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Regulating humanitarian assistance by Australian charities: legal tools to deter funding of terrorism abroad

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Abstract

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Regulating Humanitarian Assistance by Australian Charities: Legal Tools to Deter Funding of Terrorism Abroad

Gregory Rose*

What are the obligations and risks in Australian law confronting the managers of charitable funds disbursed overseas to conflict zones where funds may be diverted into political violence? The 2016 allegations against World Vision Australia for funding HAMAS are described here as a case study of applicable Australian laws. Apparent gaps in the administrative, civil and criminal regulatory framework are identified and are contrasted with approaches in other common law jurisdictions: Canada, England and Wales, and the United States. Based upon these comparisons, recommendations are made to address perceived defects in the regulatory framework to counter financing of terrorism abroad by Australian not-for-profit organisations.

INTRODUCTION

Men are more often bribed by their loyalties and ambitions than by money.

Robert H Jackson J, dissenting opinion in *United States v Wunderlich* 342 US 98 (1951).

HAMAS is an internationally listed terrorist organisation and rules Gaza following its success in an election there that distinguishes its popularity from similarly listed regional terrorist organisations that rule in parts of Libya, Mali, Somalia and Syria.¹ An engineer working for the UN Development Programme in Gaza, Waheed Borsch, was convicted in Israel in January 2017 for diverting materials to build a naval jetty for HAMAS.² The director of World Vision in the Gaza strip was charged in August 2016 with diverting millions of dollars over a decade from that global charity to HAMAS.³ HAMAS rockets were stored in UN Welfare and Relief Agency schools in 2014.⁴ A Palestinian aid worker in Gaza for Save the Children, another global charity, is alleged to have been recruited by HAMAS in 2014 to provide it with information on American aid workers.⁵ These incidents highlight the risks to charitable funding and aid projects in conflict prone environments. This article examines the legal regulatory framework for Australian charities in circumstances of financing of terrorism overseas.

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¹ Dept of Public Safety and Emergency Preparedness, Canada, *Currently Listed Entities* (28 December 2016) Public Safety Canada <<https://www.publicsafety.gc.ca/cnt/ntnl-scr/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-eng.aspx>>; Council of the European Union, *Council Decision 2016/1136 of 12 July 2016* EUR-Lex <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D1136>>; UK Home Office, *Proscribed Terrorist Organisations* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/538297/20160715-Proscription-website-update.pdf> 9; US Dept of State, *Foreign Terrorist Organisations* <<http://www.state.gov/j/ct/rls/other/des/123085.htm>>.

² AFP, "Palestinian UN Worker Sentenced to 7 months for Aiding Hamas", *Times of Israel* (4 January 2017) <<http://www.timesofisrael.com/palestinian-un-worker-sentenced-to-7-months-for-aiding-hamas/>>.

³ See text accompanying nn 34-55.

⁴ Terence McCoy, "The controversial UN agency that found rockets in its Gaza schools", *Washington Post* (1 August 2014) <https://www.washingtonpost.com/news/morning-mix/wp/2014/08/01/war-in-gaza-the-controversial-un-agency-that-found-rockets-in-its-schools/?utm_term=.5cccd7cc0188>.

⁵ AFP, "Save the Children probing claim employee recruited by HAMAS", *SBS News* (9 August 2016) <<http://www.sbs.com.au/news/article/2016/08/09/save-children-probing-claim-employee-recruited-hamas>>.

CHARITIES IN AUSTRALIA

In the *Charities Act 2013* (Cth), a charity is defined as an entity that is “not-for-profit”, and “all of the purposes of which are charitable purposes that are for the public benefit”.⁶ These purposes are listed and include: health, education and social and public welfare.⁷ Catch-all purposes also listed are “purposes that are incidental or ancillary to” those charitable purposes.⁸ These are elaborated upon as “any other purpose beneficial to the general public that may be regarded as analogous or within the spirit” of the previously listed purposes, and promoting law or policy or practice in furtherance of one of the purposes listed.⁹

An organisation cannot be a charity if it has any purposes that would disqualify it.¹⁰ A disqualifying purpose is one that promotes unlawful activities or promotes or opposes political parties or candidates for political office.¹¹ Political violence is usually unlawful under the local legal systems where it occurs (and sometimes also under Australian or other laws operating transnationally),¹² so promotion of such a purpose would be a disqualifying activity.

Australian Charities Statistics

Australian charities have existed for over a century and a half. However, little statistical information was gathered about them until recently. A great deal more information has become available since the Australian Charities and Not-for-profits Commission (ACNC) was established and commenced operation on 3 December 2012. This is a statutory office acting independently as the sector regulator and reporting directly to Parliament. It has functional support from the Australian Tax Office (the national tax revenue agency) for its human resources and administrative work.

The ACNC registered 1,643 charities in 2013, its first year. In 2016, about 50 charities were registering each month. By 2018, nearly 60,000 Australian charities were registered.¹³ This is by no means the majority of Australian charities and, when not-for-profit unincorporated associations, such as neighbourhood sports clubs are included, those registered with the ACNC comprise perhaps only 10%.¹⁴

In December 2015, the first annual charities report was published. The most recent report indicates that charities in Australia spent over AU\$122.8 billion pursuing charitable purposes, out of a total income of \$134.5 billion (the difference suggesting overhead costs).¹⁵ About 75% of income devoted to charitable purposes went to education and research (45.1%), health (25.2%), and development and housing (7.8%).¹⁶ The sector is dominated by major players. The largest 10% of charities received 89.5% of the sector’s income. About 40% of income came from government grants (\$55 billion).¹⁷

Faith-based charities were the largest single category of charity in Australia, more than four times the size of the next largest category of activity.¹⁸ The 2015 report on Australian charities involved overseas indicated that approximately 15–17% of Australian charities overall reported being “involved overseas

⁶ *Charities Act 2013* (Cth) s 5.

⁷ *Charities Act 2013* (Cth) s 12(1).

⁸ *Charities Act 2013* (Cth) s 5(b)(ii).

⁹ *Charities Act 2013* (Cth) s 12(1) (k), (l) respectively, cover analogous purposes and relevant law or policy.

¹⁰ *Charities Act 2013* (Cth) s 5(c).

¹¹ *Charities Act 2013* (Cth) s 11.

¹² For example, acts of terrorism committed overseas are illegal under Australian law operating transnationally: *Criminal Code Act 1995* (Cth) Sch (Criminal Code) s 101.1(2).

¹³ Australian Charities and Not-for-profits Commission (ACNC), *Background to the not-for-profit sector* <http://acnc.gov.au/ACNC/About_ACNC/Research/Background_NFP/ACNC/Edu/NFP_background.aspx>.

¹⁴ The Australian Institute of Criminology estimated in 2014 that the Australian not-for-profit sector, including unincorporated associations, encompassed around 600,000 charities: Samantha Bricknell et al, “Money laundering and terrorism financing risks to Australian non-profit organisations” (AIC research and public policy series No 114, 10 February 2014) 3.

¹⁵ ACNC, *Australian Charities Report 2015* <http://www.csi.edu.au/media/Australian_Charity_Report_2015_Web_ND8DU2P.pdf> 11.

¹⁶ ACNC, n 15, 53.

¹⁷ ACNC, n 15, 52–54.

¹⁸ Penny Knight and David Gilchrist, *Australian Charities 2013: The First Report on Charities Registered with the Australian Charities and Not-for-profits Commission* (Report for the ACNC, 2014) 27.

in some way”.¹⁹ Charities with a religious purpose appear more likely to be operating overseas. The 2015 report on Australia’s faith based charities indicated that 25% of charities with a religious purpose have some international activity.²⁰

DIVERTING CHARITABLE FUNDS INTO POLITICAL VIOLENCE OVERSEAS

After the Al-Qaeda attacks on the United States on 11 September 2001, ratifications of the 1999 *International Convention for the Suppression of the Financing of Terrorism* increased in number and the financial war on terrorism was launched under United Nations Security Council Resolution 1373, which called for the freezing of terrorist assets and prohibited making funds, assets, resources or financial services available to listed terrorists.²¹ In October 2001, the Organisation of Economic Co-operation and Development Financial Action Task Force (FATF), which aims to combat money laundering by organised crime, adopted eight Special Recommendations to detect, prevent and suppress the financing of terrorism and terrorist acts. One additional recommendation that was adopted in 2003 marked nine Special Recommendations. The 40+9 Recommendations were then integrated, revised and renumbered in 2012. One such recommendation concerns terrorism financing by charities and non-profit organisations. It requires that FATF countries review the adequacy of their respective laws and regulations that relate to such entities that can be abused for the financing of terrorism.²²

In February 2016, a terrorism financing risk assessment workshop for Thailand, Philippines and Malaysia identified four major regional terrorism financing risks, one being the misuse of charitable funds.²³ A regional risk assessment was conducted in 2017 for non-profit organisations that indicated a growing concern over this sector, which was rated a medium-level risk. Indonesia faces the highest risk, with 337,000 known charities, of which some have links to terrorist organisations.²⁴ Four Indonesian charities have been listed by the UN Security Council for targeted counter-terrorism financial sanctions.²⁵ Examples of charities around other parts of the world being subverted to finance terrorism in other countries include the Holy Land Foundation in the United States,²⁶ ISNA-Islamic Services in Canada²⁷ and INTERPAL in the United Kingdom.²⁸ Zakat or Islamic charitable giving is particularly vulnerable to subversion, as social welfare and “jihadi resistance” merge in some recipient organisations and can be indistinguishable to donors.²⁹

It is particularly difficult to ensure that development assistance provided to a foreign war zone does not support fighting taking place there. The Australian Transaction Reports and Analysis Centre (AUSTRAC) published a report in 2014 concerning Australian terrorism financing, which stated that

¹⁹ Penny Knight and David Gilchrist, *Australian Charities Overseas – a study supplementing the Australian Charities 2013 Report* (2015) 4.

²⁰ Penny Knight and David Gilchrist, *Australia’s Faith Based Charities – a study supplementing the Australian Charities 2013 Report* (2015) 19.

