



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
Chief Executive Officer
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By email: Thomas.Andrews@lawcouncil.au

Dear Dr Popple,

REVIEW OF THE DEFINITION OF A 'TERRORIST ACT' IN SECTION 100.1 OF THE *CRIMINAL CODE ACT 1995* (CTH)

The Law Society is grateful for the opportunity to contribute to the Law Council's submission to the Independent National Security Legislation Monitor's review into the definition of a "terrorist act" in section 100.1 of the *Criminal Code Act 1995* (Cth) (**Code**). The Law Society's Public Law, Criminal Law and Human Rights Committees contributed to this submission.

1. What (if any) changes in Australia's threat environment affect whether the definition of a 'terrorist act' remains fit for purpose?

In circumstances where over 300 Commonwealth, state and territory laws contain offences, obligations and powers that rely on the definition of terrorist act under section 100.1 of the *Code*,¹ the Law Society supports regular independent review of this definition to ensure it remains fit for purpose. However, we suggest that frequent amendment to the definition in response to changes in Australia's national threat environment is likely to overcomplicate an already complex legislative landscape. In our view, the elements of the definition of 'terrorist act' should conform with international best practice² and be drafted such that terrorist acts continue to be captured notwithstanding the emergence of new methodologies and diverse motivations.

2. Do the definition's 'purpose' and 'motive' elements remain appropriate?

The Law Society considers the definition of terrorist act under section 100.1 of the *Code*, as currently drafted, to be unnecessarily complex and lacking clarity. We suggest the definition as a whole could benefit from simplification. In particular, the definition should have a clear structure where the individual elements are easily identifiable.³

¹ Independent National Security Legislation Monitor, *Defining Terrorism – Issues Paper: Review of the definition of a 'terrorist act' in section 100.1 of the Criminal Code Act 1995* (Issues Paper, 11 August 2025) 2 (**Issues Paper**).

² See: United Nations Security Council Counter-Terrorism Committee Executive Directorate, *CTED Analytical Brief: A commentary on the codification of the terrorism offence* (Report, June 2024) 27-28 (**CTED Analytical Brief**).

³ *Ibid*, p 27.

We consider the ‘purpose’ and ‘motive’ elements appropriate and important to retain. However, we suggest they would similarly benefit from revision for clarity and precision. The intention of the perpetrator is what distinguishes terrorism from other serious criminal offences with the same or similar *actus reus*, such as murder, assault or property damage. As such, we consider it particularly important that these elements are drafted with the necessary precision to properly distinguish terrorism from other forms of serious violence.

3. Is the current list of specific harms appropriate and proportionate?

In addition to the purpose and motive elements, a terrorist act as defined in section 100.1 of the *Code* also has a ‘harm’ element. In our view, the current formulation of this element is imprecise and overly lengthy, and would benefit from significant revision. The definition stipulates an extensive list of effects which will satisfy the harm element, varying in both severity and actual impact. We note that the Courts have highlighted the unusual breadth of Australia’s harm element, with Whealy J in *R v Lodhi* noting these harms were of the ‘broadest possible kind’.⁴

We suggest the harm element 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.⁵ 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’.⁶ However, Australia’s definition includes conduct which falls well short of this threshold, including action which ‘creates a serious risk to the health... of the public’⁷ or which ‘seriously interferes with ... an electronic system’.⁸ In our view, the harm element as currently drafted is inappropriately and disproportionately broad, and captures conduct inconsistent with international best practice.

4. What are the consequences of including a ‘threat’ in the definition of a terrorist act? Is it preferable to have a separate offence addressing threats of terrorism?

The Law Society suggests the *threat* of terrorism should not be included within the broader definition of a terrorist act under section 100.1 of the *Code*. This view is consistent with recommendations made by various United Nations bodies, including the former Special Rapporteur, Counter-Terrorism Committee and the UN Office of the High Commissioner for Human Rights.⁹ The Law Society considers the *threat* of a terrorist act distinct in both conduct and criminality from actual terrorist acts. By including *threat* in the broader definition, we are concerned that conspiratorial or planning behaviour of lower levels of sophistication may be captured as a terrorist act.

⁴ *R v Lodhi* [2006] NSWSC 584 [73].

⁵ *CTED Analytical Brief* (n 2) 8.

⁶ *Ibid* 27.

⁷ *Criminal Code Act 1995* (Cth) s 100.1(2)(e) (**Code**). See also: *CTED Analytic Brief* 27: “The *actus reus* element should not use ambiguous terms such as acts “against public safety”, which are not consistent with the principle of legality.”

⁸ *Ibid* s 100.1(2)(f).

⁹ *Issues Paper* (n 1) [4.73].

