



NSW Council for Civil Liberties Inc.
PO Box A1386, Sydney South,
NSW 1235, Australia

e: office@nswccl.org.au
t: 02 8090 2952
www.nswccl.org.au

@nswccl
@nswccl

NSWCCL SUBMISSION

Independent National Security Legislation Monitor review into definition of a terrorist act

October 2025

NSWCCL

Acknowledgment

In the spirit of reconciliation, the NSW Council for Civil Liberties acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all First Nations peoples across Australia. We recognise that sovereignty was never ceded.

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

Contact NSW Council for Civil Liberties

<http://www.nswccl.org.au>
office@nswccl.org.au

Correspondence to: PO Box A1386, Sydney South, NSW 1235

The NSW Council for Civil Liberties (**NSWCCL**) welcomes the opportunity to make a submission to the Independent National Security Legislation Monitor on its review of the definition of a terrorist act in s 100.1 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).

1. Introduction

1.1 The NSWCCL recognises the importance of ensuring the safety and security of all Australians from the threat of terrorism and other forms of serious crime. The NSWCCL also acknowledges the complex and evolving nature of the national security environment and the challenges it poses for law enforcement and intelligence operations.

1.2 Since the 9/11 terror attacks in the United States, the Australian Government has enacted laws that confer extraordinary powers upon government and their agencies. Such laws may be directed to protecting the community, but they undermine the very freedoms we are seeking to protect from terrorism. Thankfully, no similar act of mass violence has occurred in Australia, despite this, successive governments have expanded powers and increased resources associated with terrorism offences.

1.3 These counter-terror measures have, and continue to, reshape Australians' understanding of the proper limits to government power and minimum democratic protections. Over time the counter-terror laws have become normalised and often passed with bipartisan support, this has extended to undermine even the most basic rights, including the power to strip someone of their citizenship.

1.4 The definition of 'terrorist act' in the Criminal Code is central to the operation of Australia's counter-terrorism framework. The definition determines the scope of conduct that may be prosecuted as terrorism, and therefore has significant implications for the rights and liberties of individuals, as well as for the effectiveness of law enforcement and intelligence agencies in preventing and responding to terrorist threats.

1.5 NSWCCL is mindful that the definition must be sufficiently precise to ensure that only conduct which genuinely constitutes a major threat to the public is captured. The definition must also be consistent with Australia's international obligations, including those under United Nations Security Council Resolutions, relevant treaties and must reflect the liberal values and principles of the Australian legal system. When assessing the merit and necessity of any counter-terrorism measure, including under relevant legislation, a balance must be struck between the need to ensure national security and the need to protect our democratic values of liberty, justice, tolerance.

1.6 NSWCCL is strongly opposed to broadening the scope of counter-terrorism laws for two fundamental reasons. First, counter-terrorism laws are contrary to many accepted criminal law principles that are fundamental to the rule of law in a free society. An example of this is the principle that a person's liberty should not be deprived on the basis of a potential future action they may take, this right is violated by continuing detention orders. Second, counter-terrorism laws allow the increased use of surveillance and behavioral restrictions, both before and after sentencing, in ways that are incompatible with fundamental human rights and freedoms such as the freedom of assembly, freedom of expression, right to protest and right to privacy.

2. Appropriateness of the current terrorist purpose requirement

The definition of 'intimidating' should be changed to reflect a higher threshold

2.1 NSWCCL's position is that the statutory formulation of the terrorist purpose requirement in section 100.1 of the Criminal Code requires amendment. This is for two reasons:

- (a) the definition of 'intimidating' permits liability to be established where no intimidation occurs in fact; and
- (b) the low threshold as to whom an act must be intended to or in fact intimidate is currently so wide as to capture individual fears, rather than the sense of widespread public alarm that meets broadly agreed definitions of a terrorist act.

2.2 The current articulation in s 100.1(3)(c) relies on the terrorist act's purpose being to intimidate a section of the public. The meaning of 'to intimidate' is vague, lacks a clear threshold and is inconsistent with both judicial interpretation and international standards. Senior jurists have cautioned against definitions that turn on the purpose

rather than the effect of an act.¹ This is because the probable result of an act is usually apparent and more objectively ascertainable.²

2.3 Australian courts, in non-terrorism contexts, have emphasised that intimidation requires more than conduct that is merely threatening or unsettling. The courts have outlined that intimidation is a transitive concept, necessarily involving two components:³

- (a) conduct of a particular nature; and
- (b) the effect that such conduct has on another person.

The definition of "terrorist act" in the Criminal Code is not concerned with whether members of the public were in fact intimidated, but instead whether the conduct was done with the intention to intimidate.⁴ Intention in this context is a characterisation of the conduct and not a fault element of the offence,⁵ treated as a circumstance of the act rather than something that must be proved to have occurred in fact. This permits liability to be established on the basis of intent alone, even when intimidation is never realised.

2.4 The threshold as to whom an act must be intended to or in fact intimidate, in Australian legislation, is lower than in other jurisdictions and international instruments.⁶ In New Zealand, terrorism is defined as conduct carried out for the purpose of inducing "terror in a civilian population",⁷ and in South Africa refers to acts intended to induce "fear or panic in a civilian population".⁸ The United Nations⁹ described terrorism as criminal acts "intended or calculated to provoke a *state of terror* in the general public, a group of persons or particular persons".¹⁰ These formulations require an intended state of collective fear, panic, or terror, capturing the idea that terrorism is not just about frightening individuals but about creating widespread social alarm.¹¹

2.5 The Australian formulation of a terrorist purpose is underdeveloped and risks overreach, lacking the qualitative element of terror or panic present in international standards. The current definition fails to capture that terrorism is communicative violence intended to create widespread social alarm. NSWCCCL considers that any legislative reform to the definition of "intimidation" in the terrorist purpose requirement should raise the threshold to the formulation observed in international standards.

The scope of 'the public' and 'a section of the public' is broad and ambiguous

2.6 The current use of "a section of the public" in section 100.1 of the Criminal Code is unacceptably broad and ambiguous. The legislation does not provide a clear or workable definition of either "the public" or "a section of the public" that aids in providing detail on the scope of populations that may be affected by terrorist acts.

2.7 The absence of a clear statutory definition has resulted in significant uncertainty and inconsistency in its application. Courts have often found that the threshold for what constitutes a "section of the public" is unclear, with

¹ See Sir Victor Windeyer in his opinion appended to the *Protective Security Review: Report*, Parliamentary Paper No 397/1979, unclassified version, (1979) at 271 (Appendix 7 – Terms of Reference) (Hope Review), referenced in *Thomas v Mowbray* (2007) 233 CLR 307.

