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## **REPORT ON PROTECTING THE “NONPROFIT SECTOR” FROM TERRORIST ABUSE**

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*By Sean S. Carter & Terrance S. Carter\**

### **A. INTRODUCTION**

In June 2013, the Centre on Global Counterterrorism Cooperation (“CGCC”), a nonpartisan policy institute based in Washington, D.C., published a report entitled “To Protect and Prevent: Outcomes of a Global Dialogue to Counter Terrorist Abuse and the Nonprofit Sector”<sup>1</sup> (the “Report”). The Report summarizes the findings of a United Nations project to develop a common understanding of anti-terrorist financing practices in the “nonprofit sector”, and to prevent terrorist abuse of “nonprofit organizations” (“NPOs”). The Report outlines seven key findings and recommendations, many of which include the involvement and cooperation of the nonprofit sector, and therefore require the awareness of NPOs for successful mitigation of terrorist financing abuse. This *Anti-terrorism and Charity Law Alert* provides a summary of the Report’s findings and recommendations.

### **B. “NONPROFIT ORGANIZATIONS” & “TERRORISM FINANCING”**

The Report uses the term “nonprofit organization,” although acknowledging that this term is not commonly used internationally and that the understanding of NPOs differs in each jurisdiction. As such, it follows the Financial Action Task Force’s (“FATF”) definition that an NPO “refers to a legal person or arrangement or organisation that primarily engages in raising or disbursing funds for purposes such as charitable, religious,

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<sup>1</sup> Centre on Global Counterterrorism Cooperation et al, *To Protect and Prevent: Outcomes of a Global Dialogue to Counter Terrorist Abuse of the Nonprofit Sector*, June 2013, online at: <[http://www.globalct.org/wp-content/uploads/2013/06/CGCC\\_Prevent-Protect-Report\\_pgs.pdf](http://www.globalct.org/wp-content/uploads/2013/06/CGCC_Prevent-Protect-Report_pgs.pdf)>.

cultural, educational, social or fraternal purposes, or for the carrying out of other types of ‘good works’.”<sup>2</sup> While this definition has been criticised for including “only a subset of what many people would consider to be civil society organizations,” it is broad enough to include registered charities under the *Income Tax Act*, as well as non-profit organizations in Canada.

Much like the term “nonprofit organization,” references to “terrorism financing” and prohibitions on “terrorism financing” vary throughout different jurisdictions. Consistent with the FATF understanding of terrorism financing, the Report states that terrorism financing covers “the provision of assets of any kind for the purpose of supporting terrorist operations, including logistical support and recruitment, organisations, or individuals.”<sup>3</sup> The Report identifies that acts of terrorist abuse of NPOs involving terrorism financing occur in two ways: (1) through complicity, whereby terrorist organisations pose as legitimate NPOs; and (2) through exploitation, whereby legitimate NPOs are abused by terrorist insiders or outsiders.

## C. THE RISK-BASED APPROACH & PROPORTIONALITY

### 1. The Risk-Based Approach

FATF’s Recommendation 8 recommends that states protect NPOs from misuse by terrorist organizations, particularly for the purposes of terrorism financing. The FATF’s best practices paper, originally published in 2002 and updated in 2012, supports Recommendation 8 and emphasizes the principles of risk and proportionality. Risk assessment tools allow governments and NPOs to identify and respond to NPO vulnerability to terrorist abuse by identifying factors that increase or reduce vulnerability. Examples of good practice for a risk-based approach listed by the Report include internal controls, (e.g. “partnership appraisal forms”); searches of publically available information (e.g. lists of sanctions targets); face-to-face interaction with partners and beneficiaries to ensure their integrity; and formal contracts to hold partners accountable.

Challenges with the risk-based approach include a lack of technical capacity and resources to undertake risk assessments; the need for assistance with undertaking reviews; and the danger that risk assessment could become too mechanical, with overreliance on certain techniques effectively rendering risk assessment a list-checking exercise. Additionally, risk assessment techniques ought to be used contextually, as not every technique works for every situation.

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<sup>2</sup> *Ibid* at 5.

<sup>3</sup> *Ibid*.

## 2. Proportionality

As regards proportionality, the Report states that NPO vulnerability to terrorist abuse should be “viewed against the background of the economic and social impact of NPOs across the world.”<sup>4</sup> Implementing the principle of proportionality is particularly challenging in areas of conflict and disaster, and these areas are where the impact of a disproportionate response is the most serious. Proportionality is vital in ensuring that anti-terrorist financing laws are robust enough to serve their function, yet do not impede or criminalize the provision of humanitarian assistance by NPOs. As such, the Report states that laws and policies “should not be vague or overly broad and should aim to facilitate, not inhibit, humanitarian action in crisis situations while safeguarding the sector against abuse.”<sup>5</sup>

Examples of proportional laws and policies include creating guidelines for local NPOs working in high-risk environments, accreditation requirements, due diligence requirements, and licensing regimes that permit NPOs to operate only after their proposed operations are reviewed and approved.

## D. COMMUNICATION & OUTREACH

The Report states that communication and outreach are vital for raising awareness, consulting with partners and stakeholders, creating understanding, and sharing knowledge and expertise, each of which are vital for fighting terrorist abuse of the nonprofit sector. While the Report discusses communication at four levels (i.e. within governments, across governments, between governments and the nonprofit sector, and within the nonprofit sector), this section will only discuss the latter two, which require active participation of NPOs.