²¹ See, generally, Nicholas Ryder, *The Financial War on Terrorism – A review of counterterrorist financing strategies since 2001* (Routledge 2015).

²² FATF, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations* (November 2017) <<http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>> 11.

²³ Agus Santoso and Sylvia Laksmi, “Regional Terrorism Financing Framework: Southeast Asia and Australia” (2016) 8 *Counter Terrorist Trends and Analysis* 21.

²⁴ Australian Transaction Reports and Analysis Centre (AUSTRAC), *Non-Profit Organisations and Terrorism Financing – Regional Risk Assessment 2017* <<http://www.austrac.gov.au/regional-not-profit-sector-risk-assessment-2017>> 20.

²⁵ AUSTRAC, n 24, 24.

²⁶ US Federal Bureau of Investigation, *No Cash for Terror: Conviction Returned in Holy Land Cases* (25 November 2008) <<https://archives.fbi.gov/archives/news/stories/2008/november/hlf112508>>.

²⁷ Stewart Bell and Sean Craig, “Government Revokes Group’s Charity Status, Audit cites possible Funding of Pakistani Militants”, *Global News Canada* (19 June 2017) <<https://globalnews.ca/news/3606224/government-revokes-groups-charity-status-audit-cites-pakistani-militants/>>.

²⁸ Alex Delmar-Morgan and Peter Osborne, “Why is the Muslim Charity Interpal being Blacklisted as a Terrorist Organisation” *The Telegraph* (online) 26 November 2014 <<http://www.telegraph.co.uk/news/religion/11255294/Why-is-the-Muslim-charity-Interpal-being-blacklisted-as-a-terrorist-organisation.html>>.

²⁹ See eg, the case of Hezbollah: Matthew Levitt, *Hezbollah – The global footprint of Lebanon’s Party of God* (Georgetown UP, 2013).

“charities and not-for-profit organisations which operate in crises and war zones overseas are at risk of being infiltrated and exploited by terrorist groups in these areas”.³⁰ In the 2016 regional risk assessment of terrorism financing, discussed at the Second Southeast Asian Regional Counter-Terrorism Financing Summit, it was reported that Australian not-for-profit organisations ranked as the second highest national risk for terrorism financing.³¹ In its report on money laundering and terrorism financing risks in the Australian non-profit sector, the Australian Institute of Criminology noted that “the greatest risk for legitimate charities appears to be what happens to funds once outside the organisation’s immediate administrative jurisdiction”.³² It observed, as an example, that HAMAS interchanges funds between legitimate and illegitimate uses³³ and that known Australian cases of financing terrorism usually involved complex networks of funds transfers.

Case of World Vision Australia

An embarrassment confronting World Vision Australia in August 2016 was disclosure by Israeli authorities of alleged diversion of its charitable funds to HAMAS. The circumstances provide a case study of shortcomings and opportunities for improvement in the Australian regulatory environment for charities engaged in regions experiencing violent political conflict.

World Vision International is a California-based Christian evangelical charity. It has an worldwide annual income of approximately US\$2.7 billion, employing more than 44,000 people operating in 100 countries.³⁴ Almost 80% of its income is donated by private sources, including individuals, corporations and foundations.³⁵ Governments (eg, Australia, EU, UK, US) and intergovernmental organisations (eg, World Food Program) make up the rest.³⁶

World Vision Australia is Australia’s largest charitable group, drawing on the support of over 400,000 donors³⁷ and is by far Australia’s most successful international charity in terms of funds raised.³⁸ Its 2014/2015 financial year revenue was AU\$424 million, a little over a sixth of the global parent organisation, of which \$266 million went to international and domestic programs.³⁹

World Vision International began working in Jerusalem – West Bank – Gaza in 1975. Funding for its work there runs at about US\$17.5 million per annum⁴⁰ where it has about 150 staff.⁴¹ World Vision Australia provides about 30% of World Vision’s funding in Gaza, US\$4.815 million in the 2014/2015 financial year.⁴² The Australian federal government recently gave about AU\$5 million to World Vision Australia across three years for projects in the Gaza Strip.⁴³

It is alleged by Israeli prosecutors that 60% of World Vision’s annual operational budget funding in Gaza has been directed towards supporting HAMAS.⁴⁴ HAMAS does not distinguish its military wing

³⁰ AUSTRAC, *Terrorism Financing in Australia 2014* <<http://www.austrac.gov.au/publications>> 16.

³¹ AUSTRAC, *Regional Risk Assessment on Terrorism Financing 2016* <<http://www.austrac.gov.au/regional-risk-assessment-terrorism-financing-2016>> 24.

³² Bricknell et al, n 14, 26.

³³ Bricknell et al, n 14, 10.

³⁴ World Vision International, *2015 Annual Review* (2016).

³⁵ NGO Monitor, *World Vision* (21 September 2016) <http://www.ngo-monitor.org/ngos/world_vision_international/>.

³⁶ NGO Monitor, n 35.

³⁷ World Vision Australia, *About Us* <<https://www.worldvision.com.au/about-us/faqs>>.

³⁸ Probono Australia, *Australia’s Biggest Fundraisers* (4 March 2014) <<https://probonoaustralia.com.au/news/2014/03/australias-biggest-fundraisers/>>.

³⁹ World Vision Australia, *Annual Report 2015* (2016) <<https://www.worldvision.com.au/about-us/annual-reports>> 72.

⁴⁰ World Vision Jerusalem – West Bank – Gaza, *Annual Review 2014* (2015) <http://www.wvi.org/sites/default/files/World%20Vision%20JWG_Annual%20Review%202014_English_Final.pdf> 36.

⁴¹ World Vision Jerusalem – West Bank – Gaza, n 40, 8.

⁴² World Vision Jerusalem – West Bank – Gaza, n 40, 36.

⁴³ Sophie McNeil, “World Vision ‘Shocked’ by Israel Allegations Gaza Manager Diverted Charity Money to Hama”, *ABC News* (5 August 2016) <<http://www.abc.net.au/news/2016-08-05/world-vision-boss-gaza-accused-by-israel-diverting-money-hamas/7692594>>.

⁴⁴ Israel Ministry of Foreign Affairs, *Behind the Headlines: Hamas exploitation of World Vision in Gaza to support terrorism* (4 August 2016) <<http://mfa.gov.il/MFA/ForeignPolicy/Issues/Pages/Behind-the-Headlines-Hamas-exploitation-of-World-Vision-in-Gaza-to-support-terrorism-4-August-2016.aspx>>.

as a different organisation from its main body,⁴⁵ and as a whole has been listed as a terrorist organisation by Canada, the European Union, United Kingdom and United States.⁴⁶ HAMAS's military wing is a listed terrorist organisation in Australia.⁴⁷

Mohammed El-Halabi is alleged by the Israeli prosecutor to have been recruited by HAMAS in the early 2000s, planted in World Vision in 2005, rising to become its Director in Gaza, where he allegedly controlled funds, equipment and aid packages. He made regular trips between Israel and Gaza and had been under extended Israeli security surveillance. He was formally arrested at the Keren Shalom Crossing Point on 15 June 2016.⁴⁸

He appeared in the Beersheba District Court in a civil prosecution for a closed hearing of 14 charges on 5 August 2016 and for a public hearing on 13 January 2017, where he pled not guilty.⁴⁹ During administrative detention, El-Halabi was alleged to have confessed to diverting annual cash transfers of US\$1.5 million to HAMAS, as part of a total of US\$7.2 million annually in transferred value.⁵⁰ Once in remand, he claimed to have been tortured and refused a plea bargain, resulting in charges under treason reportedly being added.⁵¹ The trial resumed on 2 February 2017 but little progress was reported throughout that year as both sides engaged in procedural manoeuvres over contested disclosure of confidential evidence sources and each changed legal teams.⁵²

The total value diverted to terror activities over El-Halabi's time is said to be in the range of US\$43 million.⁵³ There is much uncertainty over the figures, with World Vision contending that they are inflated beyond possibility.⁵⁴ On 8 August, World Vision Australia claimed that World Vision International's cumulative operating budget for Gaza over the past decade was far lower, at \$US22.5 million.⁵⁵ The statement also noted that El-Halabi had been the manager of World Vision's Gaza operations only since October 2014 and that before then he allegedly had the authority to approve transactions only up to US\$15,000 in the Gaza budget at a time.⁵⁶

The funds were allegedly directed to HAMAS, for the salaries of fighters in its al-Qassam Brigades, payment for fortified infrastructure, military weapons and salaries and packages for officials. To facilitate diversion of funds through ten years, fictitious projects were allegedly created, purporting to help farmers, the disabled and fishermen. Methodologies included false registration of employees, fictitious receipts and inflated invoices, favouring complicit tenderers and disguising warehouse transfers.⁵⁷

In a 29 August letter handed to around 120 contractors at a meeting in Gaza, World Vision said that it was impossible to pay them as its bank accounts in Jerusalem had been frozen by Israeli authorities and

⁴⁵ Matthew Levitt, *HAMAS: Politics, Charity and Terrorism in the Service of Jihad* (YUP, 2006); Matthew Levitt, "Hamas from Cradle to Grave" (2004) 11 (Winter) *Middle East Quarterly* 3.

⁴⁶ See n 1.

⁴⁷ *Criminal Code* s 102; Australian National Security, *Listed Terrorist Organisations: Hamas' Izz al-Din al-Qassam Brigades* <<https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/HamassIzzal-Dinal-QassamBrigades.aspx>>.

⁴⁸ Israel Ministry of Foreign Affairs, n 44.

⁴⁹ Sophie McNeil, "Israel announces late charges against World Vision official after plea deal rejected" (12 January 2017) ABC News Online <<http://www.abc.net.au/news/2017-01-12/israel-announces-new-charges-against-world-vision-official/8177272>>.

⁵⁰ Israel Ministry of Foreign Affairs, n 44.

⁵¹ Sophie McNeil, "Israeli judge allows new charges in world vision manager accused of diverting millions to HAMAS" (13 January 2017) ABC News Online <<http://www.abc.net.au/news/2017-01-13/israeli-judge-allows-new-charges-in-world-vision-manager-trial/8179950>>.

