



Law Council  
OF AUSTRALIA

# Review of the definition of a 'terrorist act' in section 100.1 of the *Criminal Code Act 1995*

Independent National Security Legislation Monitor

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## Acknowledgements

The Law Council of Australia thanks:

- the Law Society of New South Wales;
- the Victorian Bar;
- the Law Institute of Victoria;
- its National Criminal Law Committee;
- its National Human Rights Committee; and
- its National Security Law Working Group,

for their contributions to the preparation of this submission.

## Executive summary

Terrorism is an insidious form of political violence that undermines the democratic process and exposes Australians to risk of death and serious injury.

The Law Council acknowledges the need to ensure that Australia's definition of a "terrorist act" is calibrated to provide government, law enforcement and our intelligence services with a clear, precise, and appropriate basis for prosecuting, investigating, and disrupting political violence in Australia.

It is vitally important to Australia's national security, the operation of criminal justice, and the safety of the community that Australia's laws are fit for purpose and that any impacts on human rights, fundamental freedoms, or rule of law principles are limited to the extent that they are necessary and proportionate to achieve that aim.

The definition of a "terrorist act" was introduced into the *Criminal Code Act 1995* (Cth) (**Criminal Code**) in the aftermath of 11 September 2001. The spirit of the original legislation was to provide law enforcement and intelligence services with an extraordinary set of powers to address the threat posed by sophisticated and well-financed non-state actors who seek to inflict catastrophic acts of violence and destruction upon the community.

The Law Council, noting public commentary by the Director-General of Security, acknowledges that the contemporary threat environment differs significantly to that confronting the nation twenty-two years ago. In addition to the change in threat, we now have a robust national security infrastructure, routinely discuss social cohesion and the maintenance of sovereignty, and our agencies are alert and equipped to respond to political violence in a manner unrecognisable a generation ago.

In broad terms, this submission makes the following suggestions for what we believe are balanced, sensible and pragmatic improvements to the definition of a "terrorist act".

First, the definition requires careful clarification of key terms to ensure that it includes only that which is agreed to constitute terrorism while clearly excluding that which is not terrorism. We suggest that the enumerated examples of harms require refinement to ensure the high and serious threshold of terrorism is reflected in the conduct element of the definition. We propose that the phrase "section of the public" ought to be more carefully defined, and the motive element could be amended to ensure that the concept of "ideology" covers the evolving range of motivations currently understood to constitute terrorism. It is also important to consider the appropriateness of maintaining "religion" as a category of motivation within the definition.

Second, the definition can be improved to provide greater protection to Australians. We propose that clarifying within the definition that hostage taking can constitute a terrorist act is an improvement consistent with international best practice. Likewise, we suggest that ensuring that certain international organisations fall under the protections of anti-terrorism legislation sends an important signal to the international community. We also suggest excluding the provision of aid from the definition of terrorist act will provide greater certainty to those engaged in humanitarian relief.

Third, we think there are structural issues with the definition that require amendment to ensure that what constitutes a “terrorist act” has the clarity and certainty appropriate for an offence carrying a maximum penalty of life imprisonment. To this end, we recommend that “threat of action” should be removed from the definition of a “terrorist act” and re-introduced as a standalone offence with appropriate elements and penalties.

In the Law Council’s view the definition of a “terrorist act” should retain its focus on the most serious categories of political violence. The extraordinary investigatory powers, penalties, and restriction on liberty that follow from this definition, if they are to persist on the statute book, should be carefully restricted to the most serious and potentially catastrophic risks confronting the community. This includes narrowing the reference to “serious damage to property” to situations where there is either risk to, or endangerment of, persons accompanying such damage, and/or where the property constitutes critical infrastructure.

The Law Council welcomes the opportunity to make this submission to the Independent National Security Legislation Monitor’s review of this definition. We support the careful and independent review of controversial legislation in a manner that provides civil society with ample opportunities to consult and make submissions on matters of public importance. Review mechanisms, such as this, are especially important where such laws are often proposed, drafted and passed without proper Parliamentary scrutiny and under the impost of time pressure.

## Recommendations

### **Recommendation 1: International organisations**

Listed international organisations with sufficient influence, scope and connection to Australia should be included in the purpose element of the definition of “terrorist act”.

### **Recommendation 2: Section of the public**

Reference to “section of the public”, in the definition of “terrorist act” should be further clarified to enable focus on either intimidating a substantial section of the public, or intimidating a section of the public identified by reference to the terrorist motive or other criteria.

### **Recommendation 3: Religious motives**

If religion is removed from the definition of “terrorist act”, accompanying explanatory material should make it clear that ideological causes include those that are purported to be religiously based.

### **Recommendation 4: Mixed motives**

To remove possible ambiguity, the motive element of the definition of “terrorist act” should refer to “an intention”, rather than “the intention”. Further consideration should be given to whether this should be qualified as a “substantial” purpose.

### **Recommendation 5: Serious damage to property**

The definition’s inclusion of “serious damage to property” should be narrowed to situations where there is either risk to, or endangerment of, persons accompanying such damage and/or where the property constitutes critical infrastructure.

### **Recommendation 6: Electronic systems**

The definition’s inclusion of “electronic system” should be narrowed to interference, disruption or destruction causing significant consequences for the public (or a section of the public), with reference to both an adverse effect on human life and systems that constitute critical infrastructure.

### **Recommendation 7: Psychological harm**

The reference to acts causing “serious harm that is physical harm” at paragraph 100.1(2)(a) should not extend to psychological harm.

### **Recommendation 8: Threats of action**

References to “threat of action” in the definition of “terrorist act” should be removed, in favour of a separate offence criminalising threats to commit an act of terrorism.

### **Recommendation 9: Provision of humanitarian activities**

An exception should be added to paragraph 100.1(3)(a) to include development and humanitarian aid and assistance.