Our concern is amplified in circumstances where an increasing number of minors have been the subject of terrorism and other violent extremism investigations in Australia.¹⁰ In practice, our members have observed that children charged with terrorism offences typically are involved in making unsophisticated threats or plans, where there may be no real prospects of the threat being carried out. While this conduct may still warrant a criminal justice system response, it is important that the offence definition appropriately reflects the relevant criminality of the conduct. In particular, we consider it important that children vulnerable to extremist ideology are dealt with by an appropriate justice response that promotes their long-term rehabilitation and reintegration into the community, rather than being subject to an excessively punitive maximum penalty due to their behaviour being captured by more serious offence provisions.

Lastly, it is not clear how a threat ‘causes’ some of the physical harms that form an element of the ‘terrorist act’, such as serious property damage or death. We suggest that inclusion of threat in the definition causes some level of legislative incoherence, which could be remedied by separating the threat of terrorism from the definition of a terrorist act.

5. Is the exclusion for ‘advocacy, protest, dissent or industrial action’ necessary and effective?

Action or a threat of action will not be a terrorist act under the *Code* if it is advocacy, protest, dissent or industrial action that 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. However, notwithstanding this statutory exclusion, our members report instances where persons engaged in peaceful protests, including Aboriginal and Torres Strait Islander people, have been charged by police with terrorism-related offences. In our view, the legislative exclusion for advocacy, protest, dissent and industrial action is a necessary safeguard, however its effectiveness is dependent on police properly applying the provision.

6. Are any other exceptions needed, in particular, the work of impartial humanitarian organisations which are lawful under international humanitarian law?

We support 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. At present, counter-terrorism offences under the *Code* have inconsistent approaches to providing such exceptions for humanitarian organisations. For example, offences in sections 102.8, 119.2, 119.4 and 119.5 of the *Code* have an exception for those, ‘providing aid of a humanitarian nature’,¹¹ while other core counter-terrorism offences, including sections 102.2–102.7, contain no humanitarian exemptions.

In our view, 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

¹⁰ Ibid [2.20]–[2.22].

¹¹ 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.

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.¹²

In our view, 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 action¹³ and to protect humanitarian personnel.¹⁴ 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.¹⁵

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.¹⁶ We note that Australia's United Nations sanctions framework, implemented under the *Charter of the United Nations Act 1945* (Cth), has a humanitarian exception read into its provisions via section 2B,¹⁷ which reflects the wording of United Nations Security Council Resolution 2615 (2021)¹⁸ and 2664 (2022)¹⁹ clarifying that activities related to "humanitarian assistance and other activities that support basic human needs" are exempt. We suggest that this formulation can also be a basis for an exception to the definition of terrorism as well as to Australia's autonomous

¹² 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) <<https://www.aph.gov.au/DocumentStore.ashx?id=dc7bae01-042e-42aa-8955-e8b23f85e243&subId=775845>>. 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.

¹³ During armed conflict, international humanitarian law establishes a 'right of humanitarian initiative', providing impartial humanitarian organisations the right to offer their services to carry out humanitarian activities, especially when basic needs of the population are not being met (*Geneva Conventions*, opened for signature 12 August 1949 (entered into force 21 October 1950) common arts 3, 9/9/9/10). Once impartial humanitarian relief schemes have been agreed, parties to the armed conflict, as well as all States that are not a party, are expected to allow and facilitate the rapid and unimpeded passage of humanitarian relief, subject to a right of control (*Fourth Geneva Convention* art 23; *Additional Protocol I* art 70; International Committee of the Red Cross, *Customary International Humanitarian Law Study* (2005) rule 55).

¹⁴ *Additional Protocol I* art 71(2); *Additional Protocol II* art 18(2). See also: Senator Penny Wong, Minister for Foreign Affairs, 'Joint statement towards a new declaration for the Protection of Humanitarian Personnel' (Media Release, 23 September 2024) <<https://www.foreignminister.gov.au/minister/penny-wong/media-release/joint-statement-towards-new-declaration-protection-humanitarian-personnel>>.

¹⁵ 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-declaration-protect-aid-workers>>.

¹⁶ Above n 11.

¹⁷ Department of Foreign Affairs and Trade, 'The Taliban sanctions framework' (Web Page) <<https://www.dfat.gov.au/international-relations/security/sanctions/sanctions-regimes/the-taliban-sanctions-framework#:~:text=The%20UNSC%20adopted%20resolution%202615,in%20relation%20to%20the%20Taliban.>>.

¹⁸ SC Res 2651, UN Doc S/RES/2651 (22 December 2021).

¹⁹ SC Res 2664, UN Doc S/RES/2664 (9 December 2022).



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sanctions framework, so as to bring greater legal consistency and certainty across Australia's sanctions and counter-terrorism regimes.

The Law Society is available for further consultation, if required. Inquiries at first instance can be directed to Jade Fodera, Policy Lawyer, at jade.fodera@lawsociety.com.au or (02) 9926 0218.

Yours sincerely,

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President