⁵² Sophie McNeil, "World vision employee Mohammed El Halabi pleads not guilty to funding HAMAS in Gaza" ABC News (3 February 2017) <<http://www.abc.net.au/news/2017-02-03/world-vision-employee-pleads-not-guilty-to-funding-hamas-in-gaza/8238000>>.

⁵³ Israel Ministry of Foreign Affairs, n 44. Anthony Klan, "Federal World Vision funding 'went to Hamas'", *The Australian* (online), 28 November 2016 <<http://www.theaustralian.com.au/national-affairs/foreign-affairs/federal-world-vision-funding-went-to-hamas/news-story/28127fd5f7ae2d55da57b54bf06dd96f>>.

⁵⁴ World Vision International, *Update: Statement by World Vision International CEO in wake of staff arrest* (8 August 2016) <<http://www.wvi.org/pressrelease/update-statement-world-vision-international-ceo-wake-staff-arrest>>.

⁵⁵ Isabel Kershner and Diaa Hadid, "Israel Charges Aid Group's Gaza Branch Manager with Funneling Funds to Hamas" *New York Times* (online), 4 August 2016 <https://www.nytimes.com/2016/08/05/world/middleeast/world-vision-hamas.html?_r=0>.

⁵⁶ World Vision International, n 34.

⁵⁷ Israel Ministry of Foreign Affairs, n 44.

it was no longer able to transfer money to Gaza.⁵⁸ In August, the Australian Government suspended further funding pending the outcome of an investigation. Up to €1.1 million had been transferred by Germany to World Vision in Gaza since 2010 and the German Federal Development Ministry and Foreign Affairs Ministry then suspended €3.6 million earmarked for World Vision projects in Gaza.⁵⁹ The UK Department for International Development funded World Vision indirectly⁶⁰ through the Disasters Emergency Committee, and has stated it will not consider awarding grant money that would go to World Vision until the current allegations have been investigated.⁶¹

World Vision Australia is deeply engaged in Gaza and its relationship with a main local partner, the Palestinian Union of Agricultural Work Committees (UAWC), extends over three decades. It has built an extensive network of relationships with local government, organisations and recipients. It might lose these relationships if it imposes strict supervisory measures that could alienate it from its local partners and stakeholders. Additionally, the charity is perceived by many as politically partisan in its operations in Jerusalem – West Bank – Gaza. For example, Tim Costello, then Executive Director of World Vision Australia, in his defence of Mohammed El-Halabi, retorted by accusing Israel of holding children in Gaza as the world's largest prison.⁶² Further evidence suggests that a millennial desire for Christian authority over Jerusalem motivates some World Vision antagonism to Jewish sovereignty in jurisdictions it describes collectively as the Holy Land⁶³ in a pattern that is fairly consistent over a quarter century.⁶⁴ A positive exception is Project Rozana, which trains Palestinian health professionals and treats critically ill children from the West Bank and Gaza at Hadassah Hospital in Israel. This Australian-inspired initiative in 2013 engages St John's Ambulance and World Vision to facilitate treatment for Palestinians in the Israeli hospital.⁶⁵

The World Vision Australia travails concerning funding allegedly diverted to support HAMAS indicate that it might be timely to reappraise oversight and risk management of Australian charitable operations overseas in zones such as Gaza where operations are at relatively high risk of improper diversion into armed conflict.

AUSTRALIAN REGULATORY FRAMEWORK

Australian charities are regulated under federal, State and Territory civil and criminal laws that regulate charities in various ways, such as by criminalising fraud, but it is Commonwealth laws that have greater relevance to larger incorporated charities and their operations overseas due to the engagement of federal tax, corporations, financial transactions and counter-terrorism laws and the extraterritorial reach of those laws. Thus, the focus of this article is on Commonwealth laws.

⁵⁸ Nidal al-Mughrabi, "World Vision lays off contractors in Gaza after Israel allegations", *Reuters* (9 September 2016) <http://www.reuters.com/article/us-palestinians-gaza-worldvision-idUSKCN11F1RP>.

⁵⁹ Tovah Lazaroff and Benjamin Weinthal, "Germany, Australia suspend World Vision funding", *Jerusalem Post* (7 August 2016) <<http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Germany-Australia-suspend-funding-for-World-Vision-463434>>.

⁶⁰ The UK Dept for International Development has channelled £27 million for charitable work in Gaza through the Disasters Emergency Committee, which will conduct its own internal audit: see *DEC Gaza response receives strong review in emergency phase* (2 February 2015) <<http://www.dec.org.uk/press-release/dec-gaza-response-receives-strong-review-for-emergency-phase>>.

⁶¹ UK Dept for International Development, *Letter from Secretary of State the Rt Hon Priti Patel MP, to Mr Simon Johnson, Chief Executive, Jewish Leadership Council and Gillian Merron, Chief Executive, Board of Deputies of British Jews* (23 August 2016) <<https://www.bod.org.uk/wp-content/uploads/2016/08/Priti-Patel-to-BoDJLC.pdf>>.

⁶² McNeil, n 43, Video interview. There were no negative funding consequences for Palestinian local partners who named a soccer field funded by World Vision Australia in a West Bank sporting complex after Abu Jihad, a PLO terrorist responsible for dozens of murders in 2010: Cameron Stewart, *The Australian*, 27 March 2010. Similarly, in 2004 Costello called for Australia to vote against Israel in the UN: Tim Costello, "For the children's sake, tear down this wall!" *The Age*, 14 July 2004.

⁶³ See World Vision Palestine Director, Thomas Getman, "A Response to Christian Zionist Exclusivism" (1999) 15(Spring) *Cornerstone* 19: "Jerusalem is the spiritual home for 2 billion people ... Only 15 million are Jewish. The better part of wisdom would be for God's chosen to share it or they will absolutely guarantee being proven the world's rejected once again."

⁶⁴ In 1990, Phillip Hunt, then Executive Director, World Vision Australia, called for sanctions against Israel and the prevention of Jewish immigration into Israel: see Tom Ballantyne, "Jewish council attacks World Vision's stand on Israel" *Sydney Morning Herald*, 16 June 1990, 4.

⁶⁵ Project Rozana, <<http://www.projectrozana.org/>>.

Australian Charities and Not-for-profits Commission

World Vision Australia is a public corporation limited by guarantee⁶⁶ and registered since 1969 with the Australian Securities and Investment Commission and its predecessors.⁶⁷ It was annually audited as required under the *Corporations Act 2001* (Cth).⁶⁸ Since its registration with the ACNC, it is instead now audited as required under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) (*ACNC Act*),⁶⁹ by an independent accounting firm, Grant-Thornton Audit.⁷⁰

The purposes of the ACNC are to: “maintain, protect and enhance public trust and confidence in the sector through increased accountability and transparency; support and sustain a robust, vibrant, independent and innovative not-for-profit sector; and to promote the reduction of unnecessary regulatory obligations on the sector”.⁷¹ To these ends, the ACNC emphasises transparency, maintaining a free searchable online public register of charities that sets out their “purposes, activities, financial information, responsible persons and people they work to benefit”.⁷² It also seeks to provide charities with guidance, education and advice and to reduce red tape for them.

Registration with the ACNC is voluntary. However, in order to qualify for tax concessions in the form of deductible donations under Australian tax laws, registration is a prerequisite for certain classes of charities, including overseas aid funds.⁷³ Not all charities have tax deductible status.⁷⁴ World Vision Australia registered with the ACNC in 2014, with three stated charitable purposes: advancing social or public welfare, advancing religion, and promoting or protecting human rights.⁷⁵

The *ACNC Act* requires, inter alia, that charities meet five minimum governance standards concerning responsible conduct.⁷⁶ Charities are to maintain records to demonstrate their proper governance, but need produce them only if asked to do so.⁷⁷ The *ACNC Act* sets out record keeping standards for charities to comply with⁷⁸ and the ACNC has monitoring powers to gather information on and to monitor charities.⁷⁹ Whether a charity is audited typically depends on its size but not necessarily on its overseas activities⁸⁰ and there are no special requirements for charities with operations overseas.⁸¹ To impose additional requirements on charities that operate overseas, external conduct standards are referred to in the *ACNC Act* but no such standards have yet been specified in regulations.⁸² The ACNC’s enforcement powers include the ability to give directions, accept enforceable undertakings, issue

⁶⁶ ACNC Register, *World Vision Australia* <<https://www.acnc.gov.au/RN52B75Q?ID=8DD83DD0-F1AF-4168-8973-624339B8C744&noleft=1>>.

⁶⁷ Australian Securities and Investment Commission, *Company Summary – World Vision Australia* <https://connectonline.asic.gov.au/RegistrySearch/faces/landing/SearchRegisters.jspx?_afLoop=3003402451040482&_afWiindowMode=0&_adf.ctrl-state=u8kwy2c9_4>.

⁶⁸ *Corporations Act 2001* (Cth) s 301.

⁶⁹ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) Subdiv 60-C.

⁷⁰ World Vision Australia, n 39, 83.

⁷¹ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) ss 15.5–15.10.

⁷² ACNC, *Regulatory Approach Statement* <https://www.acnc.gov.au/ACNC/About_ACNC/Regulatory_app/RegApp_St2013/ACNC/Publications/Reg_App/RegAppRs_Po wers.aspx?hkey=e8deb00c-f626-4813-8f50-1cf1ef8f0a6b>.

⁷³ *Income Tax Assessment Act 1997* (Cth) ss 30.80, 30.85.

⁷⁴ To be tax deductible, an organisation must have deductible gift recipient status which is received by being endorsed by the ATO, or by being listed in law by Parliament: *Income Tax Assessment Act 1997* (Cth) Subdiv 30-B, s 30-17.

⁷⁵ ACNC Register, n 66.

⁷⁶ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 45.5.

⁷⁷ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 55.5.

⁷⁸ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) Ch 3 Pt 3-2.

⁷⁹ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) Ch 4 Pt 4-1.

⁸⁰ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 60.1. See also ACNC, *Review and audit of financial reports* <<http://www.acnc.gov.au/ACNC/Manage/Reporting/ReviewAudit/ACNC/Report/ReviewAudit.aspx>>.