## Preliminary comments

1. The Law Council welcomes the opportunity to provide a submission to the Independent National Security Legislation Monitor's (**INSLM**) review of the definition of a "terrorist act" under section 100.1 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**). This is an important own-motion inquiry that addresses a defining question of law in the twenty-first century and represents a matter of long-running interest to the Law Council.
2. The Law Council has long been involved in dialogue on the operation of national security and anti-terrorism measures at the federal level. In doing so, we have acknowledged the need to safeguard Australia's national security, and have sought to engage productively with the Australian Government and Parliament over the two decades that the definition of a "terrorist act" has formed part of the Criminal Code. The Law Council's primary focus has been on national security and terrorism related measures that have the potential to detract from established principles of the Australian criminal justice system, that may fail to demonstrate compliance or proportionality with international human rights standards, or risk departing from the rule of law.
3. We appreciate that the operational and security environment in Australia and internationally is complex and continues to evolve. Likewise, we remain of the view that proportionate laws that only limit freedoms to the extent necessary to protect national security are an important component of our nation's resilience.
4. Since its introduction in 2002, the Law Council has considered the definition of "terrorist act" to be problematic. This review is an opportunity to focus attention on what we see as the most challenging aspects of the definition, with the view to arriving at sensible and pragmatic recommendations for reform to section 100.1 and, by extension, the large number of legislative provisions that rely on this definition.
5. The Law Council recognises that there is no universally accepted definition of "terrorism" or an "act of terrorism". Several United Nations Security Council Resolutions, Conventions and Special Rapporteurs have provided guidance on the requisite elements for an act to be criminalised as terrorism. However, given the inherent complexity of defining terrorism (particularly given its evolving nature) jurisdictions tend to exercise sovereignty and define terrorist acts for the purposes of criminal law and procedure based on their specific contextual needs. As such, the Law Council understands that the approach taken to define "terrorist act", as a matter of criminal law and procedure under the Criminal Code, is that the definition must fit the Australian legislative context.<sup>1</sup>

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<sup>1</sup> SC Res 1373, UN SCOR, UN Doc S/RES/1373 (28 September 2001); SC Res 1566, UN SCOR, UN Doc S/RES/1566 (2004) art 3; *Terrorism Financing Convention*, opened for signature 10 January 2000, 2178 UNTS 229 (entered into force 10 April 2002) art 2(1)(b); Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN ESCOR, UN Doc E/CN.4/2006/98 (28 December 2005) [50].

6. In Australia, definition of a “terrorist act” has crystallised into an important part of the criminal law of the Commonwealth since it was introduced in 2002. The INSLM’s Issues Paper makes clear the scale of the definition’s influence in Australian law, highlighting that over 300 Commonwealth, state and territory laws contain offences, obligations and powers that rely on this definition.<sup>2</sup>
7. The Law Council considers the review of the definition of a “terrorist act” to be significant as this definition can enliven extraordinary powers that can have a very serious impact upon, and interfere with, fundamental human rights (e.g. control orders, preventative detention orders, presumption against bail). There are also ancillary offences that are linked to the definition of terrorism, including preparatory offences, terrorist organisation offences, financing terrorism, and advocating terrorism. Each of the ancillary offences carry significant penalties. As such, the INSLM’s review into the operation of this definition is an important opportunity to carefully analyse the fitness for purpose of this definition some two decades after its introduction into law.
8. A core function of the definition at section 100.1 of the Criminal Code is to separate terrorism from other serious criminal offending. Any definition of a terrorist act should be capable, on its face, of clearly expressing the important and difficult conceptual distinctions between what is included as an act of terrorism and by implication what is necessarily excluded as otherwise serious criminal offences that are nevertheless not terrorism. Where the Director-General of the Australian Security Intelligence Organisation (**ASIO**) advises that “[i]t would be a mistake to look at contemporary terrorism through a lens manufactured when Islamic State and al-Qa’ida were at their height”,<sup>3</sup> it is appropriate to ask if the current definition of a terrorist act still draws that distinction with necessary clarity and proportionality to address the contemporary threat environment.
9. At the same time as the definition of “terrorist act” addresses a different threat environment than what existed when the definition was first introduced, Australia’s security, law enforcement, and social infrastructure are vastly improved from that which confronted policy makers attempting to navigate risks and fears in the aftermath of the events of 11 September 2001. Australia’s security services, police forces, and society at large have changed dramatically in terms of awareness of risk, resilience, and capacity to address mass casualty violence from non-state actors. This means that any discussion of the threat environment needs also to account fully for the now mature and well-resourced national security infrastructure that is tuned toward the detection and disruption or prosecution of politically or ideologically motivated violence. Law enforcement and intelligence services are now equipped with a range of investigative powers and de-escalation measures that do not rely upon the definition of a terrorist act and the range of extraordinary powers it invokes.

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<sup>2</sup> Independent National Security Legislation Monitor, ‘Defining Terrorism: Review of the Definition of a “Terrorist Act” in Section 100.1 of the *Criminal Code Act 1995*’ (Issues Paper, August 2025) 2.

<sup>3</sup> Mike Burgess, ‘ASIO Annual Threat Assessment 2025’ (Speech, 19 February 2025) <<https://www.asio.gov.au/director-generals-annual-threat-assessment-2025>>.

10. If it is necessary to maintain a definition of a terrorist act in criminal law, then any such definition must be calibrated to the most serious and harmful examples of violence or threats by non-state actors with a view to influencing government decision-making or intimidating the public.<sup>4</sup> It is important to stress that such a threshold would be congruent with the original spirit of the legislation.
11. It does not follow that this definition should be broadened and the range of powers it justifies should be made more readily available—quite the opposite. The task is to render the appropriate application of aspects of Australia’s criminal law clearer so that it can function primarily as the basis for defining those criminal offences that address the most dangerous and socially destabilising acts of violence from non-state actors. It is necessary and proportionate to ensure that any extraordinary investigative measures remain tied to this category of risk to human life and national security concerns. An alternative, concerning possibility, is that a more expansive interpretation of a “terrorist act” might render the definition an open gateway to significant derogations from traditional criminal procedure in the service of investigating less serious offending.

## Purpose requirement

12. The Issues Paper asks whether the current “terrorist purpose” requirement is appropriate. The purpose requirement at paragraph 100.1(1)(c) of the Criminal Code currently reads as follows:
  - (c) *the action is done or the threat is made with the intention of:*
    - (i) *coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or*
    - (ii) *intimidating the public or a section of the public.*
13. Notably, when the Bill that proposed to insert Part 5.3 into the Criminal Code was first introduced into Parliament, the proposed definition of a terrorist act did not require that the action or threat of action was for any particular purpose.<sup>5</sup> At that time, the Law Council took the view that this was a vital defect in the definition. By omitting “from the definition of terrorism any element of intention to terrorise the government or the public through intimidation, coercion or the evocation of extreme fear”,<sup>6</sup> the fault element in the proposed definition of a terrorist act was an unacceptably “broad, imprecise and ambiguous formulation”.<sup>7</sup>
14. The purpose requirement was only added to the definition of a “terrorist act” following the recommendation of the Senate Legal and Constitutional Legislation Committee. The Committee report concluded that “the definition of ‘terrorist act’ should include

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<sup>4</sup> For the avoidance of any misunderstanding, the Law Council does not argue that ‘terrorism’ is a synonym for serious criminal offending or the most serious criminal offending. Terrorism as a legal concept should be reserved for a specific and serious example of politically motivated violence. This in no way diminishes the seriousness of other offences, nor places them into comparison. Murder, for example, outside of the context of terrorism remains a serious criminal offence which carries equally serious penalties.

<sup>5</sup> Security Legislation Amendment (Terrorism) Bill 2002 (Cth) Schedule 1 Clause 3.

