

## **Counter Terrorism and the Law**

The intention of this paper is to identify relevant laws in Fiji relating to “terrorism” or “terrorist act”. The paper provides an overview of Fiji Police’ current capability to combat Terrorism. It also includes a brief synopsis of Australia’s response to the terrorist threat.

Fiji is no exception to terrorist attack; even though there has been no major covert terrorist threat that has manifested itself into action. However, the destruction of the twin towers in New York on September 11, 2001 and the bombing of Kuta Night Club in Bali showed the length of terrorist groups are willing to go in pursuit their goals. It is no longer true that the further you are geographically located away from United States the more one feels free from terrorist attack.

Professor Ron Cromcombe in his report to the Forum Regional Security meeting in Port Vila, 13-15<sup>th</sup> July, highlighted four (4) key variables present in any conflicting situation in the South Pacific Region. They are;

- (i) Ethnic Differences
- (ii) Land Disputes
- (iii) Economic disparities, and
- (iv) A lack of confidence in government’s ability to resolve differences fairly or satisfactorily; and usually a belief that those in power are biased, corrupt or ineffective, in sum a lack of good governance.

Fiji’s **Penal Code** Cap 17 contains provisions that address the general issues of terrorism. They are provided under sections 72 to 78 respectively. The penalties provided in these codes are insufficient for deterrence, however, they do serve as a preliminary basis for response to terrorism threats. Fiji has however taken some initiatives in passing the **Civil Aviation (Security) Act 1994**, **Mutual Assistance in Criminal Matters Act 1997**, and the **Proceeds of Crime Act 1998** as a crucial response to counter terrorism. Consequently, the initiatives taken by the Parliament of Fiji in passing the above legislations has fulfilled some of the obligations required under the **United Nation Security Council Resolution 1373**.

### **United Nations Security Council Resolution 1373(2001)**

The international framework for combating terrorism is outlined in **United Nation Security Council Resolution 1373**, adopted on 28<sup>th</sup> November 2001.

UNSCR 1373 calls upon members of the United Nations to cooperate in international action against terrorism. The Resolution also establishes a

committee on terrorism within the Security Council, which will work with the member states to assist them to meet the requirements of UNSCR 1373. The Committee has instituted a three-tiered programme to encourage and support member states to:

- (a) introduce and pass necessary legislation ;
- (b) put in place necessary machinery to implement the legislation;
- and
- (c) use the machinery effectively once it is in place.

The ***Proceeds of Crime Act 1997*** would seem to comply with the principal obligation covered under sub articles 1(a),(b),(c) and (d) of UNSCR 1373.

The Fiji Police Force acknowledges that the current legislative provisions may not totally comply with the obligation of the said resolution, and would welcome the opportunity to work with other relevant authorities in implementing UNSCR 1373.

### **Definition of Terrorism**

The word ‘terrorism’ derives from the era of French Revolution describing “state-directed policy of inflicting terror...to obtain political and social control.”<sup>1</sup> Its more modern usage describes offences by individuals or individual organization against state in order to attain certain political objectives.

Section 2(b) of the *Financial Transaction Reporting Bill No 20 of 2004*,<sup>2</sup> of Fiji defines “terrorist act” as;

*2(b) an act of threat of action in or outside the Fiji Islands which-*

- (i) involves serious bodily harm to a person,*
- (ii) involves serious damage to property,*
- (iii) endangers person’s life,*
- (iv) creates a serious risk to the health and safety of the public or a section of the public,*
- (v) involves the use of firearms or explosive,*
- (vi) involves releasing into the environment or any part thereof or distributing or exposing the public or any part thereof to any dangerous, hazardous, radioactive or harmful substance, any toxic chemical, or any microbial or other biological agent or toxin;*

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<sup>1</sup> Operation Matavulo II Counter Terrorism UNSC Resolution manual, p 5.

<sup>2</sup> Currently being discussed by the Economic & Admin Services Sector Standing Committee. Its report is expected to be tabled in the November session of Parliament.