⁸¹ CPA Australia, *Charities: A guide to financial reporting and assurance requirements* (3rd ed, 2013) <<https://www.cpaaustralia.com.au/~media/Corporate/AllFiles/Document/professional-resources/auditing-assurance/charities-guide-report.pdf>>.

⁸² *Australian Charities and Not-for-profits Commission Act 2012* (Cth) s 50.10. The ACNC and AUSTRAC 2017 Risk Assessment for Australian charities and non-profit organisations noted that an appropriate regulatory action to fill lacuna is under consideration.

directions, obtain injunctions, suspend or remove responsible persons or entities, or apply penalty notices.⁸³

The ACNC regulatory approach is premised upon active self-regulation by charities themselves, to minimise government regulatory burdening. This is notionally a risk-based approach that takes into consideration the different circumstances of individual charities.⁸⁴ It focuses on compliance with governance standards and this extends to counter-terrorism financing. To this end, the ACNC has produced guidelines on “Safeguarding Your Organisations against Terrorism: Guidance for Non-Profit Organisations” and a list for charities to check off.⁸⁵

However, the audits in Australia of financial throughputs are not designed to detect the disguised nature of the recipients of goods and funds and the checklist might be regarded as simplistic. Ultimately, the ACNC is not designed to ensure the integrity of complex offshore charitable ventures and regulatory reform will be necessary to enable it to do so. However, it is a relatively new and rapidly developing agency that has engaged energetically in continued improvement in its role.

Australian Transaction Reporting and Analysis Centre

Provisions in relation to the financing of terrorism are set out in the *Anti-Money Laundering and Counter Terrorism Financing Act 2006* (Cth) (*AML/CTF Act*). They require entities that provide designated financial services to register with AUSTRAC.⁸⁶ The most common form of designated services are financial transfer services.⁸⁷ Remittance service providers are also to register with AUSTRAC, the national financial intelligence agency.⁸⁸ Australian charities are not designated as funds transfer services. Therefore, they are not required to register with or report to AUSTRAC, nor subject to the *AML/CTF Act* due diligence obligations. The vast majority, if not all, of Australian charities operating overseas would typically use a third party, such as a bank or remittance provider, to transfer funds. AUSTRAC therefore would obtain data about transfers overseas from that third party.

AUSTRAC has listed financial contributions by charities as one of the three most common ways of financing terrorism in and from Australia.⁸⁹ In 2015, an FATF regional mutual evaluation report concluded that Australia was not compliant with Special Recommendation 8 on terrorism financing by non-profit organisations.⁹⁰ This was because it had not conducted the required national review of the adequacy of laws and regulations and of outreach and supervision to suppress terrorism financing in the charity sector. Consequently, Australia’s first risk assessment on countering terror financing through charities and non-profit organisations was released in August 2017 by the ACNC, together with AUSTRAC.

The 2017 national report adopts a standard risk framework (threat x vulnerability x consequences) to measure not-for-profit sector and organisational vulnerability, so as to produce key risk indicators. It identifies “significant links” between Australian charities and organised crime giving rise to a “medium” risk. Between 2012 and 2016, there were 28 “suspicious matter reports” related to charitable financing of terrorism received by AUSTRAC worth \$5.6 million.⁹¹ These involved charities that

⁸³ *Australian Charities and Not-for-profits Commission Act 2012* (Cth) Pt 4-2. Some of these powers (such as the power to remove a responsible entity) can only be applied to a federally regulated entity (s 100.5) which is a constitutional corporation or an entity connected to a territory (s 205.15).

⁸⁴ ACNC, n 72.

⁸⁵ ACNC, *Checklist: protecting your charity against the risk of terrorism financing* <http://www.acnc.gov.au/ACNC/Manage/Protect/Checklist_protect_against_the_risk_of_terrorism_financing/ACNC/Edu/ChecklistTF.aspx>.

⁸⁶ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) s 6.

⁸⁷ AUSTRAC, *Enrolment and Registration* (28 June 2016) <<http://www.austrac.gov.au/businesses/enrolment-and-remitter-registration/enrolment-and-registration>>.

⁸⁸ AUSTRAC, *Remitter Registration Requirements* (16 November 2016) <<http://www.austrac.gov.au/chapter-5-remitter-registration-requirements>>.

⁸⁹ AUSTRAC, *Typologies and Case Studies Report 2010* <<http://www.austrac.gov.au/typologies-and-case-studies-report-2010>> 8.

⁹⁰ FATF, *Anti-Money Laundering and Counter-Terrorist Financing Measures Report: Australia Mutual Evaluation Report 2015* <<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>> 16.

⁹¹ AUSTRAC, *Australia’s Non-Profit Organisation Sector – National Risk Assessment 2017* <<http://www.austrac.gov.au/sites/default/files/npo-risk-assessment-FINAL-web.pdf>> 10.

demonstrated a sectoral capacity to quickly raise and camouflage the movement of large amounts of funds offshore to support individuals or groups engaged in foreign conflict.⁹²

Entities registered with AUSTRAC are expected to report and to exercise due diligence to know their customers' identities and integrity in order to manage and minimise the risk of money-laundering and terrorism financing.⁹³ To help identify money laundering and terrorism financing, AUSTRAC itself conducts data matching with the Australian Criminal Intelligence Commission and Australian Federal Police, and on an ad hoc basis with the ACNC. Its methodology concerning terrorism financing by Australian donors focuses on Australian community ties to terrorist organisations overseas.

AUSTRAC has conducted at least five investigations into terrorism financing but has not publicly reported investigation of an Australian charity. As yet, it has not developed a typology model or a methodology to address Australian charitable activities that might become compromised or corrupted overseas and divert Australian charitable resources into terrorism, but the 2017 national risk assessment might catalyse new developments.

Currently, the ACNC cannot access terrorism financing information directly from AUSTRAC due to the confidentiality provisions in the *AML/CTF Act*. Amendment of the *AML/CTF Act* to authorise the ACNC as a designated agency for the purposes of sharing information has been suggested and is proposed for the Commonwealth Parliament.⁹⁴ As noted below, regulatory supervision of charities in Canada has the advantage of informational inputs from national criminal and security intelligence agencies, which could be replicated in Australia to improve the efficient detection of terrorist financing.

Department of Foreign Affairs and Trade

The main pillar of the Australian aid program to the Middle East has been the *Australian Middle East NGO Cooperation Agreement* (AMENCA). AMENCA 3 is the current six-year program.⁹⁵ The Australian Department of Foreign Affairs and Trade (DFAT) describes the AMENCA as enabling aid to be delivered by it through Australian NGOs implementing in partnership with local consortia. This Middle East program focuses exclusively on Palestinian Territories.⁹⁶ The four Australian implementing NGOs are: Action Aid Australia (in partnership with local Palestinian NGO Asala), APHEDA (with Ma'an), CARE (with Applied Research Institute Jerusalem, and others), and World Vision Australia (with UAWC).⁹⁷

Following allegations in 2012 from an Israeli NGO, Shurat Hadin, concerning UAWC leadership personnel overlap with the Popular Front for the Liberation of Palestine, another internationally listed terrorist organisation,⁹⁸ DFAT introduced a counter-terrorism due diligence framework in 2013 and conducted an AMENCA 2 Risk Management Review, published in May 2014. The risk management review focused on local Palestinian partners and found that local partner risk management includes: Australian NGO commitments to due diligence requirements; annual spot checks by DFAT staff; annual risk and counter-terrorism management reporting by the Australian NGOs and the DFAT AMENCA program manager; and an independent risk assessment as part of a mid-term review.⁹⁹

⁹² AUSTRAC, n 91, 10.

⁹³ *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) Pt 2: Identification.

⁹⁴ Paula Chadderton and Simon Norton, "Charities, non-profits: how to cut the risk of terror financing" *The Australian* (22 August 2016) <<http://www.theaustralian.com.au/opinion/charities-nonprofits-how-to-cut-the-risk-of-terror-financing/news-story/9085352b68a24c8aa6fead425960147d>>.

⁹⁵ Dept of Foreign Affairs and Trade (DFAT), *Development Assistance in the Palestinian Territories* <<http://dfat.gov.au/geo/palestinian-territories/development-assistance/Pages/development-assistance-in-palestinian-territories.aspx>>; AMENCA 1 (2005–2008); AMENCA 2 (2009–2015) (\$35,460,225); AMENCA 3 (2016–2022) (\$43 m).

⁹⁶ DFAT, *Aid Program Performance Report 2015–16: Palestinian Territories* (September 2016).

⁹⁷ Scott Rankin, *AMENCA 2 Program Review – project summary 2016* <<http://dfat.gov.au/about-us/business-opportunities/tenders/Pages/amenca-palestinian-territories-connecting-to-markets-program.aspx>>.

⁹⁸ Yaakov Lapin, "Shurat HaDin: We've been warning about a World Vision for years" *Jerusalem Post* (8 May 2016); DFAT, *FOI disclosure log – Australian aid related requests* <<http://dfat.gov.au/about-us/corporate/freedom-of-information/Pages/foi-disclosure-log-australian-aid-related-requests.aspx>>.

⁹⁹ Belinda Lucas, *Risk Management Review of the Australia-Middle East NGO Cooperation Agreement, final report* (May 2014) <<http://dfat.gov.au/about-us/business-opportunities/tenders/Pages/amenca-palestinian-territories-connecting-to-markets-program.aspx>>.