<sup>6</sup> Law Council of Australia, Submission to the Senate Legal and Constitutional Legislation Committee, *Inquiry into Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills* (April 2002) 34.

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

reference to a design to influence government by undue intimidation or undue coercion, or to intimidate the public”.<sup>8</sup>

15. Feedback from Law Council constituent bodies and advisory committees continues to express uniform support for the presence of a purpose element in the definition of a ‘terrorist act’ in the Criminal Code.

## International organisations

16. The purpose element of the definition of a “terrorist act” currently does not extend to coercion or intimidation of an international organisation. The Law Council welcomes the INSLM’s consideration of whether acts against certain international organisations should be included in the definition of “terrorist act”, given the potential impact on, or influence over, international relations. As noted in the INSLM’s Issues Paper, previous reviews of Australia’s counterterrorism laws have recommended that “international organisations”—such as the United Nations—should be included in the terrorist purpose.<sup>9</sup>
17. Conduct directed towards international organisations and personnel already potentially attracts a range of existing criminal offences under Commonwealth law.<sup>10</sup> The Law Council supports elevating acts against certain international organisations, such as the United Nations, into the definition of “terrorist act”. We view this position as consistent with the already recognised status of these organisations under the Criminal Code and commensurate with the aims of the definition in light of the potential impact such violence might have on international relations. As such, the Law Council is supportive of adopting the earlier recommendation of the Parliamentary Joint Committee on Intelligence and Security that the definition of terrorism should recognise that international organisations may be the target of terrorist violence.<sup>11</sup>
18. A key consideration in such an analysis is which international organisations should be included. The Law Council considers that, as a starting point in performing this analysis it is worth considering the relative influence and scope of the organisation, and/or its connection to Australia. The United Nations is an obvious example of an international organisation that could easily meet both criteria, and we acknowledge that the Attorney-General’s Department’s 2009 review suggested including reference to ‘coercing, or influencing by intimidation, the United Nations, a body of the United Nations or a specialised agency of the United Nations’ in section 100.1 of the Criminal Code.

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<sup>8</sup> Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee Security Legislation Amendment (Terrorism) Bill 2002 [No.2] Suppression of the Financing of Terrorism Bill 2002 Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 Border Security Legislation Amendment Bill 2002 Telecommunications Interception Legislation Amendment Bill 2002* (Report, May 2002) [3.78] and recommendation 2.

<sup>9</sup> Independent National Security Legislation Monitor, ‘Defining Terrorism: Review of the Definition of a “Terrorist Act” in Section 100.1 of the *Criminal Code Act 1995*’ (Issues Paper, August 2025) [4.11].

<sup>10</sup> For example, Division 71 of the *Criminal Code Act 1995* (Cth) provides for offences against United Nations and associated personnel.

<sup>11</sup> Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (Report, 4 December 2006) 63.

19. The Law Council suggests that some consideration might also be given to including relevant regional and international organisations that meet in Australia in such an instrument: examples include the Association of Southeast Asian Nations (**ASEAN**) and the Asia-Pacific Economic Cooperation (**APEC**). Likewise, international non-governmental organisations such as the International Committee of the Red Cross might also be considered for inclusion.

### **Recommendation 1: International organisations**

**Listed international organisations with sufficient influence, scope and connection to Australia should be included in the purpose element of the definition of “terrorist act”.**

## **Section of the public**

20. One of the limbs of the purpose element at paragraph 100.1(1)(c)(ii) of the definition of a terrorist act is that “the action is done or the threat is made with the intention of ... intimidating the public or a section of the public”. We note that the phrase, “section of the public” also appears in paragraphs (2)(e) and (3)(b)(iv) in the context of an action that creates a serious risk to the health or safety of the public or a section of the public.
21. There is plainly some ambiguity attached to the phrase “section of the public” in this context. The term is not defined and, as noted in the Issues Paper, there is little judicial guidance on how to interpret this phrase.<sup>12</sup> However, the Issues Paper draws attention to comments in *R v Shoma* [2019] VSC 367 on this point. Here, Taylor J considered the interpretation of this element in sentencing remarks in addressing arguments made by the offender’s counsel, namely whether committing a terrorist act in a private home renders it less culpable than acts in public. Justice Taylor argued that:

*While it is beyond doubt that acts of terrorism conducted in public are designed to, and do, shock the public, I am far from convinced that, in this regard, the division between the public and private spheres is binary.*

*It cannot be said that your physical actions in carrying out the knife attack were seen or intended to be seen by the public, but they were done with the intention to advance your extremist cause and to intimidate a government or the public. In other words, you always intended the result of those actions to be public; the more public the better. You sought notoriety and widespread dissemination of your actions. You wished to be a martyr and, as you told police, to ‘trigger the west’. The west could not be triggered if its citizens remained ignorant of your actions.<sup>13</sup>*

<sup>12</sup> Independent National Security Legislation Monitor, ‘Defining Terrorism: Review of the Definition of a “Terrorist Act” in Section 100.1 of the *Criminal Code Act 1995*’ (Issues Paper, August 2025) [4.14].

<sup>13</sup> *R v Shoma* [2019] VSC 367, [59]-[60].

22. This discussion does not satisfactorily clarify the precise meaning of the phrase “section of the public” in the definition of “terrorist act”. Instead, it reflects the complexity of the concept and the variety of meanings that the term “public” carries. In these passages “public” functions in the following ways:
- “the public” is a subject capable of attack, possessed of assumptions and capable of being changed by terrorist acts;
  - “public” stands in contrast to private in the context of describing the ownership or accessibility of spaces; and
  - “public” operates as a medium or forum for communication (in the sense of “public knowledge” or “made public”).
23. While these different meanings are rarely teased apart in detail, what is clear is that these passages provide grounds only for establishing that the phrase “section of the public” is open-ended and lacking in precision, even if it is capable of sustaining jurisprudence and workable meaning. Indeed, the decision in *Director of Public Prosecutions (Cth) v Sherani* [2024] VSC 620 is another example where having a clearer definition and extrinsic materials could assist the judiciary (and by extension, juries) in understanding with more precision the concept, scope or threshold of the public that the Parliament was seeking to describe in the section 100.1 definition. In that case, two arresting police officers were regarded as a “section of the public”.
24. In light of the above, the Law Council contends that there is value in clarifying the definition of “section of the public” as its current ambiguity risks leading to error and misinterpretation and has the potential to be broadly and inconsistently interpreted.
25. In our view, this term should not be regarded as such a small section as to be able to be constituted by a small and specific group of individuals with no connection to terrorist purpose. There are circumstances where an attack on police might meet this requirement. However, our suggestion is that any proposed construction that clarifies the meaning of “section of the public” should be capable of maintaining a distinction between conduct directed towards particular persons or groups of individuals and conduct directed towards group qualities.
26. The time when such an intention is formed is critical to the functioning of this element. In the absence of evidence of earlier consideration, police officers in the ordinary course of responding to an incident should not be considered capable of forming “a section of the public”. For example, seeking to avoid arrest through threat of violence ought not to be capable of satisfying the purpose element of a terrorist act. Our concern is that, if a suspect’s reaction to police intervention becomes capable of meeting the purpose element, this indicates that the element fails to draw an appropriate distinction between situations where law enforcement are targeted with a view to intimidation of the broader public rather than seeking to threaten or intimidate particular individuals, notwithstanding their status as public officials.
27. In our view, reference should be made to a substantial section of the public, or a section of the public identified by reference to the terrorist motive or by specific identified attributes such as race, gender, religion, or sexual identify.