- (vii) *is designed or intended to disrupt any computer system or the provision of services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;*
  - (viii) *is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services; or*
  - (ix) *involves prejudice to national security or public safety; and is intended, or by its nature and context, may reasonably be regarded as being intended to-*
    - (A) *intimidate the public or a section of the public; or*
    - (B) *compel a government or an international organization to do, or refrain from doing, any act; or*
    - (C) *seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization;*
- but does not include any act which disrupts any services, and is committed in pursuance of a protest, demonstration or stoppage of work if the act is not intended to result in any harm referred to in subparagraphs, (i),(ii),(iii) or (iv).

### **Problem with the Definition**

One of the major problems in trying to define “terrorism” or “terrorist act” is that “terrorist acts” are difficult to categorize at law. While the elements of criminality, seriousness, motivation and intention may be identifiable, a “terrorist act” does not fall neatly into the provisions of legislation that is presently in place in Fiji.

As previously mentioned, the Fiji’s **Penal Code** do contain some provisions that serve as preliminary response to terrorism threat. However, these are inadequate to address threat posed by terrorism.

### **Legislative Initiatives**

Apart from the **Penal Code** the Parliament has passed the enactment of 3 other legislation which serves as a legislative response to counter terrorism threat. These include;

- (i) Civil Aviation (Security) Act 1994,**
- (ii) Mutual Assistance in Criminal Matters Act 1999,**
- (iii) Proceeds of Crime Act 1998.**

## **Civil Aviation (Security) Act 1994**

The object of this Act reads;

***To make provision for offences against the safety of Civil Aviation; the protection of Civil Aviation from acts of unlawful interference; airport security; the powers of search and arrest of operators and commanders of aircraft and related matters.***

An “act of violence” under section 2 of the Act is defined as “in relation to provisions of Part II of this Act, means:-

- (a) any act done in Fiji which constitutes an offence against the Penal Code, and
- (b) any act done outside Fiji which, if done in Fiji, would constitute such an offence as is mentioned in paragraph (a).

Part II of the Act expressly provide offences against the safety of civil aviation which is of course a vulnerable target of terrorist attack. Under section 3 to section 13 of the Act it outlines offences and includes;

- Hijacking;
- Aircraft Sabotage;
- Endangerment of Aircraft;
- Airport Sabotage;
- Taking of Aircraft;
- Threats and False statements respecting airports; and
- Offences relating to certain dangerous articles.

Sections 3 & 5 of ***Civil Aviation (Security) Act 1994*** deal with Hijacking and Aircraft Sabotaging which is given the same meaning as that given under section 73 and 76 of the ***Penal Code***. The penalty for these two offences carries a maximum penalty of life imprisonment. Other less serious offence carries penalties from seven to fourteen years imprisonment or a fine not exceeding \$20,000.

## **Mutual Assistance in Criminal Matters Act 1997**

The object of the Act reads:

***“To regulate the obtaining of international assistance in criminal matters to the taking of evidence, assistance in investigations and procedures for forfeiture or confiscation of properties used in the commission of a serious offence and related matters.***

Generally, there are provisions in the ***Mutual Assistance in Criminal Matters Act*** 1997 for mutual assistance in criminal matters that allow for taking of evidence, production of documents or other articles, assistance in search and seizure, and for arrangements for persons to give evidence or assist investigation. “Terrorism” or “Terrorist Act” has been stated as a criminal matter for which assistance can be rendered.

Under section 8 of the Act Fiji may request for international assistance in a criminal matter that Fiji is authorised to make under this Act and such a request is made by the Attorney General.

Reciprocally, foreign countries as in section 9 may request the Fiji Attorney General or a person authorised by the Attorney General to receive request for international assistance in criminal matters.

These powers can only be exercised in relation to those jurisdictions with which Fiji has an arrangement or treaty (Section 5). The circumstances in which mutual assistance is given is solely dependent on what is agreed upon in treaties or arrangements signed. Furthermore, there are no standards on which mutual assistance can be given.

“Terrorism” or “Terrorist Act” is a “criminal matter” and a “serious offence” whereby section 3 of the Act specifically provide that “serious offence” means an offence which the maximum penalty prescribed by law is death, or imprisonment for not less than 12 months.

