

## **Commonwealth Secretariat's Model Legislation on Anti-Terrorism**

*Kim Prost, Commonwealth Secretariat*

In order to give you a sense of the perspective from which I will address you today, I will give you a background on Commonwealth Secretariat's work, which has flowed directly from the mandate of the Commonwealth Heads of Government.

Sadly, terrorism is no stranger to the Commonwealth. It has for many years taken a tragic toll in loss of life, destruction of property and economic devastation within many of our member countries. Commonwealth Heads of Government have had terrorism on their agenda for many years identifying it as a matter of grave concern and calling for continuing joint efforts to eliminate this very real threat to our stability and security.

However, while it has long been a subject of international focus and concern within and outside the Commonwealth, it was the tragic events of 11 September which catapulted the issue to the top of the international agenda in a manner and with a force not seen before. And this was certainly true for the Commonwealth as well. With the postponement of the scheduled meeting of Heads of Government originally planned for October 2001, Heads of Government took the unusual step of issuing a separate statement on terrorism, in which they reiterated their condemnation of all acts of terrorism and renewed their commitment to work together as a diverse community of nations to, individually and collectively, take concerted action against terrorism. This statement has formed the basis for concerted action that has been taken by the Commonwealth over the past year and a half. In fact a Commonwealth Committee on Terrorism was established which prepared a Plan of Action that was subsequently endorsed at CHOGM, in March 2002.

An important component of the CHOGM statement and the Plan of Action was the specification of legal measures to be adopted **and the promise of support to countries to ensure their implementation.** The legal measures specified included the United Nations Security Council Resolution 1373 and the existing counter terrorism conventions, as well as the special recommendations of the Financial Action Task Force on the Financing of Terrorism.

And so, in accordance with the mandates, the Secretariat has developed certain tools – model legislation and implementation kits – to assist with that process and undertaken an ambitious program of workshops across the regions of the Commonwealth. I want to share with you today from that experience, some of the fundamental challenges that states are facing in trying to achieve the often mentioned balance between the protection of the

safety of persons and society and the maintenance of fundamental values and human rights.

We have heard much on this topic in the press with considerable focus on what I would call some “big picture” issues such as the detention legislation within the United States and the United Kingdom. But, quite frankly, it is not these obvious cases where the major concerns lie. For most Commonwealth countries the problems are much more subtle. And they are not, for the vast majority, issues of their own creation. The greatest challenge for states is trying to fulfil the obligations that have been set internationally by the United Nations Security Council and by the Financial Action Task Force in a manner that is consistent with fundamental protections, values and freedoms. And the major concern is not pre trial detention – the vast majority of Commonwealth countries are not even looking at changing from the common law position on this.

The major issues lie in the definition of terrorism, the freezing of assets and related prohibitions and in the offences and measures adopted to gather information and to prevent terrorist acts. And it is on those issues that I will focus my comments today.

And one final caveat which I have come to believe in very much over the course of my work in the past 18 months. There is no one size fits all solution. There are some measures that are outrageous in the context of some countries’ legal, political and social context which are perfectly justified and acceptable for others. While I know that many of you may disagree with me on this point, I firmly believe that the balance achieved must vary depending on the nature of the threat and the extent to which there are appropriate entrenched safeguards within a country’s legal system.

Time will not permit a detailed examination of all the relevant issues so I am just going to touch on some of the key points that I think will highlight the issues for you and bearing in mind the areas of human rights concerns set out in the seminar invitation.

## **Context**

As mentioned, when you are considering the counter terrorism initiatives ongoing in a number of countries it is important to keep in mind that much of this has not been generated domestically such that one must be careful when attaching criticism to actions taken.

On 28 September, the United Nations Security Council issued a now famous resolution – resolution 1373 - on measures to combat terrorism and in so doing set a fierce and ambitious legislative and administrative agenda for all UN member states across the globe. And it is that agenda that has been driving the action of States across the Commonwealth and the globe. And I will concentrate on measures that flow from that resolution in main part.

