

INSLM review of the definition of a 'terrorist act' in section 100.1 of the *Criminal Code Act 1995*

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Mr. Jake Blight
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Dear Mr. Blight,

INSLM review of the definition of a 'terrorist act' in section 100.1 of the *Criminal Code Act 1995*

Please consider our submission to the Independent National Security Legislation Monitor (INSLM) review of the definition of a 'terrorist act' in section 100.1 of the *Criminal Code Act 1995* (hereafter 'the review' 'the terrorism definition', and 'the Act' respectively), as follows.

We thank you for the opportunity to make this submission and for conducting the review, including the production of the detailed *Issues Paper*. The INSLM's role in ensuring the ongoing effectiveness and appropriateness of national security laws in Australia is important.

In line with ASPI's Charter, this submission does not reflect a singular ASPI perspective and is the opinion of the authors alone.

ASPI is Australia's preeminent national security and strategic policy thinktank. ASPI's Counter-Terrorism Policy Centre, within the National Security Program, was established in 2015 and is focused on terrorism issues, including assessing emergent extremist threats and challenges and providing practical counter-terrorism policy analysis.¹

Given ASPI's expertise in national security policy and affairs, this submission focuses on the broader context in which the terrorism definition was introduced and is currently operational. Specifically, it addresses the unique nature of terrorism, the evolving threat environment, shifts in the motivations for terrorism, and related matters. It is not intended to provide legal analysis in the professional or academic sense, but rather a security policy perspective grounded in operational reality.

In our considered view, the terrorism definition included in the Act since 2002 has been essential in both protecting Australia's national security and reinforcing the resilience of our democratic institutions. While some critics have argued that Australia's counter-terrorism laws would necessarily have adverse consequences for civil liberties, those concerns have not materialised substantively, as is evident from case law and from the work of complaints review bodies such as the Inspector-General of Intelligence & Security. To date, the application of these laws has been proportionate, targeted, and aligned with the intent of the Australian Parliament.

Accordingly, we submit that the terrorism definition continues to play a vital role in defending Australia and Australians. The definition should be retained, with minimal revision.

The review itself and suggested approach

Before addressing the specific matters under review, we think it important to raise a number of points related to the review itself. As the *Issues Paper* notes (p.53) this is not the first time since 2002 that the terrorism definition has been the subject of review. In fact, seven reviews of various forms, at Commonwealth and State levels, have

¹ For information on the Counter-Terrorism Policy Centre please see <https://www.aspi.org.au/programs/counter-terrorism-policy-centre/>

engaged with the definition and made a series of recommendations for revision, including the suggested removal of the motive element to the definition (for which see our views below). Tellingly, none have been implemented. One interpretation might be that this reflects some kind of failing. We suggest instead that it reflects the reality that the recommended revisions have simply not had public – and hence political – support. The terms of the current definition continue to enjoy the support of the broader public and their parliamentary representatives.

Relatedly, we reject the notion that because the terrorism definition has not been amended since introduction in 2002 it must necessarily be deficient. The onus is rather on those arguing for revision to demonstrate that a specific, alternative definition would better serve Australia including – to borrow from the scope of this review – being more effective (noting the relative success of Australian counter-terrorism efforts since 2002, compared to other jurisdictions), better protecting the rights of individuals, more necessary and proportionate to the threat of terrorism, and more consistent with international obligations.

The terms of that scope give rise to a further observation about the review. Namely that those criteria should not be weighted equally in your findings and recommendations. The greater consideration should be given to the more meaningful of those criteria in a sovereign democracy: the efficacy of the laws in securing Australia and Australians, and their material impact on Australians' liberties. The least weighting should be given to international comparisons.

It's our firm view that potential revision of the terrorism definition should be first and foremost an exercise in Australian law for Australian purposes. International comparison is about aiding that exercise not about conforming to, or complying with, other definitions. Especially given that, as noted in the *Issues Paper*, there is no internationally agreed definition of a terrorist act. We would suggest that this lack of consensus is because this is not a crime with a singular global identity; it is a deliberate, case-specific act of intimidation imposed on states and their citizens.

Furthermore, there is a strong case to be made that Australia has often been an innovator in this space, and indeed demonstrated international best practice in adapting national security laws to evolving requirements. For example, in Australia's leadership on laws countering foreign interference and in adopting denied areas legislation to curtail the flow of Australian terrorists and their supporters joining the Islamic State in Iraq and Syria.