### **Proceeds of Crime Act, 1997**

The object of this Act is:

***To provide for confiscation of the proceeds of crime to deprive persons of the proceeds, benefits and properties derived from the commission of serious offences and to assist law enforcement authorities in tracing the proceeds, benefits and properties and for related matters.***

It is relatively important to point out the connection between anti money laundering provisions provided in the ***Proceeds of Crime Act*** and counter terrorism initiatives.

Money laundering is the process of converting cash or other property derived from criminal activity such as illegal arms sale, smuggling, organised crime, embezzlement, insider trading, bribery, theft, tax evasion, computer frauds etc and to legitimise these. It is also a process to legitimise ill-gotten gains for wide use in all forms of terrorism.

Some of the relevant features of ***Proceeds of Crime Act*** are listed which may directly applicable to counter terrorism initiatives.

- S69 of the Act makes money laundering an offence punishable by a fine not exceeding 20years or both.
- S3 defines serious offence for money laundering as all those offences where the punishment is death or imprisonment of not less than 12 months.
- The definition of money laundering refers to proceeds of serious crimes and “proceeds” in section 3 is defined as any property, therefore money laundering extends all money that represent proceed of crime.
- S69 of the Act provides that the sanction for a money laundering offence is a fine of \$120,000 or imprisonment not exceeding 20years if the offender is a natural person and a fine of \$60,000 if the person is a body corporate.
- S61 of the Act requires financial institutions to inform the Commissioner of Police or the DPP where it has reasonable grounds to suspect that information it has on a transaction maybe relevant to an investigation.

#### **AUSTRALIAN APPROACH**

Since the September 2001 terrorist attack, Australia’s approach to CT has also increased. It has since received \$3.1Billion in funding since 2001. She has now adopted an ‘All Government Approach’ to CT through the networking of government agencies. The following agencies are engaged in Australia’s international CT effort: —

- ❑ Department of Foreign Affairs & Trade.
- ❑ Australian Secret Intelligence Service (ASIS).
- ❑ Australian Security Intelligence Organization (ASIO).
- ❑ Defence, the Department of Immigration, Multi-cultural and Indigenous Affairs (DIMIA);
- ❑ Department of Transport & Regional Services;
- ❑ Australian Customs Services;
- ❑ Australian Federal Police.

The Australian Government has implemented over 100 measures since 11 September 2001 to better protect Australia. The approach involves strengthening existing agencies and making CT a priority for all relevant departments, through the following means:

- Tighter legislations;
- More capable terrorism fighting agencies;
- Greater International Corporation.

On Tactical Disruption measures the following have been strengthened:—

- Increase in ASIO powers and operation capability;
- Introduction of joint CT strike teams within the AFP;
- Tactical Assault Group (Defence) to respond to terrorist incidents on the east coast of Australia;
- Increase in Aviation Security with Sky Marshals on domestic and some international flights.

ASIS and ASIO remain as principal Intelligence fronts for external and internal/domestic gathering with products channeled to the ANAU for necessary dissemination process.

A 24 hours hotline has been introduced for people to report suspected terrorist activities. The National Threat Assessment Centre (NTAC) has been established as well and operates on a 24 hours system to verify threats received pertaining to terrorist activities either internally or externally.

Necessary legislations have also been drawn and enacted.

### **FIJI'S APPROACH**

The Special Branch (SB) of the Fiji Police is the sole agency responsible for CT intelligence gathering. Its approach on this regard is based on the following: —

- (i) Intelligence Gathering;
- (ii) Verification;
- (iii) Liaison.

The Criminal Investigation Department (CID) is responsible for investigations on relevant threats received.

The newly formed Police Tactical Response (PTR) Unit is responsible for tactical disruption measures.

The following approaches have been utilized: —

- ❑ Necessary training has been introduced within the SB in the areas of identifying intelligence and symptoms related to possible terrorism. Extreme Islamic activities are being monitored closely on this regard.
- ❑ Continuous close liaison with foreign embassies based in Suva on Security updates;
- ❑ Upgrading of Border Control Security at Fiji's main port of entries. International arrivals at Nadi and Nausori Airports are being monitored closely on this regard.

The Fiji Police has limited resources for CT roles currently performed by the various Police departments. Necessary tactical equipment for investigations and disruption purposes are not available. Funding remains a major stumbling block on this regard.