² This sentiment was later cited by Kirby J in *Thomas v Mowbray* (2007) 233 CLR 307, where his Honour reiterated the dangers of criminal liability based on subjective purpose rather than on objectively assessable conduct and consequences.

³ In *Mellor v Lowe* (2000) NSWSC 75, Simpson J held that intimidation is a transitive concept, necessarily involving both conduct and its effect on another person, namely, the induction of fear or apprehension, or an alteration of behaviour in the target. This reasoning was endorsed in *DPP v Daniels* (2002), where it was reaffirmed that conduct, however menacing, does not amount to intimidation unless it produces the required effect in another person.

⁴ The references to "intention" in each of pars (b) and (c) of the definition of "terrorist act" are not fault elements of the offence. Rather, they identify the character of the action that falls within (2) of the definition. This is a physical element, being a "circumstance" within s 4.1(1)(c) of the Criminal Code.

⁵ Keiran Hardy and George Williams, *Terrorist, Traitor, Or Whistleblower? Offences And Protections In Australia For Disclosing National Security Information*, *UNSW Law Journal* 37(2) 784, 791.

⁶ *Ibid.*

⁷ *Terrorism Suppression Act 2002* (NZ) s 5(2)(a).

⁸ *Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004* (RSA) s 1(1)(xxv)(b)(ii).

⁹ See, GA Res 49/60, UN Doc A/RES/49/60 (17 February 1995) and later in SC Res 1566, UN Doc S/RES/1566 (8 October 2004).

¹⁰ Independent National Security Legislation Monitor (INSLM), *Defining Terrorism: Review of the definition of a 'terrorist act' in section 100.1 of the Criminal Code Act 1995* (Issues Paper, 2025) [4.13]; SC Res 1566, UN Doc S/RES/1566 (8 October 2004) art 3.

¹¹ This point was reiterated by Kirby J in *Thomas v Mowbray* (2007) 233 CLR 307 [277] when considering Security Council Resolution 1566.

outcomes varying depending on the size, characteristics or location of the group in question.¹² This lack of clarity is problematic in the context of terrorism offences, which carry the most serious criminal consequences and demand the highest degree of legal certainty.¹³

2.8 In some Australian jurisdictions, legislative and judicial reviews have replaced references to "the public" with "any person", reflecting an intention to broaden the scope of the provision.¹⁴ Courts have noted that such amendments indicate that, prior to the change, "the public" did not extend to "any person", supporting a narrower construction.¹⁵ In other contexts, 'the public' includes people in both public and private places.¹⁶

2.9 The lack of a clear threshold for what constitutes a "section of the public" creates a real risk that conduct not truly terrorist in nature may be captured by the legislation.¹⁷ For example, a violent act committed in a public place with the intention of affecting those present could be prosecuted as terrorism, even if the group affected is small or the act does not create widespread fear or panic.¹⁸ This blurring of the boundary between terrorism and other forms of serious criminality is inconsistent with the purpose of terrorism legislation, which is to address conduct that is extraordinary in its impact and designed to create widespread social alarm.¹⁹

2.10 International instruments and comparative jurisdictions provide more precise and workable formulations:

(a) The United Nations, in Security Council Resolution 1566, refers to acts "intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons".²⁰

(b) New Zealand's Terrorism Suppression Act 2002 and South Africa's Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004 use the term "civilian population" rather than "section of the public".²¹

2.11 These formulations provide greater clarity and ensure that terrorism offences are confined to conduct that is truly extraordinary in its impact and directed at a broader audience, rather than small or arbitrarily defined groups.

2.12 NSWCCCL submits that legislative reform is required that sets an objective and predictable threshold for the characteristics and size of the group affected. Consideration should be given to adopting terminology such as "civilian population" or "general public", as used in international and comparative law, to ensure that terrorism offences are reserved for conduct that is truly extraordinary in its impact and directed at a significant segment of the community. This would provide greater certainty and fairness in the application of the law, and would ensure that the most serious criminal penalties are imposed only in cases that genuinely warrant such condemnation.

Inclusion of bodies corporate in the definition of a terrorist purpose

2.13 NSWCCCL considers the current "terrorist purpose" requirement to be appropriately confined to acts intended to coerce or influence governments or to intimidate the public, without the specific inclusion of bodies corporate. NSWCCCL considers this distinction essential to prevent the conflation of terrorism with serious but distinct crimes against private entities, such as extortion or sabotage, which are already addressed by existing criminal laws. In the event that the definition is extended to include bodies corporate, NSWCCCL considers that any

¹² The ambiguity of "section of the public" is illustrated by the divergent outcomes in case law: see, eg, In *Madden* [1975] 3 All ER 155, eight security officers were held to be too small a group to form a class or section of the public for the purposes of public nuisance. In *Johnson* [1996] Crim LR 828, thirteen women living in the same area were held to constitute a section of the public. As Lord Denning observed in *A-G v PYA Quarries* [1957] 2 QB 169, it is no easier to say how many people make a section or class of the public than to say how many people it takes to make a group or crowd.

¹³ Independent National Security Legislation Monitor (INSLM), *Defining Terrorism: Review of the definition of a 'terrorist act' in section 100.1 of the Criminal Code Act 1995* (Issues Paper, 2025) 34; UN Human Rights Committee, Concluding Observations of the Human Rights Committee, Australia, 95th sess, UN Doc CCPR/C/AUS/CO/5 (16 March – 3 April 2009) [11].

¹⁴ Halsbury's Laws of Australia [130-22500] 'Terrorist act'; This extension of geographical jurisdiction has been held to be supported by the external affairs power in the (CC) Commonwealth Constitution: see *Thomas v Mowbray* (2007) 233 CLR 307, 364 (Gummow and Crennan JJ).

¹⁵ *R v Pannett* [2015] SASCFC 52 [36] discussing s 19AC(1) of the *Criminal Law Consolidation Act 1935* (SA).

¹⁶ In the Queensland Criminal Code, "the public" for the purposes of the offence of dangerous operation of a vehicle, being an offence endangering life or health, includes people considered for that offence, *whether in a public or private place*.

¹⁷ Tamar Meisels, [The Trouble with Terror: Liberty, Security, and the Response to Terrorism](#), (Cambridge University Press, August 2010) 12.

¹⁸ George Syrota, [The Definition of "Terrorist Act" in Part 5.3 of the Commonwealth Criminal Code](#) (2007) 33 *University of Western Australia Law Review* 307, 335.

¹⁹ *Ibid*, 318.