### ***Terrorist Act***

In December 1999 the General Assembly adopted a convention on the Suppression of the Financing of Terrorism (*SFT Convention*). In that convention, *inter alia*, State Parties were obligated to create an offence for “directly or indirectly, unlawfully or wilfully, providing or collecting funds with the intention that they should be used for or in the knowledge that they are to be used, in full or in part, in order to carry out terrorist acts.”<sup>1</sup> Jurisdiction for the offence is to apply to nationals as well as to offences committed within the territory of the state.

This obligation of course was one that States would need to comply with if they chose to become a party to this particular convention. As of September 2001, only 5 States had ratified the *SFT Convention*, the US not amongst them, and it had yet to come into force. However after 11 September everything changed and by virtue of the resolution, the Security Council has now mandated that all states adopt such a “financing offence”, using virtually the identical language to that found in Article 2 of the *SFT Convention*. Thus, all states now must create this offence. And that, in and of itself, raises some difficult issues.

First and foremost – you cannot criminalize the financing of terrorism without some definition of “terrorist act” or “terrorism”. In the absence of agreement internationally, which there is not, it falls to each country to define “terrorism” or “terrorist act” for the purposes of this mandated offence provision. The definition provisions that have been adopted, by and large, follow a pattern in terms of the elements covered.

- A list of underlying acts;
- An intention of intimidation of a population or segment of a population or to compel a government or international organization to do or abstain from doing any act;
- And in some, an additional requirement that the act is carried out to advance a political, ideological or religious cause.

One can see immediately the potential human rights issues flowing from this definition and really it is tied primarily to the kinds of underlying acts that will be singled out for coverage. Some countries have chosen to limit the underlying acts to offences under the existing counter terrorism conventions – hijacking, hostage taking and any other act intended to cause death or serious bodily harm. That is the narrowest definition that one can adopt and from the perspective of fundamental rights the one least likely to incur concern. I think there are very few who would consider that labelling an act meeting this definition as terrorist to be offensive to any fundamental rights and freedoms or open to significant abuse.

On the other hand, for many countries, particularly when one considers that the intention is to stop the financing of terrorism, this definition is far too narrow to accord sufficient protection in the face of increasingly innovative and creative terrorists. And so you will

---

<sup>1</sup> International Convention on the Suppression of the Financing of Terrorism, adopted by the United Nations General Assembly on 9 December 1999, in force 10 April 2002.

find that many countries have included a much more extensive list of underlying acts, including those which cause a serious risk to public health or safety, releasing toxins into the environment, intending to disrupt or damage computer systems, intending to disrupt the provision of essential emergency services etc. This of course provides a broader frame of protection though one can see immediately potential for broad and perhaps abusive application. And there is simply no right or wrong answer on this in terms of where the balance should be struck.

One way that some countries such as Canada and New Zealand have sought to modify the impact of a broad definition is by specific exclusions in particular for protests demonstration, work stoppage, advocacy provided they were not intended to endanger persons, cause harm or damage to property or pose a risk to public health and safety.

Another protection that is very much a two edged sword is prosecutorial discretion. In the common law it is a fundamental check in the system that it rests with the prosecution authority, generally an independent authority such as a DPP, to determine whether a prosecution will proceed. But the effectiveness of this protection is dependent first on the proper functioning of the office within the legal system and second upon that invariably human factor, the carrying out of that function.

Finally, it is important to keep in mind that the only internationally mandated requirement is to have a definition of terrorist act for the offence of terrorist financing. It is not necessary to create a substantive offence of “terrorist act”. And some countries have done precisely that - created only a definition and financing offence leaving the underlying acts to be dealt with as normal criminal offences with possibly added enhanced penalty provisions. This too is a form of protection as it limits the cases where “terrorism” prosecutions will arise.

### **Freezing of Assets**

I move then to what unquestionably is the “hardest part” of implementing SCR 1373. It comes from paragraph 1(c) of the Resolution under which states are required to:

“freeze without delay the funds and other financial assets or economic resources of

- persons who commit or attempt to commit, participate in or facilitate the commission of terrorist acts
- any entities owned or controlled by such persons
- and any funds derived from property owned or controlled by these persons or entities. “

And similarly, under paragraph 1(d), each state must prohibit its nationals and those within its territories from making any funds, financial assets or economic resources or financial or related services available to such persons.

