. Successive governments have made the financing of crime a particular target. We know that it is a way to hurt organised crime; of course, terrorism is a form of organised crime.⁶¹

10.51 The committee understands the need for Australia to comply with its international obligations and supports the government's no-ransom policy. Even so, it believes that the government should consider exploring avenues that would relieve the legal burden on those seeking to secure the safe return of a loved being held hostage overseas for ransom.

Recommendation 7

10.52 In light of the difficulties experienced by both the Wood and Brennan families, the committee recommends that the government investigate thoroughly the options for making special allowance for people seeking to transmit money overseas in order to save the life of another Australian citizen being held hostage.

10.53 The committee recommends particularly that the government consider changes to the relevant sections of the Criminal Code and the United Nations Charter Act that would allow the minister at his or her discretion to grant exemptions in exceptional circumstances.

59 *Committee Hansard*, 6 October 2011, p. 26.

60 *Committee Hansard*, 6 October 2011, p. 24.

61 *Committee Hansard*, 6 October 2011, p. 29.