**Recommendation 2: Section of the public**

**Reference to “section of the public”, in the definition of “terrorist act” should be further clarified to enable focus on either intimidating a substantial section of the public, or intimidating a section of the public identified by reference to the terrorist motive or other criteria.**

## Motive

28. The current definition of a “terrorist act” requires at paragraph (b) that “the action is done or the threat is made with the intention of advancing a political, religious or ideological cause”. This requires an intention to bring about an outcome. This element is what the INSLM refers to as the motive element of the current definition.
29. At the time a motive element was introduced to the Parliament, in the first reading of the Bill that introduced it, the Law Council was critical of the broad, imprecise and ambiguous formulation of the motivations.<sup>14</sup>
30. However, our initial concerns about motive should be read in the context of the original draft of the definition lacking what the INSLM now refers to as the purpose element (discussed above from paragraph 12). This meant that our contemporaneous discussion about any fault element turned fully on the drafting of the motive element in the absence of any accompanying purpose that might have further narrowed the scope of application. In responding to the Bill as introduced, the Law Council was concerned by the absence of any requirement to intentionally “terrorise the government or public through intimidation, coercion or the evocation of extreme fear”.<sup>15</sup>
31. Importantly, the motive element has the effect of distinguishing a terrorist act from comparable conduct that is carried out in the pursuit of personal ends. The Issues Paper recognises that this requirement is not uncommon amongst comparable jurisdictions, as almost all legal definitions of a terrorist act have reference to motivation.<sup>16</sup>
32. The definition’s focus on an intention to advance a cause requires that any action or threat of action must be performed with the motivation of furthering another objective beyond the immediate aims of the action or threat of action. In other words, this element requires that the intention must be that the action or threat of action is *instrumental*, a means to another more distant end, rather than only with an intention concerned with immediate end in itself of the action or threat of action in question.

<sup>14</sup> Law Council of Australia, Submission to the Senate Legal and Constitutional Legislation Committee, *Inquiry into Security Legislation Amendment (Terrorism) Bill 2002 [No.2] and Related Bills* (April 2002) 34.

<sup>15</sup> *Ibid.*

<sup>16</sup> Independent National Security Legislation Monitor, ‘Defining Terrorism: Review of the Definition of a “Terrorist Act” in Section 100.1 of the *Criminal Code Act 1995*’ (Issues Paper, August 2025) [4.20].

33. In response to the question posed in the Issues Paper on whether motive ought to be required as an element of the offence, the Law Council continues to support the need for motive in recognition of the unique nature of terrorist offending. Any argument that the statutory bar is too high is misconceived, as individuals are regularly convicted of terrorist offences, including preparatory offences which are rare in criminal law. While we have concerns about the lowering of criminal responsibility through preparation and planning offences, we note simply that constituent bodies have commented that this element does not function in practice as a barrier to prosecution.

## Political, religious, or ideological cause

34. The terms “political”, “religious” and “ideological” are used to describe causes that must be intended to be advanced to satisfy the definition of a “terrorist act”. These are not defined in the legislation and thus, under principles of statutory interpretation, are read with their ordinary meaning.
35. The first paragraph of the Director-General’s review in the *ASIO Annual Report 2024–25* addresses terrorism. The Director-General comments:

*While the level of threat is unlikely to change [from PROBABLE], the form and face of terrorism is evolving. Cases are becoming more complex, with traditional distinctions between extremist motivations breaking down.<sup>17</sup>*

To underscore this issue, he commented that:

*Within the mixed ideologies investigations, we saw people embracing seemingly antithetical concepts, which at times were cherry-picked to create unique, hybrid beliefs. In some cases, individuals adopted violent extremism without a coherent ideology at all.<sup>18</sup>*

36. It is important to note that the Director-General’s comments address the assessment outcomes of the security intelligence collection and analysis activities of ASIO into politically motivated violence (of which terrorism is a serious example), rather than law enforcement investigations and prosecutions of criminal offences.<sup>19</sup> However, the Director-General’s comments do provide a broad overview of the ideational environment confronting law enforcement and prosecution services when attempting to collect and explain evidence of motive in contemporary cases of politically motivated violence that may be found to meet the legislative description of terrorism.
37. We note that the Parliamentary Joint Committee on Intelligence and Security’s review of Security and Counter Terrorism Legislation considered the necessity of including the list of terrorist motives within the definition and made the following observations:

*The case for a special terrorism law regime is made out on the basis that terrorism is qualitatively different from other types of serious crime. Terrorist violence is typically directed toward the public to create fear and promote political, religious or ideological goals. We believe that terrorist violence is seen by the public as something distinctive from other serious crime. A serious*

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<sup>17</sup> ASIO, *Annual Report 2024–2025* (Report, 2025) 4.

<sup>18</sup> *Ibid.*

<sup>19</sup> NB, the definition of security is provided under the *ASIO Act 1979* (Cth) s 4.

*criminal offence committed for personal reasons, no matter how heinous, does not fall into that category and should be prosecuted under separate offence provisions.*<sup>20</sup>

38. The Joint Committee ultimately recommended that “the requirement that the person intends to advance a political, religious or ideological cause be retained as part of the definition of terrorism”.<sup>21</sup>

### **Political motives**

39. One of the key motivations that can give rise to a terrorist attack under the Criminal Code is a “political” motive. As observed by the INSLM in the Issues Paper, there is little judicial consideration of the meaning of “political” for the purposes of a terrorist act.<sup>22</sup>
40. The word “political” in this paragraph is to read in accordance with its ordinary meaning. In this regard, it is an adjective which means “relating to politics”. The ordinary meaning of “politics” is broad, encompassing:
- the activities, persons and procedures that constitute the way a group (including a country) is governed;
  - the activities and persons of political parties;
  - holding positions of authority;
  - the study of government and/or authority;
  - the relationships of power within social groups; and
  - a person’s opinions about the above.

Although the ordinary meaning of the word “political” is broad, it is not ambiguous and this appropriately provides flexibility where limit cases might plausibly and reasonably be addressed as a matter of factual determination by a jury.