The term “funds” has been interpreted broadly, with most countries applying the very wide definition of this term incorporated in the *SFT Convention*. Ostensibly, this obligation alone in 1373 might have been manageable in that each country would decide on what standard and criteria a person or specified funds would be considered to fall within the categories outlined above. But what complicates the matter considerably is that under related resolutions both pre and post, the Security Council has listed persons and entities that fall within the language of these paragraphs and the assets of whom all states are then obligated to freeze on an indeterminate basis. And facing the political realities of our times, states can expect to receive lists with additional names from other states accompanied by a request for freezing.

I think you can imagine immediately why this aspect of the resolution is so challenging when it comes to implementation. And no one mechanism has been adopted.

- Some countries treat this freezing requirement like any other “sanction” order of the UNSCR – under existing foreign power based UN legislation they adopt regulations to freeze the assets of those named by the UN.
- Some have resorted to such UN legislation as a stopgap measure for an interim period and then brought in legislation to provide for a domestic executive power to issue orders specifying or designating persons and entities, with a resulting freezing of assets so that they can deal not only with SC lists but other countries lists and domestic cases.
- Some have simply issued directions to financial authorities under existing banking or anti-money laundering powers.
- Others have created a court application process on a broad based test hoping that the considerable weight will be accorded to the listing of a person or entity by the UNSC
- And still others yet have maintained that any freezing action must be tied to specific criminal offences and requires an application to a court, on the basis that the person has been charged with an offence or there is a reasonable basis to believe they have been involved in the commission of terrorist acts. What is not clear in the latter approach is whether the Security Council list constitutes a “reasonable basis”.
- And in some countries you will find a mix of all of the above.

You can see that this is a classic case of being caught between a stone and a hard place. Fail to have an effective freezing mechanism and you are in breach of obligations under the Security Council resolution. Fail to design a provision that accords sufficient rights and protections to the individual and there is a fundamental concern about a breach of

those rights let alone constitutional and legal challenges to the legislation. Again there is no right or wrong answer and there are strong arguments on both sides.

### **Prevention offences**

For obvious reasons one of the preoccupations of the Security Council and of individual state governments is the prevention of terrorism and the adoption of measures that will enhance our effectiveness in that regard. There is no set requirement for the form such measures should take but there is a clear exhortation to countries to have in place adequate provisions for prevention. And obviously the main concern for all of us as individuals and for governments has to be preventing these horrific acts that threaten our safety and security. And therefore it is not surprising to see countries adopting a number of measures, some which no doubt you will find controversial, on the question of prevention. I will just touch on a few and we can discuss the issue further in our exchange of views.

1. Making membership and related activities criminal offences
  - Making it a criminal offence to belong to a group and as a result to recruit to that group, hold or arrange meetings etc.
  - Objective to reduce the opportunities for getting together, discussing and planning of terrorist acts
  - Freedom in issue – right of association
  
2. Incitement and Recruitment
  - Make it a criminal offence to incite or encourage membership or commission of acts and to prohibit any form of recruitment
  - Objective to limit what can be said and done to induce and encourage membership and participation in such groups and acts
  - Freedom in issue – freedom of speech
  
3. Obligation to report
  - Most controversial – placing a positive obligation on persons to report any information about a planned terrorist act or information that would lead to arrest and prosecution and criminalize the failure to do so
  - Objective to ensure a flow of information about these most heinous of acts
  - Freedom in issue not sure but not something we do in the common law with exception of treason. Also raises fundamental concerns about dangers to those reporting and the creation of an atmosphere of informants.

There are a number of other issues that come up in the area of counter terrorism legislation including:

Investigative techniques, pre charge detention, international cooperation regimes, prevention of abuse of refugee systems, removal of the political offence exception in application to terrorism offences and even some of the measures recommended by FATF such as regulation of charities and alternative remittance systems.

But I will stop here and invite some comments and discussions on the points I have dealt with specifically, some of these other issues or anything you might be so inclined to raise.