Why terrorism isn't just a crime, and why motivation (including religion) matters

The *Issues Paper* draws attention to terrorism's treatment as a 'special category of crime' (Chapter One). We endorse the idea that terrorism is indeed a special form of criminal offence, necessitating enhanced law enforcement, intelligence and other powers.

Terrorism is first and foremost a crime directed against the state and the nation, regardless of the specific target of the action or threat. Terrorism's unique effect on society and government makes it particularly damaging to social cohesion within a democracy. For terrorism is an exercise in the negation of politics - in so far as violence for political, religious or ideological purposes within a constitutional democracy and society simply cannot be tolerated. It represents an unacceptable challenge to the lawful monopoly on violence by the democratic state. All the other ills (including the terrible harms visited on people or the population) are important but secondary to this point.

An Australian definition of terrorism must therefore start from this understanding. It's why having a 'terrorist motive' element to the terrorism definition is so important – and should not be diminished.

The present definition requires that the action done, or threat made, have the intention of 'advancing a political, religious or ideological cause'. As has been noted elsewhere, and within the *Issues Paper*, this is a comprehensive, indeed even suitably redundant conception of terrorist motivation. Alternatively, it has been suggested, for example (see p.43 of *Issues Paper*), that 'ideological' alone might serve in isolation, encompassing both political and religious motivations. It's our firm view that this narrowing of the motivational element would be sub-optimal, especially in a security environment increasingly marked by acts with 'mixed motives' (per p.44 of the *Issues Paper*). For our assessment of the security environment please see below section.

Addressing the religious dimension to the question of motivation is unavoidable given the onus placed upon this in the *Issues Paper* (pp.41-42) and the broader political context to the push for revision of the terrorism definition.

That push, or at least its translation in previous reviews such as the 2021 Lay-Harper review, appears to argue that the inclusion of 'religion' in the definition is the cause of a suspicion of Muslims and an association of Islam with terrorism (and in turn shapes the application and outcomes of counter-terrorism policing in Australia). This argument, that such a phenomenon results primarily from the legal definition, rather than the definition necessarily reflecting the lived experience of how terrorist violence in Australia has been motivated, seems unsound. As the paper itself acknowledges (p.42) almost 95% of the 83 sentenced terrorism cases in Australia identified had 'religion' as a motivation (with all associated in some way with Islam). It cannot be reasonably argued that this is simply a function of the current definition. A recommendation to omit religious motivation from the definition of terrorism in Australian law on these tenuous grounds will likely see that recommendation meet the same fate as the aforementioned seven previous reviews.

Motivation should be retained in the terrorism definition and with the suitably broad ranging current inclusion of ideological, political or religious motivations.

Do changes in the threat environment require changes to the definition? Not obviously.

Australia's security environment is not static. It is constantly evolving, including with regard to terrorism – and indeed the motivations for terrorism.

The national threat level for terrorism was increased in August 2024 to PROBABLE.² Social cohesion is suffering in a threat environment that is becoming increasingly volatile and unpredictable. Terrorism is a domestic crime, but its actors are informed and emboldened by ongoing global conflicts and acts of violence both at home and abroad.

The pace of radicalisation is surging while warning time is shrinking. Radicalisation has moved online, with social media users and gaming platforms users funnelled into silos, exposing them to echo chambers which rewrite their conception of 'normal', and allow propagators of terrorist content to disseminate it with impunity. As noted in the *Issues Paper*, almost all individuals under investigation for terrorism were unknown beforehand to ASIO or the police, with acts committed by solo actors – often minors, self-radicalised online, and using rudimentary tools. This signifies a shift away from organised groups aiming for mass casualty events with sophisticated weaponry and complicated logistics that required careful planning.

This has also meant a shift in terrorist motivations. Terrorists are now more likely to have mixed ideologies, with increasing rates of nationalist and racist ideologies, and rising number of individual motivated specific grievances such as misogynistic ideology (please below for a relevant extract from previously undertaken ASPI research in this regard). That being said, religiously motivated terrorism is still a dominating factor.³ We believe that the breadth of extremist terrorist motivations demonstrates the continued need for the elasticity of the 'political, religious or ideological' definition.⁴ Removing the 'religious' element from the definition would fail to appropriately capture the range and intermingling of such actors' self-declared motivations.