41. The Law Council has received no feedback from constituent bodies or advisory committees that this word generates any practical interpretive concerns. The ordinary meaning of this word is considered sufficiently descriptive and expansive to not be controversial.

### **Ideological motives**

42. The word “ideological” gives the impression that motivations should be linked to formal or doctrinal systems of thought and action, examples of which might be religions or political programmes. The Director-General of Security has commented that increasingly:

*traditional distinctions between extremist motivations are also breaking down ... Individuals are cherry-picking seemingly antithetical ideologies to create new, hybrid beliefs... Of all the potential terrorist matters investigated last year, fewer*

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<sup>20</sup> Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (Report, 4 December 2006) 57.

<sup>21</sup> Ibid 58.

<sup>22</sup> Independent National Security Legislation Monitor, ‘Defining Terrorism: Review of the Definition of a “Terrorist Act” in Section 100.1 of the *Criminal Code Act 1995*’ (Issues Paper, August 2025) [4.31].

*than half were religiously motivated. The majority involved mixed ideologies or nationalist and racist ideologies.*<sup>23</sup>

### Religious motives

43. The Issues Paper has asked whether it is appropriate to retain reference to all three terms (political, religious and ideological), with a particular emphasis on whether the inclusion of the term “religion” ought to remain in the definition.
44. The Law Council notes the observations from former INSLM Bret Walker SC that the requirement to prove religious motive in terrorism offences comes too close to pursuing a case against a religion.<sup>24</sup> In highlighting his concerns with this approach, the former INSLM notes:

*the individual who is accused must be shown to have a religious belief, which involves proving that his or her beliefs match what is also proved to be the content or doctrines of a particular religion.*<sup>25</sup>

45. The Law Council also appreciates concerns from religious communities about how the inclusion of religion as a motive for a terrorist act can adversely impact community perceptions and contribute to damaging public discourse. The definition’s requirement that emphasis is placed on motive as well as harm can cause damage to certain religious communities, particularly where violent acts or threats are claimed to have been carried out in the name of religion, despite it being widely accepted that there are “no acceptable justification in the tenets of any religion to warrant the unjustified killing of innocent civilians”.<sup>26</sup>
46. However, it is important to note, as the Issues Paper does, that ‘religion’ appears as a motive in a significant number of terrorism convictions. Albeit misguided, religious fanaticism clearly drives some terrorist acts. Before steps are taken to remove this term from the definition it must be asked whether it is possible to imagine a person otherwise satisfying the definition of a terrorist act to advance the cause of a religion or spiritual belief that does not also meet the definition of advancing a political or ideological cause.
47. If it is the case that reliance on the remaining causes listed in the definition of “terrorist act” (namely, ideological and political) is sufficient to capture the range of activity that we expect to plausibly be deemed terrorist conduct, then there is a strong argument in favour of the removal of religion from the definition. Importantly, the Issues Paper’s analysis and associated research on identified or inferred motive demonstrates that ideological and/or political motives can be identified as underpinning every single analysed case.<sup>27</sup> While purported religious causes were present in a significant number of these cases, we suggest that this demonstrates

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<sup>23</sup> Mike Burgess, ‘ASIO Annual Threat Assessment 2025’ (Speech, 19 February 2025).

<sup>24</sup> Independent National Security Legislation Monitor, ‘Defining Terrorism: Review of the Definition of a “Terrorist Act” in Section 100.1 of the *Criminal Code Act 1995*’ (Issues Paper, August 2025) 115.

<sup>25</sup> Ibid.

<sup>26</sup> Council of Australian Governments, *Review of Counter-Terrorism Legislation* (Report, 2013) 8 [34].

<sup>27</sup> Independent National Security Legislation Monitor, ‘Defining Terrorism: Review of the Definition of a “Terrorist Act” in Section 100.1 of the *Criminal Code Act 1995*’ (Issues Paper, August 2025) 40. See also INSLM, *Spreadsheet of relevant terrorism sentencing cases v2* (Report, 2025) <<https://www.inslm.gov.au/publications/resource-summaries-relevant-terrorism-sentencing-cases-v2>>.

that the removal of an express reference to religion would not impede successful prosecutions.

48. Political and ideological belief systems motivating violence are not stagnant or clearly defined and have always been subject to change, idiosyncratic adherence, or nuance. There is no evidence to suggest that the wording of the definition has prevented those with nebulous political or ideological beliefs from being prosecuted under the Commonwealth's statutory regime.
49. If the INSLM is minded to recommend removing religion from the definition of "terrorist act", the Law Council suggests that to assist in this statutory interpretation, explanatory material accompanying the reforms should note that ideological causes include those that are religiously based, albeit in a misguided manner. In providing greater guidance on what the term "ideological" means, the Law Council notes the 2023 Canadian proposal quoted in the Issues Paper that defines "ideology" as:

*a motivation based on a system of unshakeable beliefs that is judgmental of the way society is or ought to be, is intended to be propagated, and claims explanatory power.*<sup>28</sup>

As noted in the Issues Paper, this approach is likely to cover religious motivation, as well as belief systems based on racist or so-called "incel" movements.

### **Recommendation 3: Religious motives**

**If religion is removed from the definition of "terrorist act", accompanying explanatory material should make it clear that ideological causes include those that are purported to be religiously based.**

### **Mixed motives**

50. Subsection (b) of the section 100.1 Criminal Code definition of a "terrorist act" requires that the action or threat of action is "made with the intention of advancing a political, religious or ideological cause". It does not provide guidance about whether advancing such a cause must be the sole motivation for the action or threat of action. We note that there is some latitude or ambiguity in the relationship between the singular "a" in the phrase "a ... cause" and whether or not this singularity must be read as inclusive or exclusive of other motivations. The drafting of the provision perhaps turns more on whether the phrase "the intention" restricts the motivation to the cause, regardless of whether it is the sole motivation, or even the sole cause—accepting that a singular cause might plausibly contain either one or multiple religious, political and ideological elements.

<sup>28</sup> Michal Nesbitt, Leah West and Amarnath Amarasingam, 'The Elusive Motive Requirement in Canada's Terrorism Offences: Defining and Distinguishing Ideology, Religion and Politics' (2023) 60(3) Osgoode Hall Law Journal 549 quoted in Independent National Security Legislation Monitor, 'Defining Terrorism: Review of the Definition of a "Terrorist Act" in Section 100.1 of the *Criminal Code Act 1995*' (Issues Paper, August 2025) [4.47].

51. The phrase “with *the* intention of advancing ... a cause”, is we suggest a more restrictive drafting than the broader alternative “with *an* intention of advancing ... a cause”, which more readily admits of the possibility of plural and/or confused motivations. However, both framings allow for an inclusive interpretation so long as the action or threat of action is accompanied by the specific intention described in subsection 100.1(b), regardless of whether there are other intentions which fall outside of those described in subsection 100.1(b).