### 1. Communication and Outreach between Governments and the Nonprofit Sector

At the level of communication and outreach between governments and the nonprofit sector, the Report calls for increased consultation and outreach based on the idea of “partnership in confronting a common problem.”<sup>6</sup> Examples include regular meetings, interactions with umbrella bodies, on-site visits, the spread of information online and through the media, and direct engagement of NPOs by governments in order to conduct Recommendation 8’s proposed review in collaboration with the nonprofit sector. To mitigate terrorism financing, the Report also stresses the importance of “clear,

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<sup>4</sup> *Ibid* at 11.

<sup>5</sup> *Ibid*.

<sup>6</sup> *Ibid* at 22.

consistent, and actionable guidance from states”,<sup>7</sup> particularly through greater government transparency and outreach activities, such as governments publishing typologies, case studies and advice for NPOs.

Additionally, communication between the government and NPOs ought to be based on a two-way relationship between the entities. Not only should governments “reach out” to NPOs by providing them with guidance, but NPOs have expressed a desire to be directly consulted by the government on issues such as regulatory changes that directly affect them, thereby allowing NPOs to “reach in” to government policy deliberations.

## 2. Communication and Outreach within the Nonprofit Sector

NPOs are often unaware of terrorism financing issues, as many professional networks among NPOs focus on operational issues and do not touch on terrorism financing concerns. As such, facilitating communication and outreach within the nonprofit sector is vital. The Report emphasizes that the nonprofit sector is in great need of capacity-building assistance, raising awareness of terrorism financing risks, dissemination of this information, and increased good governance and accountability. It suggests increasing infrastructure for interaction between NPOs, such as umbrella organizations, and it expects that this would increase NPO understanding of terrorism financing issues, including the FATF Recommendations.

## E. SUGGESTED REGULATORY APPROACHES

To prevent terrorist financing through abuse of NPOs, the Report stresses the importance of effective regulation. Although regulatory approaches differ between jurisdictions, commonalities between governmental regulatory approaches include registration and licensing, monitoring and supervision, and investigation, enforcement and prosecution. Additionally, the Report indicates that NPOs have expressed interest in self-regulation.

### 1. Registration and Licensing

Registration and licensing of NPOs is a recommended step to regulating and protecting the nonprofit sector from being abused by terrorists. Registration allows governments to gather information about NPOs, such as their purpose and objectives, and about the nonprofit sector in general. This is key in

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<sup>7</sup> *Ibid* at 14.

implementing the risk-based approach described above. The registration and licensing process should be transparent, consistent and accessible across jurisdictions, and should not be too stringent, as stringent processes can undermine an NPO's ability to operate effectively and lead to loss of trust between the nonprofit sector and the government. Worse yet, NPOs may be driven underground or led to incorporate in other forms, contrary to their objectives, in order to avoid stringent registration and licensing.

To encourage compliance with registration requirements and to encourage NPO transparency, the Report suggests that governments provide incentives, such as tax-exempt status for registration, as is already the case with registered charities in Canada. A potential incentive for transparency of an NPO's operational information is that it is a demonstration of good standing to potential donors and beneficiaries.

## 2. Monitoring and Supervision

Government monitoring and supervision of NPO operations protects the nonprofit sector by detecting and disrupting terrorist resourcing activities. As such, cooperation between agencies, including the nonprofit sector and the government, is vital. Regulatory tools used to monitor NPO operations include the submission of annual financial statements, reporting and record-keeping requirements, and accounting controls to ensure that NPOs spend their funds in pursuit of their stated objectives. This is akin to ensuring that Canadian charities meet their "charitable purpose" as required by Canada Revenue Agency.

## 3. Investigation, Enforcement and Prosecution

Investigation, enforcement and prosecution apply to instances of alleged or potential terrorist abuse of NPOs. The Report suggests that investigative powers and evidentiary rules should be established by law. However, legislation itself is insufficient to ensure effective investigations. In this regard, the Report stresses the importance of interagency communication, particularly by establishing rules and policies for the sharing of classified information.

Regarding enforcement, the Report notes that, in certain jurisdictions, noncompliance may lead to refusal or revocation of charitable status. The principle of proportionality may play a role in enforcement issues as well, for example, preserving charitable activities while abuse claims are investigated and prosecuted.

In terms of prosecutions, the Report states that prosecutions may not always be appropriate in every case of alleged abuse, particularly when tactical interventions may be equally if not more effective. A good practice in this regard is for governments to publish investigation reports and related security alerts and to use outreach activities to disseminate lessons learned to the nonprofit sector.

#### 4. NPO Self-Regulation

According to the Report, NPOs have expressed an interest in self-regulation as a means to prevent terrorist abuse. Self-regulation of NPOs is already prevalent, with over 350 initiatives globally, and is often advanced through umbrella organizations. NPOs adopt self-regulatory programs, as they often overlap with governmental regulatory requirements and therefore allow the NPO to adopt measure to protect themselves from terrorist abuse. Additionally, they allow NPOs to boost their public perception by providing transparency and demonstrating that they have an interest in establishing robust business practices. This has the effect of demonstrating an interest in good governance within the nonprofit sector.

## F. CONCLUSION

It is important that NPOs be aware of the ongoing risk of being subjected to abuse for purposes of terrorism financing. The Report provides a good overview of some pertinent concerns regarding terrorist abuse of NPOs and terrorism financing in general, and presents suggestions for mitigating the risks that the particularly vulnerable nonprofit sector faces, i.e. through proportional risk-based approaches. Based on the Report, it is clear that ongoing dialogue among the various stakeholders is vital, and that cooperation between all parties, including NPOs and the government, is necessary for successful mitigation of terrorism financing. Finally, while many of the Report's suggestions for risk mitigation are directed primarily at governments and policymakers, Canadian registered charities and not-for-profit organizations can benefit from a better understanding of regulatory approaches that may eventually be implemented in Canada.