²⁰ This point was reiterated by Kirby J in *Thomas v Mowbray* (2007) 233 CLR 307.

²¹ *Terrorism Suppression Act 2002* (NZ) s 5(2)(a)); (*Protection of Constitutional Democracy Against Terrorist and Related Activities Act 2004* (RSA) s 1(1)(xxv)(b)(ii)).

extension should be limited to corporations performing essential public functions (such as government trading enterprises) and only with robust safeguards.

3. Appropriateness of the current terrorist motive requirement

Retention of terrorist motive

3.1 When considering the appropriateness of retaining the requirement for a terrorist motive, it is helpful to consider the broader criminal law, in a non-terrorism context. Criminal law generally separates the concept of motive, or the reason for the intent to engage in particular conduct, from the concept of intent itself.²² Motive is not usually an element of non-terrorism related offences. By contrast, a terrorist act specifically requires that an action be done with "the intention of advancing a political, religious or ideological cause".²³

3.2 This construction of motive marks a terrorist act as a distinct category of serious crime which requires its own language and terms of reference distinct from other types of crime. This appropriately makes the task of prosecution more difficult, reflecting the onerous nature of a terrorism offence.²⁴ This difficulty in prosecution "provides an important safeguard that limits the use of extraordinary measures".²⁵ A broader definition of a terrorist act may have the effect of enabling "the expansion of extraordinary police powers to a greater scope of violent incidents",²⁶ creating unnecessary ambiguity in what constitutes a terrorist act.

3.3 The inclusion of a motive requirement is not unique to the Criminal Code. The motive requirement was first included in the *Terror Act 2000* (UK), which in turn influenced the inclusion and construction of the motive requirement in the Criminal Code, Canadian and New Zealand terrorism legislation.²⁷ Additionally, several reviews of the appropriateness of the motive requirement have considered, and ultimately rejected, the removal of motive from the definition.²⁸

3.4 For the reasons set out above, NSWCCCL supports retention of the motive requirement in the current construction of a terrorist act.

Retention of political, religious and ideological terms

3.5 While the terms 'political', 'religious' and 'ideological' are components of the 'terrorist act' definition, there is little judicial guidance on their meanings. NSWCCCL submits that retention of all three terms is incompatible with the objectives of fairness and social cohesion that underpin counter-terrorism law. The religious term is the most controversial of these components.

Religious term

3.6 The definition of 'religion' is uncertain in the context of terrorism.²⁹ The definition of religion has been primarily considered in the context of taxation, not cases involving terrorism offences.

3.7 The religious term in the motive requirement means that an action must have intended to advance a religious cause, which may be difficult to factually ascertain. Individuals or groups committing serious acts involving violence and claiming to do so to advance a particular religious cause are usually not acting in accordance with the accepted beliefs or practice of that religion. To illustrate the complexity of this, the Australian Muslim Advocacy Network recently suggested that declaring crimes by ISIL as 'religiously motivated' provides false credence to the narrative that they are involved in a religious war.³⁰

3.8 Terrorism laws containing motive requirements including religion unnecessarily feed into the misconception that the war against terrorism is a war against certain religions,³¹ therefore risking discrimination against particular

²² *De Gruchy v The Queen* (2002) 211 CLR 85; [2002] HCA 33 [51] (Kirby J).

²³ *Criminal Code Act 1995* (Cth) s 100.1(b).

²⁴ Council of Australian Governments, *Council of Australian Governments Review of Counter Terrorism Legislation* (Report, 2013) [21].

²⁵ Attorney-General (ACT), *Statutory Review – Terrorism (Extraordinary Temporary Power) Act 2006* (Report, April 2021) [10].

²⁶ Department of Justice and Community Safety (Vic), *Review of the Terrorism (Community Protection) Act 2003, Stage Two Report* (Report, August 2021) 30.

²⁷ See, *Terror Act 2000* (UK), *Criminal Code, RSC 1985* (Canada); *Terrorism Suppression Act 2002* (NZ).

²⁸ See, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (Report, 4 December 2006) 57 [5.25]; Council of Australian Governments, *Council of Australian Governments Review of Counter-Terrorism Legislation* (Report, 2013) 57; Bret Walker, *INSLM Annual Report 2011–12* (Report, 20 December 2012) 114 – 16, 119.

²⁹ *The Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 137.

³⁰ Australian Muslim Advocacy Network, *Submission to the Australian Government regarding the Universal Periodic Review (UPR)* (15 September 2023) 7.

³¹ Kent Roach, 'The Case for Defining Terrorism with restraint and Without Reference to Political or Religious Motive' in Lynch, MacDonald and Williams (eds) *Law and Liberty in the War on Terror* (Federation Press, 2006) 48.

religions.³² In July 2025, the Special Rapporteur reported that best practices in preventing terrorism and violent extremism must not directly or indirectly discriminate on prohibited grounds, including religion.³³

3.9 Islam has been regularly associated with terrorism cases and Muslim organisations have been frequently labelled 'terrorist organisations' with no basis but for the fact that such organisations are Muslim.³⁴ The Islamic Council of Victoria articulated that there is a reasonable fear in the Muslim community that interpretations of terrorism will be directed at the Muslim community in the first instance.³⁵ NSWCCCL submits that the discriminatory effect of the religion term in the motivation requirement is avoidable and unacceptable.

3.10 International legal instruments concerning terrorism do not require the establishment of a religious cause to be advanced.³⁶ Similarly, a 'religious cause' is not contained in any of the 13 United Nations' sectoral treaties.³⁷ Further, the *International Convention for the Suppression of the Financing of Terrorism*³⁸ has a definition that captures financing of terrorism without categorising the offence on religiously-motivated grounds.

3.11 Counter-terrorism law should have the direct effect of certainty and the indirect effect of promoting social cohesion.³⁹ Removing the religious cause requirement would generate a modern, progressive counter-terrorism law less supportive of discriminatory stereotypes. As such, NSWCCCL's position is that the religious term should be removed from the motivation requirement.

Appropriateness of an ideological term only

3.12 The Australian conception of terrorism as a political act is at least as old as the *ASIO Act 1979* (Cth), which defines terrorism as "acts of violence for the purpose of achieving a political objective in Australia or in a foreign country".⁴⁰ There has been no judicial consideration of the definition of ideology in any Australian cases regarding terrorism.

3.13 The concepts of religion and ideology are often used interchangeably, but a key difference lies in their foundations: religions are founded on supernatural, intangible beliefs; whereas, ideologies are founded on worldly ideas and often concern politics, society or economics. A religion can also be considered a specific type of ideology because both provide a worldview and a framework for life.