52. Jonathan Hall KC, the Independent Reviewer of Terrorism Legislation, argues that:

*Being a terrorist does not rule out having multiple reasons for acting ... as a matter of general principle and common sense the terrorist purpose does not have to be the only, or even the dominant, purpose to qualify. It would be sufficient if it is “substantial”. The alternative would result in absurd outcomes: “Yes, it is true that I detonated the bomb, but it was only partially to change government policy. It was mainly for the thrill of it.”<sup>29</sup>*

53. The Issues Paper notes the potential uncertainty where an established terrorist motive exists alongside other motives, such as personal grievances or desire for notoriety. In our view, referring to ‘an intention’ would address the issue. We suggest that further consideration might be given to whether the motive element might be further improved by requiring that the necessary motivation should reach the threshold of “substantially” in terms of contributing to the action or threat of action.

54. We note that this change, coupled with some consideration of the use of adjectival forms in describing causes will address the concern about ill-conceived or poorly articulated programmes to which violence or the threat thereof is adopted as a means to that end.

#### **Recommendation 4: Mixed motives**

**To remove possible ambiguity, the motive element of the definition of “terrorist act” should refer to “an intention”, rather than “the intention”. Further consideration should be given to whether this should be qualified as a “substantial” purpose.**

## Harm caused

55. In addition to the purpose and motive elements, a “terrorist act” as defined in section 100.1 of the Criminal Code also has a harm element. In our view, the current formulation of this element risks being imprecise, overly lengthy, and would benefit from significant revision.

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<sup>29</sup> Jonathan Hall, ‘Independent Review on Classification of Extreme Violence Used in Southport Attack on 29 July 2024’ (Report, 13 March 2025) [2.7]–[2.8].

56. As noted in the Issues Paper, the relevant harms can be grouped into three categories:<sup>30</sup>
- serious physical harm to people or creating a serious risk to the health or safety of the public or a section of the public;
  - serious damage to property; and
  - serious interference, disruption or destruction of electronic systems.
57. The definition currently stipulates an extensive list of consequences which will satisfy the harm element, varying in both severity and actual impact. We note that the courts have highlighted the unusual breadth of the harm element under the Criminal Code definition, with Whealy J in *R v Lodhi* noting these harms were of the “broadest possible kind”.<sup>31</sup>
58. We suggest the harm element might be revised to better conform with international best practice. The United Nations Security Council Counter-Terrorism Committee Executive Directorate (CTED) recently noted that the inclusion of the harm, or outcome, element in a terrorism offence reflects the expectation that conduct captured by terrorism offences has a threshold of serious violence.<sup>32</sup> In this regard, the CTED recommended that the harm element should clearly specify action that causes “death or serious bodily injury, or significant damage or destruction of property or critical infrastructure”.<sup>33</sup>
51. We note that Australia’s definition currently includes conduct with consequences that fall well short of this recommended best practice threshold, including action that “creates a serious risk to the health or safety of the public”,<sup>34</sup> or which “seriously interferes with ... an electronic system”.<sup>35</sup> In our view, the harm element as currently drafted is inappropriately and disproportionately broad, and captures conduct inconsistent with international best practice.

## Serious damage to property

59. The Law Council has longstanding concerns with the inclusion of “serious damage to property” as a type of action that can constitute a terrorist act.<sup>36</sup> A key aspect of these concerns is that the current approach does not impose a sufficient threshold to capture what separates damage to property as terrorism from general offences that address property damage. It merely specifies that the damage to property of any kind be serious.
60. This approach has the potential to capture serious damage to property of minimal value just as readily as it includes catastrophic damage to a nationally significant building after a bombing. Offences that carry a maximum sentence of life

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<sup>30</sup> Independent National Security Legislation Monitor, ‘Defining Terrorism: Review of the Definition of a “Terrorist Act” in Section 100.1 of the *Criminal Code Act 1995*’ (Issues Paper, August 2025) [4.57].

<sup>31</sup> *R v Lodhi* [2006] NSWSC 584, [73].

<sup>32</sup> United Nations Security Council Counter-Terrorism Committee Executive Directorate, *CTED Analytical Brief: A commentary on the codification of the terrorism offence* (Report, June 2024) 8.

<sup>33</sup> *Ibid* 27.

<sup>34</sup> *Criminal Code Act 1995* (Cth) s 100.1(2)(e).

<sup>35</sup> *Criminal Code Act 1995* (Cth) s 100.1(2)(f).

<sup>36</sup> *Criminal Code Act 1995* (Cth) s 100.1(2)(b).

imprisonment and enable the use of extraordinary investigative powers should not have such low thresholds.

61. A second ongoing concern is the absence of any requirement of danger to life and limb in the context of property damage. Here, we query whether a sentence of life imprisonment should be available for planning to threaten to damage property without the intention to harm, or indeed, risk life or limb (where other elements are met). The current approach has the potential to capture and label protest acts that cause serious damage to property as terrorism, regardless of the relevant exceptions under subsection 3 of the definition, which remain relatively untested in the courts and uncertain in application.
62. There are contemporary international examples where advocacy and protest groups are designated as terrorist organisations due to protest acts that cause serious damage to property, typically to private business rather than any property public in nature.<sup>37</sup> Serious damage to property remains a criminal offence. However, to label actions such as these as terrorism has consequences and ramifications that may not be proportionate to the act itself. This has resulted in international concern regarding the inappropriate use of counter-terrorism legislation to restrict and criminalise protest movements, particularly where acts with the intent to damage property are already covered under criminal legislation.
63. Several United Nations experts have recently stated that:

*mere property damage, without endangering life, is not sufficiently serious to qualify as terrorism... Protest actions that are not genuinely 'terrorist', but which involve alleged property damage, should be properly investigated as ordinary crimes or other security offences.*<sup>38</sup>
64. Further, designating protest movements as terrorist organisations can have a ripple impact across communities, as individuals who voice support for the movements could be prosecuted for peacefully exercising their rights to freedom of expression, assembly, association and participation in political life. This can ultimately have a chilling effect on political protest and advocacy in relation to defending human rights.
65. It is noteworthy that of the sentenced terrorism cases to date in Australia, none appears related solely to property damage. In the cases involving damage to property, the courts have generally inferred that the acts would also likely have endangered life and risked serious harm to people. This suggests that paragraph 100.1(2)(b) of the definition may not align with community expectations or judicial interpretation as to what conduct is capable of constituting a terrorist act.

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<sup>37</sup> UNHCR, 'UN experts urge United Kingdom not to misuse terrorism laws against protest group Palestine Action' (Press release, 1 July 2025).

<sup>38</sup> Ibid.