Within the due diligence requirements, local Palestinian partner organisations are vetted by Australian NGOs, which check the local partner organisation name against various lists of terrorist organisations¹⁰⁰ and their key personnel are vetted using similar lists.¹⁰¹

Australian NGOs and their staff (such as Mohammed El-Halabi) do not require vetting under AMENCA. Instead, they are collectively covered under DFAT's Australian NGO accreditation process.¹⁰² Prerequisites for accreditation include being a signatory to the Australian Council for International Development (ACFID) Code of Conduct for Non-Government Development Organisations and signing DFAT contracts requiring compliance with Australian counter-terrorism laws, as well as committing to vet key overseas partner organisations and personnel, document risk management, and report annual counter-terrorism due diligence.¹⁰³

The 2014 AMENCA Risk Management Review report lacked critical analysis, although descriptive and informative. For example, it did not address the lack of ongoing presence of Australia-based staff, lack of vetting of Australian implementing NGO locally appointed staff, lack of whistle blower protections for locally based staff under local partner peer pressure, and lack of calibration of risk management to correspond with operational circumstances. On comparing the DFAT counter-terrorism due diligence framework for government funded humanitarian assistance with that of the United States, discussed below, it is apparent that the Australian framework is superficial, under-resourced and ineffectual.¹⁰⁴

World Vision Australia Self-regulation

World Vision Australia is signatory to several voluntary self-regulatory codes. These include the ACFID "Code of Conduct" and the Australian Institute of Director's "Good Governance Principles and Guidance for Not-For-Profit Organisations". World Vision Australia states that it has an "independent body outside World Vision that interviews and does security checks" and that it is subject to regular internal audits. It has commissioned its own forensic audit to be conducted by external experts to clarify whether or how funds were diverted to HAMAS.¹⁰⁵ A member of the Board of Directors of World Vision Australia, Prof Tim McCormack, who is respected internationally, has conducted an initial internal assessment of the organisation's position, working with World Vision International to ensure that the external forensic audit is conducted thoroughly and rigorously. Therefore, it can be hoped that the review will lead to improvements in mechanisms for due diligence in implementation of government and voluntary codes.¹⁰⁶

Civil Litigation

Charities and their trustees may be liable for injury or loss of life caused by harmful acts of, or funded by, their employees in connection with their work. The civil liability lies in tort law actions brought by

¹⁰⁰ By using Bridget/ Watchdog plus, DFAT, and Attorney General's Dept lists, and by using internet search engines to check the organisation name for current or previous affiliations with such organisations: Lucas, n 99.

¹⁰¹ Board members of partner NGOs, senior executive staff of partner NGOs, financial staff of partner NGOs.

¹⁰² DFAT, *Australian NGO accreditation guidance manual* (October 2016) 16.

¹⁰³ In addition, Australian implementing NGOs must comply with the DFAT *Overseas Aid Gift Deduction Scheme* (OAGDS) in order to receive tax deductible donations for overseas operations. The OAGDS guidelines are principally about charity registration and conformance to ACNC governance standards and not especially to overseas due diligence against terrorism: DFAT, *OAGDS Guidelines* <<https://dfat.gov.au/about-us/publications/Documents/oagds-guidelines.pdf>>.

¹⁰⁴ Beyond the DFAT Middle East program, similar problems arise in other regions, such as South East Asia, eg, the Australian Government paid Habitat for Humanity \$12.7 million for a development assistance project to build classrooms, science laboratories and school libraries in the Autonomous Region of Muslim Mindanao in the southern Philippines during a 6-year program, 2012- 2017. Habitat for Humanity subcontracted the project to Alhayam Sultana Construction (belonging to members of the Maute family clan) even after it had publicly pledged allegiance to the Islamic State in 2014. The Maute clan brothers responsible for the 2017 siege of Marawi city may have received millions of dollars through the subcontracting: see Amanda Hodge, "AusAID cash went to Marawi Terrorist" *The Australian*, 11 November 2017 <<http://www.theaustralian.com.au/national-affairs/foreign-affairs/ausaid-cash-went-to-marawi-terrorist/news-story/69136cb9d46649d7a2c069fa308ab45a>>.

¹⁰⁵ World Vision International, n 34.

¹⁰⁶ World Vision Australia is understandably reticent to pre-empt the results of its own, the DFAT or Israeli inquiries and did not respond to the author's requests for information concerning its internal oversight.

victims.¹⁰⁷ However, tort claims are governed primarily by Australian State and Territory tort laws that are unlikely to succeed. They require proofs of a duty of care, and of causation and foreseeability of damage, which are beset with difficulties in these indirect circumstances of third party financing of terrorist acts. As will be seen below, the United States has introduced statutory reforms that enable victims of terrorist acts to claim damages from terrorism sponsors. The Australian Government instead provides direct State compensation payments to some victims of officially declared terrorist acts.¹⁰⁸

Other forms of civil claim might seek restitution for the value of donations misappropriated contrary to the terms of the charitable purposes for which the donations were given.¹⁰⁹ These forms of legal action also have little likelihood of success. The charity has no contract with, fiduciary duty to, or unjust enrichment from the donor. Claims for damages based on fraud would require proof of intent to defraud on the part of the charity, which is implausible in circumstances of failures in diligent management, which would form the majority of charity cases.

Criminal Law Enforcement

Criminal laws most relevant to the subversion of charitable funding into terrorism are set out in the Commonwealth *Criminal Code* counter-terrorism provisions. They implement a treaty obligation to prevent and punish the “provision or collection of funds with the intentional knowledge that they are to be used, in full or in part, to carry out a terrorist attack”.¹¹⁰ The *Criminal Code* makes it an offence to finance acts of terror.¹¹¹ It provides:

- 103.1(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.¹¹²

Section 103.2 similarly proscribes funding a terrorist. Appropriate to an era of globalised electronic transactions, financing is an offence also if it occurs overseas.¹¹³ Culpability of persons for this offence requires criminal intent but the state of mind need not be one of deliberate intent, as the *mens rea* or fault component is met if the state of mind was reckless. The *Criminal Code* defines recklessness as:¹¹⁴

- 5.4(2) A person is reckless with respect to a result if:
- (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.

Although recklessness is a lower threshold for criminal intention than deliberate intent, the factual evidence requires proof beyond reasonable doubt of the awareness of substantial risk. The substantial risk component itself is an assessment of probability, and the unjustifiability component is an assessment of reasonableness. This combination of factors is complex and difficult.

First, an Australian prosecutor would need to consider whether the probability of the funds being diverted into terrorist acts was a substantial risk (under s 103.1(b)). Given the Gaza operational

¹⁰⁷ Charity Commission for England and Wales (Charity Commission), *Vicarious Liability of a Charity or Its Trustees* (23 May 2013) <<https://www.gov.uk/government/publications/vicarious-liability-of-a-charity-or-its-trustees>>.

¹⁰⁸ Dept of Human Services, *Australian Victim of Terrorism Overseas Payment* <<https://www.humanservices.gov.au/customer/services/centrelink/australian-victim-terrorism-overseas-payment>>.

¹⁰⁹ See, generally Wayne Covell, Keith Lupton and Jay Forder, *Principles of Remedies* (Lexis Nexis, 2015).

¹¹⁰ *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 10 January 2000, 2178 UNTS 197 (entered into force 10 April 2002) Art 2.

¹¹¹ *Criminal Code*, s 103.1 addresses financing of terrorism in the form of a terrorist act; s 103.2 addresses financing of a terrorist. These provisions were introduced in 2005 to address FATF compliance concerns over Australia’s implementation of the FATF Special Recommendations flowing from the 2005 compliance evaluation; s 102.6 deals with financing terrorist organisations and was already in place from 2002. Confusion caused by the duplicative nature of the provisions, particularly ss 103.1, 103.2, has been critiqued elsewhere (see, eg Bret Walker, Annual Report (Independent National Security Legislation Monitor, 7 November 2013) 76.

¹¹² Intention is the fault element for the conduct described in s 103.1(1). See s 5.6(1).

¹¹³ *Criminal Code* s 103.3; the Attorney-General’s consent to prosecute is required if the alleged offence occurred entirely outside Australia (s 15.4).

¹¹⁴ *Criminal Code* s 5.4.

environment and poor oversight, it seems that it can be objectively asserted that a substantial risk was present. Second, a prosecutor would need to consider whether individual officials of World Vision Australia were beyond reasonable doubt themselves subjectively aware of the substantial risk that their funding would be diverted (under s 5.4(2)(a)). This would require an investigation of the awareness of individual officials of World Vision Australia of the unreliability of oversight mechanisms they employed to prevent diversion of funds. On the evidence available at this stage, it is unsure whether World Vision awareness of the unreliability of oversight mechanisms could be proved. If that unreliability was well known even in DFAT, then complicity of government officials might be implied too.

Finally, to determine whether it was unjustifiable to take the substantial risk requires an assessment of the reasonableness (under s 5.4(2)(b)) of providing aid in circumstances that will ameliorate the suffering of Gazan residents, while at the same time prolonging HAMAS rule and suffering brought through its waging perpetual war and its repression of Gaza's populace. In light of the mixed consequences, a prosecutor might reasonably assert that the risk was unjustifiable.

Despite evidence of Australian funding of terrorist acts,¹¹⁵ there has not been a successful prosecution under s 103 of the *Criminal Code* on criminal funding of terrorist acts since the legislation was introduced over a dozen years ago.¹¹⁶ Two cases in Victoria have, however, considered crimes under s 102 concerning funding of terrorist organisations.

In the more recent case, *R v Vinayagamoorthy*,¹¹⁷ two defendants collected funds in Australia from the Tamil Community and made the funds available to the Liberation of Tigers of Tamil Eelam, a terrorist organisation proscribed under United Nations sanctions. They pleaded guilty to counts under s 21 of the *Charter of the United Nations Act 1945* (Cth), which provides that it is an offence to make an asset available to a proscribed person or entity. This provision is a strict liability offence,¹¹⁸ and therefore it is simpler to use to gain a conviction, as any knowledge or recklessness on the part of the defendant that the entity is a terrorist organisation need not be considered.

In *R v Benbrika*¹¹⁹ the Supreme Court of Victoria considered the attempted financing of terrorism, among numerous terrorism charges against seven defendants. The second, fourth and fifth defendants were charged with attempting intentionally to make funds available to a terrorist organisation, knowing that it was a terrorist organisation, in breach of the *Criminal Code Act 1995* (Cth), s 11.1(1) concerning attempt and s 102.6(1) on funding a terrorist organisation. They had stolen two cars and intended to strip them and sell their parts to fund their group's terrorist activities. The jury found the three defendants guilty of attempted funding of a terrorist organisation. The prosecutions for this offence were relatively simple, as the defendants were attempting to fund their own group's terrorist activities and, therefore, it was easily proven that they had actual knowledge that they were intentionally funding a terrorist organisation.