3.14 In around half of the terrorism sentencing decisions reviewed by INSLM, a political motive can be readily identified⁴¹ but is often found alongside a religious or ideological cause. Indeed, the INSLM's review did not find a single case where political cause was found to be the sole cause of a terrorist act.

3.15 To assess whether an 'ideological' cause exists, a 2023 Canadian study suggested asking four questions:⁴²

- (a) does the accused ascribe to a system of beliefs;
- (b) does their system of beliefs relate to how they understand society;
- (c) does their system of beliefs prescribe an ideal society; and
- (d) is their system of beliefs intended to be shared with and influence others?⁴³

³² INSLM, Australian Government, *Declassified Annual Report* (Annual Report, 2012) 112.

³³ Ben Saul, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism: Best Practices to Protect Human Rights while using Administrative Measures to Prevent Terrorism: Restrictive Orders, Terrorist Listings, Security Detention and Compulsory Interventions*, 80th sess, Agenda Item 72(b), UN Doc A/80/150 (31 July 2025) [4-5] para 6 and 6(g).

³⁴ Ibid [4.41]-[4.42].

³⁵ Submissions to the Legal and Constitutional Committee Report, Islamic Council of Victoria, *Submission 138*, 6.

³⁶ *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002); *International Convention for the Suppression of Acts of Nuclear Terrorism* opened for signature 13 April 2005, 2445 UNTS 89, (entered into force 7 July 2007); GA Res 49/60, UN Doc A/RES/49/60 (17 February 1995); SC Res 1566, UN Doc S/RES/1566 (8 October 2004).

³⁷ INSLM, Australian Government, *Declassified Annual Report* (Annual Report, 2012) 113-14.

³⁸ New York, 1999, Art 2(1).

³⁹ See Rita Jabri Markwell, 'Religion as a Motive: Does Australian Terrorism Law Serve Justice' (2023) 12(3) *International Journal for Crime, Justice and Social Democracy* 1.

⁴⁰ *Australian Security Intelligence Organization Act 1979* (Cth) 4.

⁴¹ INSLM, *Defining Terrorism: Review of the definition of a 'terrorist act' in section 100.1 of the Criminal Code Act 1995* (Issues Paper, 2025) [4.32].

⁴² 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, 591-2.

⁴³ Ibid.

These questions would arguably capture religion, politics, extremism and non-traditional and emerging belief systems (e.g. incels, white supremacy).

3.16 Academic literature overwhelmingly supports the idea that, for the purposes of the definition of a 'terrorist act', any act of "religiously motivated" terrorism could also be motivated by either ideology, politics or a combination of both.⁴⁴ Such an overlap is logical and practically demonstrated by no terrorism sentencing decision being made in circumstances where a "religious" motive was the only identified or inferred motive, in the absence of an accompanying political or ideological motive.

3.17 NSWCCCL considers that it may be appropriate to develop a definition of an ideology term in the motive requirement that removes the need for the political and religious terms. NSWCCCL cautions that any change to these terms in the motive requirement should not broaden the scope of what could be considered a terrorist act. At this time, NSWCCCL has not been able to identify any examples from legislation that would be appropriate to recommend but could provide further consideration of this issue to the INSLM by way of supplementary submission.

4. Appropriateness of the specific harms currently captured by the Criminal Code

If the harm element should be limited to serious harm to people

4.1 NSWCCCL considers that the definition of harm to persons should continue to be restricted to 'serious harm'. This is broadly in line with the approach in the United Kingdom,⁴⁵ Canada,⁴⁶ and New Zealand.⁴⁷

4.2 Importantly, NSWCCCL draws attention to the role that the seriousness of harm plays in the general public's assessment of whether an act could be considered to be a terrorist act. For example, a protestor who repeatedly throws tennis balls at counter-protestors at a demonstration would be doing physical harm with a political intent, but cannot seriously be considered to be doing terrorism where the counter-protestors merely suffer mild bruises. However, if the tennis balls were replaced with a dangerous projectile, then our assessment is likely to be different. This is because of the change in the level of harm inflicted.

4.3 NSWCCCL emphasises the balance that must be struck between effective prosecution of those who commit or intend to commit terrorist acts and the potential restrictions to a person's liberty where the definition of harm is made so broad that it 'catches' in its scope acts that would not broadly be understood to be terroristic in nature. As a result, it considers 'serious harm' to be an appropriate threshold for the infliction of harm under the Criminal Code.

4.4 In addition, NSWCCCL draws attention to the potential risk for the definition to capture other offences already covered in the Criminal Code, thus creating a duplication of the offences.

If serious damage to property is retained should it be limited to damage to critical infrastructure

4.5 NSWCCCL submits that the inclusion of property damage within the scope of potential terrorist activities should be limited to serious damage to property that creates a material risk of indirect serious harm to people. For example, this would include damage to hospitals, electricity pylons, payment processors or firefighting facilities. This limitation captures the types of damage that amount to the most serious of harms to individuals or communities, while keeping out of scope those types of damage to property (e.g. smashed windows, graffiti) that are more appropriately dealt with by lesser criminal damage offences that already exist.

4.6 Therefore, to better serve the objectives of counter-terrorism law and to limit overreach and duplication with criminal law, NSWCCCL supports a more targeted approach that limits in-scope property damage. This approach would reduce the risk of overlap with state-based offences such as arson, which already carry significant penalties, and would ensure that the most severe consequences of terrorism laws are reserved for conduct with the greatest potential to disrupt society.

4.7 Critical infrastructure is defined at a national level as:

Those physical facilities, supply chains, information technologies and communication networks which, if destroyed, degraded or rendered unavailable for an extended period, would significantly impact the social or economic wellbeing of the nation or affect Australia's ability to conduct national defence and ensure national security', where 'significant' in the context of this definition is

⁴⁴ See Rita Jabri Markwell, 'Religion as a Motive: Does Australian Terrorism Law Serve Justice' (2023) 12(3) *International Journal for Crime, Justice and Social Democracy* 1, citing W Laqueur, *The New Terrorism: Fanaticism and the Arms of Mass Destruction* (2000, New York: Oxford University Press) 6; M Sedgwick, 'Al-Qaeda and the Nature of Religious Terrorism' (2004) 15(4) *Terrorism and Political Violence* 795, 795; Independent National Security Legislation Monitor, Australian Government, *Declassified Annual Report* (Annual Report, 2012) 111.

⁴⁵ *Terrorism Act 2000* (UK) s 1.

⁴⁶ *Criminal Code*, RSC 1985, c. C-46, s 83.01.