### Recommendation 5: Serious damage to property

**The definition’s inclusion of “serious damage to property” should be narrowed to situations where there is either risk to, or endangerment of, persons accompanying such damage and/or where the property constitutes critical infrastructure.**

## Electronic systems

66. As with “serious damage to property”, the Law Council has concerns with the potentially expansive interpretation of paragraph 100.1(2)(f), which holds that action that “seriously interferes with, seriously disrupts, or destroys, an electronic system” meets the threshold of a terrorist act under the current definition. Currently, the definition provides a non-exhaustive list of electronic systems, including:
- an information system;
  - a telecommunications system;
  - a financial system;
  - a system used for the delivery of essential government services;
  - a system used for, or by, an essential public utility; or
  - a system used for, or by, a transport system.
67. The current definition does not impose a sufficient threshold to ensure that only damage to the above systems that have large scale and/or serious consequences will be captured. The Law Council therefore supports an approach that, first, limits the operation of this provision to electronic systems of significance and those that constitute critical infrastructure; and, second, requires a direct nexus between the impact on the relevant electronic system and an adverse effect on human life.
68. We note that in 2002, the Council of Europe Framework Decision on Combatting Terrorism approached impacts on electronic systems, government services, public utilities and transport systems as terrorist acts by including them in the following forms in the list of acts defined as terrorist offences:
- causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;
  - interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life.<sup>39</sup>
69. In our view, this approach is preferable and would ensure that terrorism-related offences are reserved for actions with significant consequences for the Australian public (or a section of the public), noting that there are a range of non-terrorism offences for interference with electronic systems and cyber-related crimes.

<sup>39</sup> Council of Europe, Framework Decision on Combatting Terrorism, 13 June 2002, 2002/475/JHA, Article 1, available from <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:164:0003:0007:EN:PDF>>.

**Recommendation 6: Electronic systems**

**The definition’s inclusion of “electronic system” should be narrowed to interference, disruption or destruction causing significant consequences for the public (or a section of the public), with reference to both an adverse effect on human life and systems that constitute critical infrastructure.**

**Psychological harm**

70. The current definition of terrorist act in section 100.1 of the Criminal Code captures, among other things, an offending action or threat of action that causes serious harm that is physical harm to a person. As noted in the Issues Paper, various reviews have recommended that the definition should be amended to also include harm to mental health.<sup>40</sup>
71. It is standard throughout the Criminal Code that the definition of harm encompasses both physical and psychological harm. This reflects a broader policy which recognises that the impact of psychological harm on a person can be serious, debilitating and long-lasting and that, therefore, acts that are intended to cause psychological harm ought to be regarded with the same opprobrium as acts that are calculated to cause physical harm. The Law Council supports this broader policy.
72. However, in the Law Council’s view, terrorism offences are in many respects already approached differently from the average offence against the person and therefore the definition of terrorist act should not be amended simply in the name of consistency and uniformity.
73. The definition of “terrorist act” in the Criminal Code is, in effect, the gateway to a series of serious offence provisions and the trigger for a range of exceptional executive powers which would, in all but emergency circumstances, be regarded as unjustified and unnecessary. Therefore, the definition must be drafted with great care and specificity. It must be possible to precisely determine the type of conduct that it captures, so that an assessment can be made of whether the measures available to prevent, investigate and prosecute that conduct are proportionate to the risk that is sought to be averted. It should not be intended to be a catch-all definition.
74. In the Law Council’s view, if the term serious harm is no longer limited to harm that is physical—the type of conduct captured by the definition of terrorist act will be even harder to determine. It may, for example, encompass certain types of confronting advocacy and protest such as that employed by animal liberation or anti-abortion groups, even though we acknowledge that advocacy, protest, and dissent are excluded from the definition in certain circumstances pursuant to sub-section 101.1(3). For those reasons, the Law Council opposed the inclusion of psychological harm within the definition of ‘terrorist act’.

<sup>40</sup> Independent National Security Legislation Monitor, ‘Defining Terrorism: Review of the Definition of a “Terrorist Act” in Section 100.1 of the *Criminal Code Act 1995*’ (Issues Paper, August 2025) [4.68].

### Recommendation 7: Psychological harm

The reference to acts causing “serious harm that is physical harm” at paragraph 100.1(2)(a) should not extend to psychological harm.

## Hostage taking

75. The current elements listed in the “terrorist act” definition do not include hostage taking. The Law Council considers there is merit in the INSLM considering whether this is a definitional gap given the prevalence of hostage taking by terrorist groups and the significant terror caused to the public through this act.
76. We note that the United Nations Special Rapporteur,<sup>41</sup> the 2013 Council of Australian Governments Review,<sup>42</sup> and a former INSLM,<sup>43</sup> have all suggested its inclusion in the definition of terrorism.
77. The United Nations describes the act of hostage taking as

*any person who seizes or detains and threatens to kill, to injure or to continue to detain a hostage in order to compel a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage.*<sup>44</sup>

This definition has been adopted in Australian legislation under the *Crimes (Hostages) Act 1989* (Cth) (**Hostages Act**). However, for clarity, the Law Council submits that consideration could be given to including the act of hostage taking in the definition of a terrorist act, utilising the existing definition under the Hostages Act.

## Threats of action

78. The section 100.1 definition states that a “terrorist act” means “an action or threat of action” that leads to the harms outlined in the previous section.
79. About the inclusion of a “threat of action” within the definition, the Law Council has previously noted that it is almost impossible to conceive of how a mere threat of action, on its own and if not carried out, could cause serious harm, death, serious property damage or the like.<sup>45</sup> These concerns remain.

<sup>41</sup> Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Ten Areas of Best Practices in Countering Terrorism*, UN ESCOR, UN Doc A/HRC/15/51 (22 December 2010) 22.

<sup>42</sup> Council of Australian Governments, Council of Australian Governments Review of Counter Terrorism Legislation (Final Report, 2013) 9–10 [39]

<sup>43</sup> Bret Walker SC, ‘Declassified Annual Report’, Independent National Security Legislation Monitor (Report, 2012) 120–2.

<sup>44</sup> *International Convention against the Taking of Hostages*, opened for signature, 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983).

<sup>45</sup> Law Council of Australia, ‘Anti-Terrorism Reform Project: A Consolidation of the Law Council of Australia’s Advocacy in Relation to Australia’s Anti-Terrorism Measures’ (Report, October 2013) 36.