These are the only two cases that have prosecuted the financing of terrorism in Australia and both concerned offences of intentional funding of a terrorist organisation.¹²⁰ Neither concerned funding of a terrorist act or person under s 103 of the *Criminal Code*, which has the sole provision on reckless funding. Nevertheless, terrorism funding through charities, identified as Australia's second highest terrorism financing risk, occurs through reckless administration (eg, the World Vision case) as well as

¹¹⁵ For example Dar al Quran wa Sunnah, a charity in Sydney to raise money for Syrian refugees, is suspected of sending overseas \$27 million in Commonwealth child care benefits and rebates, used in part for terrorism financing: Lisa Main and Suzanne Dredge, "Islamic State: Member of Australian Charity Charged with Raising Funds for Jihadists and Recruiting for IS" *ABC News* (3 July 2015).

¹¹⁶ The two convictions for terrorism financing in Australia did not involve charitable organisations or recklessness: see *R v Vinayagamoorthy* [2010] VSC 148; *R v Benbrika* (2009) 222 FLR 433; [2009] VSC 21.

¹¹⁷ *R v Vinayagamoorthy* [2010] VSC 148.

¹¹⁸ *Charter of the United Nations Act 1945* (Cth) s 21(2).

¹¹⁹ *R v Benbrika* (2009) 222 FLR 433; [2009] VSC 21.

¹²⁰ It is likely that charges pending against a woman recently arrested for electronically transferring \$30,000 to the Islamic State terrorist organisation will be brought under s 102 also, rather than s 103: Rachel Clun, "Sydney Woman Charged with Financing Islamic State", *Sydney Morning Herald* (online), 23 January 2018 <<http://www.smh.com.au/nsw/sydney-woman-arrested-over-terror-financing-20180123-h0mphu.html>>.

by intent. Unfortunately, though, prosecution for recklessly funding a terrorist act or person seems to confront impossible hurdles under s 103. It follows that a reconsideration of whether the s 103 is workable is appropriate.

SELECTED COMPARABLE JURISDICTIONS

Other common law countries also face challenges in preventing the diversion of charitable funds into political violence overseas. Have alternative models been identified by them that provide charities with credible regulation and disincentives within their jurisdictions? The following survey identifies features in jurisdictions with similar legal frameworks regulating charities in Canada, England and Wales and the United States that might provide lessons for Australia. The legal frameworks were, in each case, established to address misuse of funds or other abuses of responsibilities by charities.

Canada

In Canada, a Charities Directorate was established in 1967 within the Canada Revenue Agency (CRA), which is the national tax collection office. Charities must file annual reports and a list of any international partner organisation that has been provided funds, in disclosures that are publically available on the CRA website.¹²¹ Canadian charities that transfer funds to other organisations for international projects must also ensure that those organisations' work adheres to the same guidelines for charitable activities that they themselves must follow.¹²²

The *Charities Registration (Security Information) Act 2001* (Can)¹²³ establishes the following test for financing of terrorism: are there reasonable grounds to believe, based on criminal and security intelligence reports, that an organisation makes its resources available, either directly or indirectly: to a terrorist group that is a listed entity under the *Criminal Code*, or to any other organisation engaged in terrorist activities or in activities that support terrorist activities? The Minister of National Revenue and the Minister of Public Safety each review the evidence and sign a certificate if they believe the test has been met. The certificate is then referred automatically to a judge of the Federal Court to determine the reasonableness of the ministers' decision. The judge prepares a summary of the security and criminal intelligence reports, which is given to the affected organisation. The organisation can then appear before the judge to argue against the certificate. If the judge upholds the ministers' decision, the organisation is barred from obtaining registration as a charity, or if already registered, it loses its registration. The bar to registration lasts for seven years. However, an organisation can ask ministers to reconsider its case at an earlier point if there has been a material change in circumstances.¹²⁴

In a July 2015 parliamentary report authored by the Standing Senate Committee on National Security and Defence, the CRA confirmed that eight registered charities had had their status revoked as a result of links to terrorism.¹²⁵ The Committee raised concerns about the length of time investigations can take, and the fact that there appears to be no individual liability in Canadian law for directors and staff of charities linked to terrorism.¹²⁶

The Islamic Relief Fund for the Afflicted and Needy (IRFAN) had its charity registration revoked by the CRA on April 9, 2011 based in part on CRA's findings that IRFAN-Canada provided support to HAMAS. CRA findings indicate that IRFAN-Canada provided over \$14.6 million in resources to operating partners that were run by officials of HAMAS, openly supported and provided funding to

¹²¹ The full return provided by the charity can be viewed, including a summary of activities overseas if applicable. Guidance for charities operating overseas is also provided by Canada Revenue Agency, *Canadian registered charities carrying out activities outside Canada* (8 July 2010) <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/plcy/cgd/tsd-cnd-eng.html>>.

¹²² *Canadian Committee for the Tel Aviv Foundation v Canada* 2002 FCA 72; *Canadian Magen David Adom for Israel v Canada (Minister of National Revenue)* 2002 FCA 323; *Bayit Lepletot v Canada (Minister of National Revenue)* 2006 FCA 128.

¹²³ *Charities Registration (Security Information) Act 2001*, SC 2001, c 41, s 113.

¹²⁴ *Charities Registration (Security Information) Act 2001*, SC 2001, c 41, s 113.

¹²⁵ Senate Committee on National Security and Defence, *Countering the Terrorist Threat in Canada: An Interim Report* (2015) <<http://www.parl.gc.ca/Content/SEN/Committee/412/secd/rep/rep18jul15-e.pdf>> 9.

¹²⁶ Senate Committee on National Security and Defence, n 125, 9.

HAMAS, or to entities that were listed by various jurisdictions because of their support for HAMAS or other terrorist entities.¹²⁷

Like Australia, the Canadian Government inserts a standard obligation to comply with counter-terrorism laws in development aid contracts with Canadian NGOs, which are first tier implementing partners, and requires that they pass on similar clauses to second tier local partner NGOs and community-based organisations. However, Canadian governmental officials also directly check lists of names of development aid subcontracted organisations and key personnel against terrorist lists.¹²⁸ This process enables the engagement of Canadian national security intelligence in a way that is not available to Australian NGOs, which are merely using checklists and open internet searches.

As at July 2015, there had been only a single prosecution for a terrorism financing offence not coupled with other terrorism charges in Canada,¹²⁹ although increased disclosures by the Financial Transactions and Reports Analysis Centre of Canada to intelligence and the Royal Canadian Mounted Police may see an increase in future.¹³⁰

England and Wales

The Charity Commission for England and Wales was originally established in 1853 and currently operates under the *Charities Act 2011* (UK). It reports directly to Parliament and is the veteran model for independent statutory charities commissions. Registration is mandatory for charities with an income of over £5,000.¹³¹

The Charities Commission has published a range of guidance against charitable engagement in terrorist activity. These include regulatory guidance on obligations under terrorism legislation,¹³² operational guidance on the Charity Commission's role in possible terrorist cases,¹³³ a "Compliance Toolkit" on charities and terrorism,¹³⁴ and on "Protecting charities from abuse for extremist purposes",¹³⁵ and it has also published a policy paper on its counter-terrorism work.¹³⁶ Significant for suppression of support of terrorism overseas, it has also developed a "compliance toolkit" for working with international partners, which is based on due diligence in ensuring the integrity of partners and beneficiaries, with the stringency of integrity assurance obligations corresponding to a risk assessment of the circumstances.¹³⁷ The Charity Commission's suite of guidance to counter the charitable financing of terrorism is currently further advanced than that of the ACNC.

The Commission has powers to ensure compliance and accountability by addressing complaints about the way a charity is run. These are concerns about a charity not doing what it claims to do, losing money, harming people, being used for personal profit or gain, or being involved in illegal activity.¹³⁸

¹²⁷ Canada Revenue Agency, *Revoked Canadian charity listed under the Criminal Code as terrorist entity* (29 April 2014) <<http://www.cra-arc.gc.ca/chrts-gvng/chrts/whtsnw/rrrst-ntty-eng.html>>.

¹²⁸ In contrast, Australia requires implementing Australian NGOs to conduct their own vetting, although it imposes quality assurance checks on the vetting: Lucas n 99, 11.

¹²⁹ *R v Thambaitthurai* 2011 BCCA 137. The accused pled guilty to supplying financial services knowing they would benefit the Liberation Tigers of Tamil Eelam, a listed organisation under *Criminal Code* (Can).

¹³⁰ Stewart Bell, "Canada is seeing a spike in behind-the-scenes funding for terrorists, finance minister's office says" *National Post* (online) 8 June 2015 <<http://news.nationalpost.com/news/canada/terror-financing-cases-doubled-in-a-year-agency-says>>.

¹³¹ *Charities Act 2011* (UK) s 30.

¹³² Charity Commission, *Terrorism Act Alert* 30 September 2015 <<https://www.gov.uk/government/news/terrorism-act-alert-30-september-2015>>.

¹³³ Charity Commission, *Operational Guidance: Charities and Terrorism* (31 December 2013) <<http://ogs.charitycommission.gov.uk/g410a001.aspx>>.

¹³⁴ Charity Commission, *Charities and Terrorism* (1 December 2012) <<https://www.gov.uk/government/publications/charities-and-terrorism>>.

¹³⁵ Charity Commission, *Protecting Charities from Abuse for Extremist Purposes* (5 January 2013) <<https://www.gov.uk/government/publications/protecting-charities-from-abuse-for-extremist-purposes>>.

¹³⁶ Charity Commission, *The Charity Commission's Counter-Terrorism Work* (23 May 2013) <<https://www.gov.uk/government/publications/the-charity-commissions-counter-terrorism-work/the-charity-commissions-counter-terrorism-work>>.

¹³⁷ *Charity Commission Compliance Toolkit: Protecting Charities from Harm* (3 January 2011) <<https://www.gov.uk/government/publications/charities-due-diligence-checks-and-monitoring-end-use-of-funds>>.