⁴⁷ *Terrorism Suppression Act 2002* (NZ) s 5.

defined as an event or incident that puts at risk public safety and confidence, threatens our economic security, harms Australia's international competitiveness, or impedes the continuity of government and its services.⁴⁸

4.8 Additionally, the *Security of Critical Infrastructure (Application) Rules (LIN 22/026) 2022* is a source of federal legislation which provides a list of what is considered critical infrastructure/assets.⁴⁹

4.9 Limiting the scope of 'serious damage to property' to critical infrastructure would ensure that terrorism offences are reserved for conduct that threatens the essential services and systems upon which the community depends. The current definition can capture acts such as arson against places of worship, which, while serious and politically motivated, do not threaten the functioning of critical infrastructure and are already criminalised under state-based law.⁵⁰ By confining the definition to critical infrastructure, the law would focus on conduct with the potential to cause widespread societal harm, such as attacks on the electricity grid or water supply.⁵¹

4.10 NSWCCCL acknowledges that this approach would mean that some acts currently prosecuted as terrorism, such as attacks on places of worship, monuments, or other non-critical assets, would fall outside the scope of terrorism offences unless they also caused serious harm to individuals or met another element of the definition. While such attacks have large impacts on communities, the direct threat to critical infrastructure is absent, and such conduct is more appropriately dealt with under existing criminal law.

If interference (etc.) with an electronic system should be confined to critical infrastructure

4.11 For the reasons stated above at paragraphs 4.5-4.10, NSWCCCL supports restricting the definition of interference, serious disruption or destruction of electronic systems to those systems that form part of 'critical infrastructure', where disruption would have significant human rights or societal impacts. This would exclude politically motivated cyber-attacks on private or non-essential electronic systems from the definition of a terrorist act, unless those systems are integral to the nation's functioning or security.

4.12 By refining damage to property and electronic systems, the definition would address concerns about overreach and the potential for terrorism laws to be applied to conduct that, while serious, does not pose a systemic threat to society. It would maintain the distinction between terrorism and other forms of serious criminality, ensuring that the extraordinary powers and penalties associated with terrorism offences are reserved for egregious conduct. This approach would also provide greater clarity and certainty for law enforcement and the courts, by focusing on a defined set of assets and systems whose compromise would have the most serious consequences.

Inclusion of mental harm

4.13 NSWCCCL considers that the inclusion of harm to mental health or psychological harm would significantly broaden the scope of the current legislative framework.

4.14 While the original 2002 definition of terrorist act included psychological harm, this was subsequently removed due to concerns that psychological harm is more remote from the commonly understood forms of terrorism, which typically involve physical violence or threats to life and bodily integrity.⁵² Although terrorism has changed over time, through technological advancements and the type of threats and groups making them, violence is still a core way terrorists advance their cause.

4.15 International and comparative approaches also support a narrower definition. Neither the *European Union Council Framework Decision on Combating Terrorism* nor the *International Convention on the Suppression of the Financing of Terrorism* includes psychological harm within their definitions, instead focusing on death and serious bodily injury.⁵³ This international practice underscores the appropriateness of maintaining a focus on tangible, physical harms in the Australian context.

4.16 NSWCCCL considers that the inclusion of psychological harm would risk undermining the clarity and certainty of the law. The threshold establishing psychological harm is inherently less clear and more subjective than for physical harm, potentially leading to inconsistent and broad application.

⁴⁸ Australian Government Department of Home Affairs, 'Critical Infrastructure Resilience Strategy' (Strategy Paper, February 2023) 4.

⁴⁹ *Security of Critical Infrastructure (Application) Rules (LIN 22/026) 2022* s 4.

⁵⁰ See, *Abdullah Chaarani v R* [2020] VSCA 88, [12]–[15].

⁵¹ See, *Lodhi v R* (2006) 199 FLR 303 121, [162]; Australian Government Department of Prime Minister and Cabinet, *Review of Australia's Counter-Terrorism Machinery* (Report, 2015).

⁵² Parliament of Australia, 'Review of Security and Counter Terrorism' (Report, December 2006).

⁵³ Directive (EU) 2017/541 of the European Parliament and of the Council [2017] OJ L 88/6, art 3; *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, 2178 UNTS 197 (entered into force 10 April 2002) art 2(b).

4.17 This is particularly relevant given the high bar for mental harm claims under civil liability legislation in jurisdictions such as New South Wales and Western Australia.⁵⁴ Introducing psychological harm into the definition of a 'terrorist act' could inadvertently lower this threshold, as it could influence judicial reasoning in civil cases and expand the range of psychological injuries recognised as compensable under civil law, creating a broader and less predictable legal standard.

4.18 Notwithstanding the above, to completely discount any form of psychological or emotional harm from the definition of harm in the Criminal Code may not align with our changing understanding of the intersection between physical and psychological harm, as well as the potential debilitating effects of psychological harm, which can be as significant as physical harm. Therefore, a balance must be struck between the risk of overreach under a broader definition and the risk of excluding harms that are in the public interest to include.

4.19 NSWCCCL submits that the high standard of diagnosed and appropriately documented psychiatric harm is the appropriate threshold. This keeps the definition relevant to current threats and avoids expanding the definition into a realm where a 'terrorist act' covers acts that do not align with the goal of the legislative framework. It also ensures that the law remains targeted, clear and effective in addressing the most serious forms of terrorist conduct, without creating uncertainty in its application.

Expressly inclusion of hostage taking

4.20 Hostage taking, as defined under international law, involves the unlawful detention of individuals, typically accompanied by threats to their life or safety, or the use of such individuals as leverage to achieve a particular outcome.⁵⁵ There is a potential for hostages to suffer from serious physical or psychological harm as a result of this experience.

4.21 The former UN Special Rapporteur on Counter-Terrorism and Human Rights' 'model' definition of terrorism includes 'the intentional taking of hostages'.⁵⁶ Further, that EU, Canada and some US definition of a 'terrorist act' expressly include kidnapping and/or hostage taking.⁵⁷ Inclusion of hostage taking in the definition would allow alignment of the Criminal Code with international instruments that Australia is a party to, such as the International Convention against the Taking of Hostages. NSWCCCL considers, therefore, that it is appropriate for hostage taking to be included in the definition.

5. Consequences of including a 'threat' in the definition of a terrorist act

5.1 NSWCCCL supports the inclusion of a separate offence for threats of terrorist action, and removing references to threats from the current terrorism offence. This is for the following reasons:

(a) The current definition of a terrorist act, which includes threats, is too broad for purpose, and captures in its scope offences where there is no reasonable prospect of a terrorist act taking place.