80. We have generally received support for removing “threat of action” from the definition of a terrorist act. This reflects a widely held view that the continued inclusion of a threat as one of two genres of a terrorist act (the other being an act) introduces an unacceptable level of confusion, incoherence, and/or complexity into the principal element of the definition. However, there have also been some concerns raised that changes such as this might risk upsetting the ecosystem of subsidiary offences and powers exercisable under the current counter-terrorism framework.
81. While a workable solution has been found by the Courts to interpret this provision, the rule of law requires that criminal offences be written in such a way that their meaning is clear and certain on the face of the legislation. Where those offences carry maximum penalties of life imprisonment, the Law Council finds it concerning that basic issues with grammar and logic can remain unaddressed for almost a quarter of a century.
82. This issue was raised in the 2006 *Report of the Security Legislation Review Committee (Sheller Review)*, where it was agreed that “the inclusion of the phrase ‘threat of action’ in the definition of ‘terrorist act’ causes at least uncertainty”.<sup>46</sup> The Sheller Review was concerned that the physical elements described in the definition address action and ‘[n]one of the paragraphs (a) to (f) of subsection 100.1(2) sits comfortably with a prospective bombing’.<sup>47</sup> The Sheller Review made the obvious and important suggestion that problems in the interpretation of the definition of “terrorist act” should be avoided, noting that they are likely to make prosecutions prolonged and more difficult, and increase the difficulties members of the public have in understanding the legislation.<sup>48</sup> We concur.
83. These concerns are exacerbated in circumstances where more than 92 pieces of counter-terrorism legislation have passed in the two decades after 11 September 2001.<sup>49</sup> The types of harms found in subsection (2) of the definition are all result elements which cannot be read literally in the context of a threat, where the action has not taken place.
84. To be clear, the legal profession offers unqualified support for a criminal offence that addresses threats to conduct a terrorist act. However, there is support for such an offence to have its own distinctive elements and penalties capable of distinguishing the consequences and gravity of threats as opposed to actions. A threat to commit an act is materially different from actually committing the act. Similarly, a threat to commit an act is different from an attempt, a conspiracy or an incitement to commit that act. Although threats might be reprehensible, they represent conduct of a different type with materially distinct consequences from the performance of an action, and we suggest that this requires that threats be addressed separately.

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<sup>46</sup> Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (Report, June 2006) [6.10].

<sup>47</sup> *Ibid* [6.11].

<sup>48</sup> *Ibid* [6.12].

<sup>49</sup> Keiran Hardy and George Williams, ‘Two Decades of Australian Counterterrorism Laws’ (2022) 46(1) *Melbourne University Law Review* 34, 45.

85. In our view, a separate offence provision for threats of action could address the particular fault elements of a threat offence and introduce an appropriate penalty set. In this regard, we note that distinct murder and threatening to kill offences are present in most criminal jurisdictions around Australia, with distinct elements and maximum penalties.<sup>50</sup>

### **Recommendation 8: Threats of action**

**References to “threat of action” in the definition of “terrorist act” should be removed, in favour of a separate offence criminalising threats to commit an act of terrorism.**

## Exclusions

86. The definition of “terrorist act” contains certain exclusions at subsection 100.1(3), namely where actions are regarded as advocacy, protest, dissent or industrial action and is not intended to cause death, serious physical harm, endanger life (other than the person taking the action) or create a serious risk to public health and safety. These exclusions are separate from (and in addition to) the ordinary defences that apply to all criminal matters.
87. The Law Council supports the current exclusions, and notes that they ensure that terrorist offences do not unjustifiably criminalise acts committed in the exercise of freedom of expression, assembly, association, and/or political participation.<sup>51</sup>

## Provision of humanitarian activities

88. The Law Council supports the inclusion of a specific exception for impartial humanitarian organisations from the definition of a terrorist act, which may provide greater consistency within Australia’s counter-terrorism framework.
89. At present, terrorism offences under the Criminal Code have inconsistent approaches to providing exceptions for humanitarian organisations. For example, offences in sections 102.8, 119.2, 119.4 and 119.5 of the Criminal Code have an exception for those “providing aid of a humanitarian nature”,<sup>52</sup> while other core terrorism offences, including those in sections 102.2–102.7, contain no humanitarian exemptions.

<sup>50</sup> We note that threatening to kill offences carry a maximum penalty of 7 to 12 years around Australia, whereas, murder as the most serious homicide offence, uniformly carries a maximum penalty of life imprisonment

<sup>51</sup> Ben Saul, ‘Submission by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Professor Ben Saul, in *Yasak v. Türkiye* (Application No. 17389/20) before the European Court of Human Rights (Grand Chamber)’, (Submission to ECHR (Grand Chamber), 1 April 2025) [27] <<https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/court-submissions/amicus-ecthr-yasak-v.-turkiye-un-sr-ct.pdf>>.

<sup>52</sup> As well as those performing an official duty for the United Nations or an agency of the United Nations; or the International Committee of the Red Cross. Note that “aid” may not necessarily capture all forms of humanitarian assistance, which may include broader aid-plus type services.

90. We understand that this inconsistency has created uncertainty in the interpretation and application of these laws, causing delays to the timely provision of humanitarian assistance. In particular, the broad scope and extraterritorial reach of Australia’s counter-terrorism offences require humanitarian organisations to undertake extensive due diligence, comply with donor/funding requirements as well as navigate a risk-averse private sector seeking to mitigate their own counter-terrorism risks, leading to delays in the time-critical provision of humanitarian assistance in situations including armed conflict.<sup>53</sup>
91. A consistent humanitarian exception within Australia’s counter-terrorism framework would alleviate some of the above concerns and also better comply with Australia’s obligations under international humanitarian law to allow and facilitate humanitarian action and to protect humanitarian personnel. In this respect, we note Australia’s recent launch of the Global Declaration for the Protection of Humanitarian Personnel, under which Australia has committed to take practical action to:

*Allow and facilitate access for humanitarian personnel and their assets... This includes streamlining bureaucratic and administrative processes that may unduly delay or impede the provision of humanitarian assistance ... by implementing legal and practical measures, such as humanitarian exemptions to sanctions and counter-terrorism measures.*<sup>54</sup>

92. We suggest, to the extent practical and in line with the commitment above, that any such humanitarian exception within Australia’s counter-terrorism framework should also be consistent with Australia’s sanctions regimes, which pose similar risks to humanitarian organisations.

**Recommendation 9: Provision of humanitarian activities**

**An exception should be added to paragraph 100.1(3)(a) to include development and humanitarian aid and assistance.**

<sup>53</sup> See, for example: Australian Red Cross and International Committee for the Red Cross, Submission No 1 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Inquiry into the review of the amendments made by the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Act 2021* (17 January 2025). The submission identifies that concerns around Australia’s autonomous sanctions measures as they relate to the timely provision of humanitarian assistance, are also applicable to Australia’s counterterrorism regime.

<sup>54</sup> Minister for Foreign Affairs, ‘Australia launches global declaration to protect aid workers’ (Media Release, 22 September 2025) <<https://www.foreignminister.gov.au/minister/penny-wong/media-release/australia-launches-global-declarationprotect-aid-workers>>.

## About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its constituent bodies:

- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
- Law Firms Australia.

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- Ms Elizabeth Shearer, Treasurer
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