¹³⁸ Charity Commission, *Complain about a Charity* (7 July 2016) <<https://www.gov.uk/complain-about-charity>>.

Complaints about fundraising¹³⁹ and advertising¹⁴⁰ are directed elsewhere. It can impose individualised conditions of operation, prescribe or proscribe certain staff or directors, suspend funding, negate contracts, and so on.¹⁴¹ Using its enforcement powers, the Commission conducts inquiries and a full list of inquiries is set out on its website.¹⁴²

It has conducted one inquiry into possible terrorism financing, the result of which was released after a criminal conviction had been secured in separate proceedings.¹⁴³ Meanwhile, it had frozen bank accounts, confiscated funds and donated them to other charities, and disqualified the prosecuted individual from being a trustee of a charity.¹⁴⁴ The Crown Prosecution Service charged 36 people and convicted 11 for terrorism financing between 2000 and 2010 under the *Terrorism Act 2000* (UK) (as amended)¹⁴⁵ and has since achieved further convictions.¹⁴⁶

The Charities Commission of England and Wales has a proactive role as regulator, including providing information to liquidators to assist recovery of funds from staff of charities who misappropriated funds.¹⁴⁷ It has a dedicated secondee to the National Terrorist Investigation Unit based at the Metropolitan Police and information sharing gateways with other authorities for the investigation of terrorism.¹⁴⁸ The Charities Commission appears to have powers to respond to complaints and to enforce, that are more extensive than the ACNC, but its effective use of those powers is questioned.¹⁴⁹ Concerns have been raised also over a lack of robust oversight to prevent terrorism financing through public funds disbursed by the UK Department for International Development.¹⁵⁰

United States

The US Department of Treasury has found that approximately 20% of funding for acts of terrorism prosecuted in the United States has come from charitable organisations.¹⁵¹ The risk of funding terrorism

¹³⁹ Fundraising Regulator <<https://www.fundraisingregulator.org.uk>>.

¹⁴⁰ Advertising Standards Authority <<https://www.asa.org.uk>>.

¹⁴¹ *Charities Act 2011* (UK) ss 76–85.

¹⁴² Charity Commission, Inquiry reports <<https://www.gov.uk/government/collections/inquiry-reports-charity-commission>>.

¹⁴³ Charity Commission, *Inquiry Report: Funds raised for charitable purposes and held on charitable trusts in the name of Adeel Ul-Haq* (28 July 2016) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/541460/adeel_ul-haq.pdf>.

¹⁴⁴ Charity Commission, n 143, 4.

¹⁴⁵ Ryder, n 21, 102.

¹⁴⁶ See Home Office, *Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes and stop and search, Great Britain, quarterly update to September 2017* (December 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664978/police-powers-terrorism-sep2017-hosb2417.pdf> 4.

¹⁴⁷ Sam Bourne James, “Trustee received £150,000 in unauthorised benefit, regulator finds” *Third Sector* 15 January 2015 <<http://www.thirdsector.co.uk/trustee-received-150000-unauthorised-private-benefit-regulator-finds/governance/article/1327920>>.

¹⁴⁸ FATF, *Third Mutual Evaluation Report: Anti-Money Laundering And Combating the Financing of Terrorism, United Kingdom of Great Britain and Northern Ireland* (29 June 2007) <<http://www.fatf-gafi.org/documents/documents/mutualevaluationofunitedkingdomofgreatbritainandnorthernireland.html>> 243–244.

¹⁴⁹ The UK National Audit Office reported in 2015 on the effectiveness of the Charity Commission as a regulator and in its use of regulatory powers, noting that the Commission is a reactive rather than proactive regulator and has been ineffective in many cases: National Audit Office, “Follow up on the Charity Commission” (22 January 2015) <<https://www.nao.org.uk/wp-content/uploads/2015/01/Follow-up-on-the-charity-commission.pdf>> 29.

¹⁵⁰ David Maddox, “Brit Woman Attacked by Palestinian Terrorists Demands Probe as UK aid ‘used on prisoners’”, *The Express* (online) 10 January 2018 <<https://www.express.co.uk/news/politics/902983/british-aid-palestine-terrorists-prisoners-probe-stephen-twigg-kay-wilson>>. Families of convicted terrorists in Israeli jails are paid an annual salary by the Palestinian Authority Prisoners’ Fund, which is economically reliant on foreign government donor funds. The salaries are publicised and scaled in accordance with the severity of the offence, providing incentive and reward for more severe acts of terrorism: see Yossi Kuperwasser, *Incentivizing Terrorism: Palestinian Authority Allocations to Terrorists and their Families* (Jerusalem Centre for Public Affairs, 2017) <<http://jcpa.org/paying-salaries-terrorists-contradicts-palestinian-vows-peaceful-intentions/>>.

¹⁵¹ US Dept of Treasury, *National Terrorist Financing Risk Assessment 2015* (6 December 2015) <<https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/National%20Terrorist%20Financing%20Risk%20Assessment%20%E2%80%93%202006-12-2015.pdf>> 36.

is particularly high for organisations based in or operating in high risk jurisdictions where terrorist groups are most active.¹⁵²

The Department of Treasury obliges tax-exempt organisations to file returns with the Internal Revenue Service (IRS) and to disclose matters, such as the amount of donations.¹⁵³ Charities are to disclose their controls surrounding overseas activities and to detail expenditures by region and partner organisation.¹⁵⁴ The Department of Treasury has also published voluntary best practice guidelines designed to facilitate compliance with US laws. These guidelines propose that US charities collect at least certain basic information on grantees, and conduct basic vetting of grantees and of their own key employees.¹⁵⁵ These guidelines are complemented by responses from Treasury to comments received on the guidelines during public consultations.¹⁵⁶ In contrast, AMENCA does not require similar vetting of Australian charity employees and World Vision has not been required to disclose details of its due diligence practices.

Beyond guidance, under the *International Emergency Economic Powers Act* (US), Treasury has powers to designate charities that provide assistance to terrorist networks.¹⁵⁷ For each designation, Treasury prepares an evidentiary “package” to be reviewed by the Departments of Treasury, State and Justice to determine if there is a reasonable basis to believe the charity meets the requirements for designation. When an entity has been designated, notice of the designation is published on the national List of Specially Designated Nationals and Blocked Persons containing a public statement with reasons for designation.¹⁵⁸ The charity loses its tax-exempt status,¹⁵⁹ and the IRS may prosecute those that have concealed their affiliation with a designated foreign terrorist organisation terrorist by filing false tax forms.¹⁶⁰ All US persons subject to US jurisdiction then have an obligation to identify and block the property of the designated entity and instances must be reported to the Office of Foreign Assets Control.

The US Agency for International Development (USAID) requires that all organisations being awarded a grant or contract by USAID certify that they do not provide material support for terrorism. In accordance with the *Federal Acquisition Regulation*, before a grant or contract is given, USAID also makes a “Responsibility Determination”.¹⁶¹ In 2007, the USAID updated Mission Order 21 on counter-terrorism measures.¹⁶² This sets out its vetting procedures for non-US recipient organisations and their key personnel, as well as for individual recipients (of sums over US\$1,000). Information for vetting is collected by USAID’s NGO partners and submitted to USAID’s Program Support Unit where the information is verified and sent to a USAID Vetting Centre in Washington. New vetting is required

¹⁵² US Dept of Treasury, n 151, 37.

¹⁵³ US Internal Revenue Service (IRS), *Form 990: Return of Organisation Exempt From Income Tax* <<https://www.irs.gov/pub/irs-prior/f990--2012.pdf>>.

¹⁵⁴ IRS, Schedule F to Form 990: Statement of activities outside the United States <<https://www.irs.gov/pub/irs-pdf/f990sf.pdf>>.

¹⁵⁵ See, eg US Dept of Treasury, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for US based Charities* (September 2009) <https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/guidelines_charities.pdf>; US Dept of Treasury, *Protecting Charitable Organisations* (24 August 2016) Resource Center <<https://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-index.aspx>>; Office of Foreign Assets Control, *Guidance Related to the Provision of Humanitarian Assistance by Not-for-Profit Non-Governmental Organizations* (17 October 2014) US Dept of Treasury <<https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20141017.aspx>>; IRS, *Compliance Guide for Public 501(c)3 Charities* <<https://www.irs.gov/pub/irs-pdf/p4221pc.pdf>>.

¹⁵⁶ US Dept of Treasury, *Response to comments submitted on the US Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary best practice for US based charities* <<https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/response.pdf>>.

¹⁵⁷ Presidential Executive Order 13224 designated 54 charities, along with additional branches and associated individuals, for the support terrorist organisations, as at 31 December 2014: US Dept of Treasury, n 151, 36.

¹⁵⁸ House Committee on financial services: Subcommittee on oversight and investigations, *Testimony of Daniel Glasser: Deputy Assistant Secretary (Terrorist financing and financial crimes)* (26 May 2010) <<https://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/FINAL%20GLASER%20TESTIMONY%20ON%20CHARITIES%205-26-2010%20edited%20PDF.pdf>> 5.

¹⁵⁹ 26 USC s 501(p).

¹⁶⁰ For example *United States v Mubayyid* 658 F 3d 35 (1st Cir, 2011), cited in US Dept of Treasury, n 151, 39.

¹⁶¹ *Federal Acquisition Regulation* Pt 9.104-4 Subcontractor responsibility.

¹⁶² US Agency for International Development, *Updated Anti-Terrorism Procedures, Update to Mission Order #21* (5 October 2007) <<https://www.usaid.gov/sites/default/files/documents/1883/2007-WBG-26.pdf>>.

whenever there is a change in an organisation's key individuals. USAID has three full-time staff that manage the vetting processes in its local Program Support Office in Jerusalem. USAID also undertakes annual financial audits on 100% of its prime partners and significant sub-awardees. It recognises that there is significant administrative burden required by its partners to comply with its requirements and allows those costs to be included in the contract.¹⁶³ Mission Order 21 stands in contrast with more superficial Australian regulatory oversight, which does not prescribe DFAT vetting procedures for local partners.