The *Issues Paper* alludes to the change in terrorist profile and motivation as a significant departure from the operational use of the terrorism definition in the early 2000s to the present day. We would not support that view without qualification. Specifically, the trend in minors as terrorists and their mixed motivations is presented as a failing of the definition. The definition cannot be positioned as being responsible for a whole of society issue. It is not the definition's failing that disinformation is rife, politics is increasingly polarising, or that individuals feel disconnected from society. This change in profile has radically reduced the warning time that our law enforcement have to respond, making their efforts in convicting preparatory offences and advocating terrorism offences more, not less, essential.

Incidences of terrorist acts in Australia are mercifully low,⁵ which when considered in the light of the PROBABLE terrorism threat assessment should be seen as proof of the effectiveness of Australia's security agencies under the current legal framework.

² Please see: <https://www.nationalsecurity.gov.au/national-threat-level/current-national-terrorism-threat-level>

³ Please see: <https://www.oni.gov.au/news/asio-annual-threat-assessment-2025>

⁴ A 'terrorist act' in section 100.1 the *Criminal Code Act 1995*

⁵ Please see: <https://www.visionofhumanity.org/maps/global-terrorism-index/#/>

ASPI's research on 'Incel'-related ideologically-motivated violence

In August 2023 ASPI published the research report Incels in Australia: The ideology, the threat, and the way forward by Jasmine Latimore and John Coyne. This report gave insights into how this particular form of ideologically motivated violence is evolving in Australia. The following is an edited extract from that research.

The phenomenon of 'incels'—involuntary celibates—and the misogynistic ideology that underpins a subset of this global community of men has become a thriving Internet subculture. Online spaces, from popular social media sites to dedicated incel forums, are providing a platform for not just the expansion of misogynistic views but gender-based violent extremism.

It is important to note that not all incels hold violent beliefs and of course not all misogynists are incels. To denote the difference, the term 'misogynist incel' (MI) is used to describe incels who dehumanise women, glorify violence and adhere to a male supremacist ideology. As a result of this complexity, policy and implementation responsibility for dealing with each phenomenon is dispersed so it is useful to clarify lines on responsibility. Misogyny is a threat to social cohesion but, for the most part, is a societal issue and not a security matter.

Domestic violence is an abhorrent crime, but remains a law enforcement responsibility. Where violence against women involves an ideology, in this case an MI ideology, it becomes a potential national security matter. Violence against women—a physical expression of misogyny—was described as 'a problem of epidemic proportions' in Australia's National Plan to End Violence Against Women and Children (2022–23). Approximately one in three women in Australia have experienced physical violence perpetrated by another person, irrespective of the type of relationship between the victim and abuser. In addition, on average, one woman per week is killed by her intimate partner in Australia. Separately, Australia is also seeing an increased trend of hate speech towards women, and 23% of Australian men find it acceptable to use sexist or misogynistic language online.

Separate from Australia's endemic domestic-violence challenges, there's evidence that misogynist ideology, beyond individual criminal behaviour, has fuelled acts of violence against women around the world. Current available, predominantly English-language, open-source data suggests that those attacks may have led to or being associated with a total of 58 deaths (63, including attacker suicides) and an additional 82 injured. In Australia, despite the existence of hate speech towards women, authorities have not identified any overt acts of violence driven by a specific misogynistic ideology as opposed to domestic violence that had misogyny at its core. Nevertheless, there's evidence that misogynist hate speech in Australia, which is often driven by a view that equality for women and diverse groups means inequality and disadvantage for men, is intensifying.

And it raises key questions regarding Australian efforts to counter misogynistic ideologies within our nation. If there's a continuum that has sexist, but lawful, views on gender at one end and gendered hate speech at the other, at what point does misogynistic ideology tip into acts of gendered violence? What's needed to prevent misogynistic ideologies from becoming violent? And how do we, as a society, avoid the epidemic levels of violence against women in Australia?

This report makes recommendations designed to reduce and, where possible, prevent the risk of future occurrence of incel and similar violence in Australia. The recommendations include greater awareness raising and policy recognition that incel violence can be an ideological form of issue-motivated extremism which would provide certainty that incels could formally fall within ASIO's remit—in addition to law-enforcement agencies—and would encourage tailored education programs focused on engaging young males at risk from indoctrination in this extreme subculture (along with their parents).

Full report is at <https://www.aspi.org.au/report/incels-australia-ideology-threat-and-way-forward/>.