(b) It is not clear that a mere threat can meet the harm threshold under subsection (2), thus making it challenging to prosecute in practice.

(c) Including mere threats within the same offence as terrorist acts collapses the undeniable factual difference between the consequences of these two acts, which should be treated differently under separate offences.

(d) Inclusion of threats within the definition of a terrorist act permits the use of the most intrusive investigative powers in a wider range of circumstances than is strictly necessary.

5.2 This approach would strike a balance between ensuring that threats of terrorism are appropriately criminalised, addressing legislative ambiguity, and safeguarding values of justice and liberty from excessive and disproportionate exercises of power. Creation of a separate offence would bring Australia into alignment with the recommendations of United Nations bodies, as well as the US and New Zealand who treat threats as distinct offences.⁵⁸

⁵⁴ *Civil Liability Act 2002* (NSW); *Civil Liability Act 2002* (WA).

⁵⁵ *International Convention Against the Taking of Hostages*, opened for signature 17 December 1979, 1316 UNTS 205 (entered into force 3 June 1983) art 1.

⁵⁶ 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, 16th sess, Agenda Item 3, UN Doc A/HRC/16/51 (22 December 2010) 22.

⁵⁷ *Directive (EU) 2017/541 of the European Parliament and of the Council* [2017] OJ L 88/6, art 3; Criminal Code, RSC 1985, c. C-46, s 83.01(1) (a)(iv) (by express reference to the Hostages Convention); 18 USC §2331 (definitions of 'international terrorism' and 'domestic terrorism'); 18 USC §2332b (definition of 'acts of terrorism transcending national boundaries'). The *Terrorism Act 2000* (UK) s 1(3) removes the requirement to demonstrate a terrorist purpose if a firearm or explosive is involved.

⁵⁸ INSLM, *Defining Terrorism: Review of the definition of a 'terrorist act' in section 100.1 of the Criminal Code Act 1995* (Issues Paper, 2025) [4.72]-[4.73].

The current definition of a terrorist act extends to a 'threat' of action.⁵⁹ As such, counter-terrorism powers and offences apply to a person who has threatened an act of terrorism, even if the person did not have the capability or intention to carry through with the threat.⁶⁰ This unnecessarily broadens the scope of the definition and risks capturing conduct that does not truly constitute terrorism, thus resulting in unacceptable infringements on the fundamental rights and freedoms of individuals.

5.3 The application of the current definition to 'threats' is both ambiguous and complex.⁶¹ The definition states that a threat of action is considered a terrorist act if the action falls within subsection (2) of the definition.⁶² Subsection (2) contains a number of observable and resulting forms of harm, at least one of which must be satisfied for a threat to amount to a terrorist act. These include, for example, that the threatened action causes serious physical harm to a person, causes serious damage to property or causes a person's death.⁶³

5.4 It is therefore unclear how a 'threat' can satisfy the definition in circumstances where the action does not take place and the requisite harm does not eventuate.⁶⁴ Subsection (2) requires an outcome to have actually materialised and does not appear to extend to prospective or hypothetical consequences.⁶⁵

5.5 Although it is possible that a terrorist threat (without any accompanying action) could cause *some* harm, damage or interference, it is difficult to see how it would be capable of achieving the specific form and high standard of harm required under subsection (2). As a result, the requisite causal nexus between a threat and its damage is difficult to establish, resulting in prolonged and burdensome proceedings or alternatively, the non-commencement or discontinuation of proceedings.⁶⁶

5.6 The Attorney-General's Department *National Security Legislation: Discussion Paper on Proposed Amendments* stated that this interpretation is unintended and instead, the word 'causes' should be read (and amended) to include 'or is likely to cause'.⁶⁷ The NSWCCCL disagrees with this approach and considers the ambiguity in the current definition is better addressed by removing references to a 'threat of action' and dealing with threats as a separate offence.

5.7 Further, merely amending the definition by loosening the causal requirements of harm from 'causes' to 'likely to cause' would have an "undeniably expansionist" impact on the definition and on the offences that hinge upon it. This would have the effect of capturing conduct that does not pose a real risk or fails to meet level of harm or culpability associated with terrorism.⁶⁸

5.8 Creation of a separate offence elsewhere in the Criminal Code will ensure that such conduct is appropriately recognised and sanctioned.⁶⁹ It would also remove interpretative uncertainty, enhance public clarity regarding criminal conduct and make it easier to commence and prosecute proceedings.⁷⁰ NSWCCCL submits that removing the 'threat of action' from the definition will not dilute the policy focus of criminalising threats of terrorism within the offences in Division 101 of the Criminal Code.⁷¹ It is uncontroversial that a threat to act is less severe than the actual commission of the terrorist act, both in terms of the harm caused and the immediate risks to the

⁵⁹ *Criminal Code Act 1995* (Cth) s 100.1(1).

⁶⁰ INSLM, *Defining Terrorism: Review of the definition of a 'terrorist act' in section 100.1 of the Criminal Code Act 1995* (Issues Paper, 2025) [4.72].

⁶¹ Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (Report, June 2006) [6.10]-[6.11] ('Sheller Review').

⁶² *Criminal Code Act 1995* (Cth) s 100.1(1).

⁶³ *Ibid* s 100.1(2).

⁶⁴ Sheller Review [6.11].

⁶⁵ *Ibid*.

⁶⁶ *Ibid* [6.12].

⁶⁷ Attorney-General's Department, *National Security Legislation: Discussion Paper on Proposed Amendments* (Discussion Paper, July 2009) 47-9 ('2009 AGD Discussion Paper') <<https://www.inslm.gov.au/system/files/2025-08/previous-review-2009-AGD-discussion-paper.PDF>>.

⁶⁸ *Ibid*.

⁶⁹ Gilbert and Tobin Centre of Public Law, Submission to Council of Australian Governments, *Review of Counter-Terrorism Legislation* (21 September 2012) 8 <<https://api.research-repository.uwa.edu.au/ws/portalfiles/portal/49150577/GilbertTobinCentreofPublicLaw.pdf>>.

⁷⁰ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (Report, 4 December 2006) [5.38]-[5.40] <<https://www.inslm.gov.au/system/files/2025-08/previous-review-2006-PJCIS-review.pdf>>; Council of Australian Governments, COAG Response to the COAG Review of Counter-Terrorism Legislation (Report, 2014) Recommendation 1 Response <<https://www.inslm.gov.au/system/files/2025-08/previous-review-2014-COAG-response.pdf>>.