In the United States, civil litigation can be brought by donors against charities for fraudulent misrepresentation or misuse of funds.¹⁶⁴ Separately, the victims of terrorist acts overseas also can sue charities that fund terrorist acts for the damage they cause. Liability lies in tort law in the jurisdiction of each State, as has been demonstrated by awards of damages against funders for suffering caused to victims.¹⁶⁵ In addition, federal statutes specify that liability can be imposed for loss caused by terrorist acts overseas¹⁶⁶ and court judgements confirm that liability lies also against the funders.¹⁶⁷ In 2008, the appellate court in *Boim v Holy Land Foundation for Relief & Development*¹⁶⁸ upheld the civil liability of officers of a US registered charity for financing terrorism by providing money to HAMAS. As noted above, Australian practice is instead to provide victims with governmental compensation.

A series of high profile criminal cases prosecuting material support for terrorism also feature on the US legal landscape. Congress has enacted laws that criminalise such material support, including by the provision of drug proceeds,¹⁶⁹ and by conduct in violation of executive orders prohibiting transactions with terrorist organisations.¹⁷⁰ Following the attacks on the United States on 11 September 2001, the US Department of Justice brought a series of prosecutions against charities and their responsible officers, including the Benevolence International Foundation, Holy Land Foundation for Relief and Development, Islamic American Relief Agency, Child Foundation, Tamil Rehabilitation Organisation, and Care International.¹⁷¹ The Holy Land Foundation case is particularly relevant to the current circumstances of World Vision Australia, as it involved diversion of funds to HAMAS. Although the Holy Land Foundation specified that its donations were for welfare purposes, the element of reckless knowledge was proved because HAMAS was outside the control of the charity and was widely known to commit terrorist acts, thereby demonstrating a substantial probability of the charity's knowledge that the funds might assist engagement in terrorism.¹⁷² Five defendants were convicted on charges, ranging across conspiracy, providing material support to a foreign terrorist organisation, providing funds for a designated terrorist, money laundering and tax evasion.¹⁷³ As noted above, there are no Australian convictions for reckless financing of terrorism and the relevant criminal law appears convoluted and ineffectual.

ANALYSIS AND IMPLICATIONS

The World Vision Australia case demonstrates the potentially embarrassing consequences of delivering humanitarian assistance in a high-risk conflict zone under an inadequate regulatory framework. There can never be zero risk of misuse of charitable resources in zones of armed conflict but only diligent risk

¹⁶³ Lucas, n 99.

¹⁶⁴ See, eg. Cameron McWhirter, "Four 'sham' cancer charities accused of \$236 million fraud", *The Australian*, 20 May 2015. In this complaint, filed by US Federal Trade Commission, all 50 States and the District of Columbia, four cancer charities are accused of misuse of funds.

¹⁶⁵ Affirmed in *Klinghoffer v PLO*, 739 F Supp 854 (SDNY, 1990), aff'd in part and rev'd in part, 937 F 2d 44 (2d Cir, 1991).

¹⁶⁶ *Anti-Terrorism Act* (18 USC § 2333(a)); *Anti-Terrorism and Effective Death Penalty Act* (Pub L No 104-132, 110 Stat 1214).

¹⁶⁷ *Ungar v Palestine Authority* 153 F Supp 2d 76 (concerning *Anti-Terrorism Act*). *Boims v Quaranic Literacy Institute* 127 F Supp 2d 1002 (ND Ill 2001) (concerning *Anti-Terrorism and Effective Death Penalty Act*).

¹⁶⁸ *Boim v Holy Land Foundation for Relief & Development* 549 F 3d 685 (7th Cir, 2008).

¹⁶⁹ 18 USC ss 2339 A–C, 21 USC s 960a.

¹⁷⁰ *International Emergency Economic Powers Act*, 50 USC ss 1701–05. The most frequent charge is provision of material support to a designated foreign terrorist organisation (s 2339B): Michael Taxay, Larry Schneider and Catherine Didow, "What to Charge in a Terrorist Financing or Facilitation Case" (2014) 62(5) *US Attorney's Bulletin* 9 (Terrorist Financing Special Issue).

¹⁷¹ Taxay et al, n 170.

¹⁷² *United States v El Mezain* 664 F 3d 467, 484 (5th Cir, 2011), cited in Elizabeth Shapiro, "The Holy Land Foundation for Relief and Development: a Case Study" (2014) 62(5) *US Attorney's Bulletin* 9, 24 (Terrorist Financing Special Issue).

¹⁷³ *United States v El Mezain* 664 F 3d 467 (5th Cir, 2011).

management. However, that diligent management is sometimes dominated by a politicised mission or by the moral weight of the humanitarian imperative. Looking forward, how might the dilemma be addressed?

First, the variable degrees of risk of terrorism financing need to be assessed in the various circumstances of different operations and addressed individually. Assessing degrees of risk requires surveying the local situation at the site of delivery, including armed conflict, political coercion, track records of local aid delivery agents, host governments and civil society in combating tolerating or promoting terrorism; then categorising these circumstances in terms of degree of risk of diversion of aid; and then matching the categories to the charities' proposed operations. It makes no sense that an identical typology should apply in a Sydney local soup kitchen as in a Gaza warehouse.

Second, more engaged and rigorous oversight mechanisms are required for not-for-profit operations in high risk categories. Ensuring that supervisors from the charity's home base are continuously resident in the high risk zone and tasked with pushing back against local stakeholder partisanship is a necessary first step. Other risk management steps might include controls more qualitative than checklists to undertake regular local inspections, vet staff, investigate suspect activities, and to produce compliance reports for the organisational headquarters and national regulator.

Third, the governing legal system should be empowered to impose consequences upon a charity or not-for-profit organisation for non-compliance. The regulator could design individualised conditions of operation, prescription or proscription of certain staff or directors, suspend funding, negate contracts, require repayment of funding, and so on. Within the civil liability legal framework, redress in the form of damages for victims or terrorist acts and in the form of restitution for donors whose funds were misappropriated negligently or in bad faith should also be facilitated, as well as meaningful sanctions. The criminal law should enable corporate and individual liability for cases of culpable negligence, recklessness or criminal conduct and prosecute appropriately.

CONCLUSION AND RECOMMENDATIONS

The Australian regulatory framework for charitable operations overseas is evolving but does not yet effectively deter overseas terrorism financing. The above analysis indicates that it needs to be more situation-sensitive in risk assessment, to apply more rigorous preventive measures in high risk categories, and to enable meaningful remedial consequences for cases of misuse of resources. The comparison of Australian regulatory practice suggests that there are lessons from Canada on the better use of criminal intelligence, and from England and Wales on better charities guidance and regulation, whereas the United States provides sophisticated models for Australian consideration in the design of safeguards for development assistance, remedies in civil liability and of criminal culpability.

Due diligence requirements could be calibrated to manage risks of terrorism support in overseas environments prone to armed conflict. The ACNC counter-terrorism education and checklist program could be made responsive to differences across operating environments overseas. External conduct standards referred to in s 50.10 of the *ACNC Act* should be elaborated in ACNC regulations and greater public transparency provided on overseas operations, as is the case in Canada.

A public complaints and public inquiry mechanism such as employed by the Charities Commission of England and Wales could be a feature of the ACNC regulatory framework that would catalyse investigations into misuse of funds to finance terrorism. It could be equipped with powers including search and seizure, as well as asset freezing and confiscation. It could maintain cases on a public database to improve transparency in the sector. The suite of due diligence guidance provided by the ACNC could be extended by learning from the compliance toolkits provided in England and Wales.

AUSTRAC could develop a typology model to address the diversion of Australian charitable funds into terrorism by Australian NGOs operating overseas to complement standards to be adopted under s 50.10 of the *ACNC Act*, particularly because the growing number of small Australian charities operating overseas require attention. The national anti-money laundering and counter-terrorism financing risk assessment in the not-for-profit sector being led by AUSTRAC (threat x vulnerability x consequences) could be used by the ACNC to calibrate its regulatory oversight. Presently, there is a lack of calibration of risk management to correspond with operational risk circumstances in distinctly different operating environments. The ACNC should be able to access financial transaction information from AUSTRAC, and vice versa, as contemplated pursuant to an amendment proposed for the *AML/CTF Act*.

Concerning government provision of public funds for humanitarian assistance delivered through charities in foreign conflict zones, the DFAT counter-terrorism due diligence and risk management framework requires substance. Currently, it operates to minimise bureaucratic red tape and compliance costs but provides less safeguards than comparable measures employed by Canada or the United States. National counter-terrorism security intelligence could be accessed and considered, as it is in Canada, when categorising the risk factors and track records for individual Australian NGOs. Australian governmental security intelligence officials should be engaged in risk assessment processes. They should participate in Canberra and in situ in the vetting of local partner organisations and key personnel, as is the practice of USAID under Mission Order 21.

The Australian NGO accreditation process used by DFAT tends to emphasise front-end “in-principle” commitments but needs emphasis on ongoing performance monitoring. In very high risk environments, ongoing risk management measures should be acknowledged as a significant operating cost that government funders incorporate into development aid project budgets, as does USAID. Australian NGO staff who are locally engaged or are posted overseas also need to be vetted. The lack of requirement of ongoing presence of Australia-based staff and the lack of whistle blower protections for staff based overseas who may come under local peer pressure each magnify risks of improper use of resources.

Australian federal law reforms to provide civil remedies for misuse of charitable funds could be facilitated, so that donors can seek reimbursement. Elaboration of tort laws, as adopted in the United States to facilitate civil jurisdiction and liability to victims of terrorist acts committed overseas but funded by charities from within jurisdiction, should also be considered for introduction in Australia so as to provide adequate payment of damages to victims. Finally, in relation to criminal prosecutions, Div 103 of the Commonwealth *Criminal Code* needs to be revised to improve its clarity and workability in circumstances of reckless financing of terrorism.

The recent development of Australian oversight for charities and not-for profit organisations ensures that many avenues are available to improve current measures. Detailed consideration of a few of the recommendations made in broad brush strokes above could lead to improved deterrence of Australian charitable resourcing of terrorism abroad.