⁷¹ 2009 AGD Discussion Paper 49.

public and property. The creation of a separate offence would prevent the conflation of conduct of a lesser gravity with the act of terrorism itself.⁷²

5.9 A threat usually means a communicated intention to inflict some kind of harm on the person or property of another, with the intention to intimidate the other person, to overcome their will, to unsettle their mind, or to restrain their freedom of action.⁷³ NSWCCCL accepts that threats, especially threats to commit a terrorist act, should be criminalised. However, it is clear that a threat to act is less severe than the actual commission of the act, both in terms of the harm caused and the immediate risks to the public and property.

5.10 As the current definition treats a 'threat' and an 'act' as equivalent, the full scope of counter-terrorism powers and penalties may be applied to conduct that, while serious, does not reach the level of harm or culpability associated with the completed act. For example, an individual who issues a bomb threat to advance an ideological cause, but who does not have the means or capability to ever carry out the action, may be subject to extraordinary measures such as preventative detention orders and control orders that clearly violate an individual's rights and liberties.⁷⁴ Similarly, that same individual could face sentences comparable to those imposed on persons who have committed actual acts of terrorism, including life imprisonment.⁷⁵

5.11 Such an outcome would be in clear violation of the proportionality principle affirmed in *Hoare v The Queen*,⁷⁶ which established that a sentence of imprisonment "should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances".⁷⁷ It would therefore be "impermissible" that an ancillary offence such as a 'threat' attracts life imprisonment merely for the purpose of promoting general deterrence through exemplary sentencing.⁷⁸

5.12 Courts have recognised the lesser objective seriousness of threats and have reflected this during the sentencing process.⁷⁹ Further, there are *some* legislative protections imposing minimum thresholds on the exercise of counter-terrorism powers. For example, the Criminal Code requires that a court must be satisfied that the making of a preventative detention order or control order is reasonably necessary to prevent a terrorist act (or threat of a terrorist act) from occurring.⁸⁰

5.13 However, this approach relies on the exercise of judicial discretion, which creates significant potential for errors and inconsistencies that could otherwise be avoided through the inclusion of a separate offence that distinguishes between a mere threat to commit a terrorist act and an act of terrorism itself. Such a distinction would subsequently ensure that the suite of powers invoked and penalties imposed under the Criminal Code remain proportionate to the severity of the conduct and reflect the degree of harm involved.⁸¹

5.14 NSWCCCL recognises the importance of preventing, responding to and punishing acts of terrorism, particularly given its classification as a 'special category' of crime due to the significant threat it poses to the nation and general public.⁸² Accordingly, acts of terrorism attract a vast array of investigative powers, counter-terrorism measures, policies, operational arrangements and offences that would otherwise be incompatible with fundamental values of liberty and the rule of law.

5.15 The current legislative system fails to distinguish between a 'threat' of terrorism and an 'act' of terrorism when determining the application and scope of various powers and penalties that are enlivened once the definition is satisfied. As a result, the most invasive investigatory powers can currently be disproportionately used for individuals who have made terrorist threats, even where they clearly have no capacity to follow through with these threats. This is not a proportionate compromise between the need to investigate serious risk of terrorism with the fundamental rights of human beings, not least their right to privacy.

⁷² Office of the High Commissioner of Human Rights, *Defining 'Terrorism' in National Criminal Legislation* (Guidance Note, 27 March 2025) ('OHCHR Guidance Note') <<https://www.ohchr.org/sites/default/files/2025-03/ohchr-guidance-note-defining-terrorism-in-national-legislation.pdf>>.

⁷³ Sheller Review [6.10].

⁷⁴ Australian Human Rights Commission, Submission to the Independent National Security Legislation Monitor, *Review of Counter-Terrorism and National Security Legislation* (14 September 2012) 3-4 <https://humanrights.gov.au/sites/default/files/content/legal/submissions/2012/20120914_counter-terrorism.pdf>.

⁷⁵ *Criminal Code Act 1995* (Cth) s 101.1(1).

⁷⁶ *Hoare v The Queen* (1989) 167 CLR 348.

⁷⁷ *Ibid* 354.

⁷⁸ Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne University Law Review* 489, 495 <<https://www.austlii.edu.au/au/journals/MelbULawRw/1994/1.pdf>>.

⁷⁹ *DPP (Cth) v Sherani* [2024] VSC 620 [28]-[29], [40].

⁸⁰ *Criminal Code Act 1995* (Cth) ss 104.4(1)(d) and 105.4(d).

⁸¹ OHCHR Guidance Note 6.

⁸² INSLM, *Defining Terrorism: Review of the definition of a 'terrorist act' in section 100.1 of the Criminal Code Act 1995* (Issues Paper, 2025) [1.4].

5.16 For all the reasons above, NSWCCCL supports the removal of threats from the current offence and the creation of a new, less serious offence, that deals with terroristic threats.

6. Appropriate exemptions to the definition of a terrorist act

Necessity and effectiveness of the exclusion for 'advocacy, protest, dissent or industrial action'

6.1 In January 2024, the current Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, noted the worsening of human rights violations through the misuse of counter-terrorism measures in the previous 18-year period.⁸³ NSWCCCL considers that it is necessary to retain an exclusion in the definition of a terrorist act to protect fundamental human rights and freedoms, particularly freedoms of association, assembly and expression.

6.2 The supplementary explanatory memorandum to the Report of the Special Rapporteur states that the purpose of this exception is to ensure that conduct exercising fundamental human rights would not be covered by the definition unless it intended to cause serious harm. Serious harm is defined to include physical harm to a person, a person's death, endangerment of a person's life or the creation of a serious risk to health or safety.⁸⁴ This means, for example, that protests or industrial action that cause mere property damage would not fall under the definition of terrorist act.⁸⁵

6.3 NSWCCCL considers that restrictions on advocacy, protest, dissent or industrial action may be justified to prevent serious violence or harm to individuals or groups. However, any restriction cannot be drafted to include circumstances where conduct that does not cause such harm could be classified as a terrorist act.

6.4 The notable lack of an exclusion for the above conduct in the *Terrorism Act 2000* (UK) has allowed misuse of UK counter-terrorism legislation regarding the protest activities of Palestine Action. Palestine Action is a UK-based activist group known for protests targeting companies and sites involved in supplies and arms manufacturing to Israel. The group's protests often involve non-violent civil disobedience such as blockades at factories linked to arms exports. In June 2025, Palestine Action group members trespassed into a military airfield and allegedly spray painted two military aircraft. As a result, the UK Government proscribed the group under the *Terrorism Act 2000* (UK) which made it a criminal offence to be a member of Palestine Action, wear an item of clothing that arouses reasonable suspicion that the person is a member of Palestine Action or to express support for the group. Further, at least 200 people have been arrested under the act, many while attending non-violent protest activities.⁸⁶

6.5 The UN Human Rights Chief, Volker Türk, condemned the UK Government's decision in proscribing Palestine Action, characterising it as 'disproportionate and unnecessary,' and stated that it appeared to constitute an impermissible restriction on protestors' rights to freedom of expression, freedom of association and peaceful assembly, and is in conflict with the UK's international human rights obligations.⁸⁷

6.6 Courts have noted that the 'advocacy, protest, dissent or industrial action' exclusion is framed too broadly, rendering its current operation redundant.⁸⁸ The exclusion has been raised unsuccessfully in only one case where Kirby J stated it was 'optimistic verging on the entirely fanciful'.⁸⁹ NSWCCCL notes the need for a more precise exclusion in order to be meaningful. Further, NSWCCCL considers that this exclusion should not be limited to lawful protest activity.

Other appropriate exclusions

6.7 In March 2025, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, identified two desirable exclusions as follows:

(a) activities of armed forces during armed conflict which are governed by the law of armed conflict (**Armed Forces Exclusion**); and

⁸³ UN General Assembly, *Vision and priorities: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Ben Saul, Human Rights Council 55th sess, agenda item 3, UN Doc A/HRC/55/48 (17 January 2024), 4 [10].

⁸⁴ Explanatory Memorandum, *Suppression of the Financing of Terrorism Bill 2002* (Cth), 3 [item 5].

⁸⁵ Ibid.

⁸⁶ United Nations Office of the High Commissioner, 'UK: Palestine Action ban 'disturbing' misuse of UK counter-terrorism legislation, Türk warns', *Office of the High Commissioner for Human Rights* (Press Release, 25 July 2025) <<https://www.ohchr.org/en/press-releases/2025/07/uk-palestine-action-ban-disturbing-misuse-uk-counter-terrorism-legislation>>.

⁸⁷ Ibid.

⁸⁸ *Thomas v Mowbray* (2007) 233 CLR 307 [265]. See also, *R v Bayda*; *R v Namoa (No 2)* [2019] NSWCA 24 [7].

⁸⁹ *R v Mohamed, Chaarani & Moukhaiber* [2019] VSC 498 [54].

(b) the provision of humanitarian activities by impartial humanitarian organisations (**Humanitarian Exclusion**).⁹⁰

Armed Forces Exclusion

6.8 The definition of terrorist act is not geographically limited; the definition applies regardless of the location and context in which the act takes place. The relationship between international humanitarian law and terrorism is complex, often overlapping.

6.9 International humanitarian law regulates the means and methods of warfare by providing protection to persons who are not, or are no longer, participating in hostilities. The objective is to reconcile military necessity with humanitarian necessities, mitigating the suffering caused by war without impeding a belligerent's legitimate pursuit of military advantage.

6.10 It is clear that international humanitarian law prohibits certain acts commonly associated with terrorism, such as attacks against civilians, hostage-taking, and acts intended to spread terror among the civilian population. These prohibitions apply regardless of the perpetrators' motives. A more difficult situation is when an act carried out in the context of armed conflict, which is in compliance with international humanitarian law, could be classified as a terrorist act under counter-terrorism laws.

6.11 NSWCCCL's position is that there should be an Armed Forces Exclusion to clearly delineate the legality of acts undertaken in the context of an armed conflict as a matter for international humanitarian law. This would ensure legal certainty about the application of counter-terrorism legislation and encourages compliance with and respect for international humanitarian law.

Humanitarian Exclusion

6.12 The proposed Humanitarian Exclusion relates to activities related to providing humanitarian assistance in the context of an armed conflict, where they are provided by an impartial humanitarian organisation in accordance with international humanitarian law.⁹¹

6.13 In its July 2025 guidance note, the International Committee of the Red Cross states that while counter-terrorism measures adopted by states are frequently based on UN Security Council resolutions and international and regional counter-terrorism instruments, many states have criminalised the provision of support, services, financing and/or assistance to entities or persons involved in terrorist acts.⁹²

6.14 Broadly, the ICRC is concerned that provisions in terrorism legislation with a broad scope may criminalise the core activities of impartial humanitarian organisations and their personnel,⁹³ for example, providing aid and assistance to wounded civilians and combatants.

6.15 The ICRC proposes that the following sample exclusion is included in domestic counter-terrorism legislation, which is supported by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism:

*The provision of exclusively humanitarian activities by impartial humanitarian organisations carried out in accordance with international humanitarian law is not considered as an offence/crime for the purposes of this law/act.*⁹⁴

6.16 NSWCCCL's position is that an exclusion similar to the ICRC's proposal above should be included in the Criminal Code to protect the legitimate humanitarian activities of humanitarian workers and organisations.

7. Conclusion

7.1 NSWCCCL has long opposed expansive counter-terrorism laws due to the way they interfere with fundamental principles in criminal law that can have a significant impact on human rights and civil liberties.

⁹⁰ Ben Saul, Submission in *Yasak v Türkiye*, Application No. 17389/20, European Court of Human Rights (Grand Chamber), 1 April 2025.

⁹¹ International Committee of the Red Cross, 'Humanitarian Exemptions in Domestic Counterterrorism Legislation' (Guidance Note, 15 July 2025).

⁹² International Committee of the Red Cross, *Humanitarian Exemptions in Domestic Counterterrorism Legislation* (Guidance Note, 15 July 2025).

⁹³ International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, (Reports 2011, 2015, 2019 and 2024).

⁹⁴ International Committee of the Red Cross, 'Humanitarian Exemptions in Domestic Counterterrorism Legislation' (Guidance Note, 15 July 2025).

Counter-terrorism laws often enable administrative modes of surveillance and policing of people that are incompatible with rights to privacy, freedom of expression and the right to assembly.

7.2 It is for these reasons that NSWCCCL has made recommendations throughout its response to issues raised in the INSLM issues paper that call for clearer definitions under the Criminal Code, with a narrower scope to classify conduct as a terrorist act. NSWCCCL also recommended inclusion of express categories of harm suffered as a result of a terrorist act, such as critical damage to infrastructure and hostage taking. Further, NSWCCCL submits that more clearly defined exclusions in the definition of a terrorist act would assist both the utilisation of these exclusions and clarity about the interaction of international humanitarian law and humanitarian activities.

We trust that this submission assists the INSLM's review and would be pleased to offer further assistance if it would assist the INSLM.

Yours faithfully



Adam Connor
Secretary
NSW Council for Civil Liberties

Contact in relation to this submission: Adriana Boisen
Email: adriana.boisen@nswcccl.org.au Mobile: 0403 832415