Potential exclusions: protests and property damage

The *Issues Paper* provides insightful background on the amendment (at the recommendation of a Senate committee) of the original definition introduced into Parliament in 2002 (pp.10-11) including the removal of the original requirement for exemption that 'advocacy, protest or dissent' be 'lawful'.

There is an implication in the paper and in associated public comments that there might be advantage in further expanding this 'protest' exclusion. We support the current exclusion of 'advocacy, protest or dissent' but would caution that further loosening of this exclusion would be inadvisable at a moment when there are increasing efforts to legitimise political violence in democracies (from left and right extremes) both internationally and in Australia.

There are already question marks about the application of the exclusion of 'protest', including – and much more seriously – as it intersects with separate calls to exclude serious property damage from the 'harm' element of the definition (discussed at pp.45-46). Much of this flows from the UK government's proscription of the 'Palestine Action' group following an attack on a Royal Air Force base and serious damage inflicted on military equipment.

As a thought experiment:

Ms Jones has organised the 'Stop the redefinition of terrorism Now!' group, an organisation otherwise known for its solely peaceful opposition to a change in the definition of terrorism. Ms Jones then forms a cell of that group (called the 'Stop the definition of terrorism Now! Terrorist Action Army) and decides to burn down the INSLM office in order to intimidate the INSLM into ceasing this review. Ms Jones issues a statement after undertaking this act, saying we did it, we were proud to do it and we would do it again. And we did it for this explicit political reason.

But Ms Jones is apparently at pains to ensure no person is harmed in the attack – the timing, forewarning, etc were all effectively calculated so that no one was 'harmed' or at serious risk of their health. Ms Jones then starts planning to burn down the offices of the Attorney-General's Department, with the exact same apparent care for the protection of persons. Ms Jones tells the media she will continue this campaign until the Australian government rules out changing the definition.

Ms Jones is obviously guilty of arson. But surely Ms Jones is also engaged in terrorism? And if the definition doesn't account for these actions as terrorism, maybe there is something wrong with the current definition (ironically given the hypothetical campaign!) and most especially wrong with an alternative definition where the harm element is limited to harms against a person.

This situation is not improved by the argument for limiting property to critical infrastructure (per pp.46-47 of the Issues Paper). Is the INSLM office critical infrastructure? Is critical infrastructure somehow linked to human rights (an argument introduced at p.46)? Surely an individual Australian's human rights will be impacted if someone burns down their house or their shop? Or even their car. Are these assets all now critical infrastructure?

Clearly, property damage can be undertaken with the intent of 'coercing, or influencing by intimidation the government of the Commonwealth or a State, Territory or foreign country, or of a State, Territory or foreign country; or intimidating the public or a section of the public',⁶ and can meet the bar of an action done with terrorist intent. While other offences like arson and vandalism are able to cover some of the elements of property damage, they fail to emphasise the seriousness of that a terrorist motivation adds to the crime.

We oppose amending the definition with regard to the current exclusion of protest or seeking to exclude serious property damage.

Opportunities for improvement

It is always prudent to review our laws and check them against their intended purpose and function. The case made in this submission is not intended to preclude the benefits which might derive from prudent revisions that otherwise preserve the intention of the laws and their operational use.

For example, the Issues Paper itself identifies a number of such opportunities for prudent, limited revision, such as:

- The current definition only considers physical harms to persons. The inclusion of harm to a person's mental health, or the psychological harm of a terrorist act would be a practical improvement to the law.

⁶ A 'terrorist act' in section 100.1 the Criminal Code Act 1995

As noted in the Issues Paper, expanding the definition of harm would align 'harm' within this definition with the usual definition of serious harm across other categories.

- In the same vein, hostage taking, and/or kidnapping, should be considered as an inclusion to the definition. By explicitly outlining them in the act, prosecutors would not need to retrofit the current definitions of harms to be applicable to terrorist acts of hostage taking or kidnapping.

Separately, the Issues Paper highlights that a terrorist act and a terrorist threat are linked and prosecuted with the same weight under the current law. There is room for a sensible argument for separating out the two into their own crimes, allowing for different prosecutions. That being said, it is critical that the successful disruption of terrorist plots by security agencies is not diminished in legal significance as they would have taken place without intervention. The law must not inadvertently disincentivise agencies from acting early and precisely to safeguard our democracy.

Conclusion

We would like to reiterate our thanks to INSLM for the opportunity to put forward this submission.

In a time of social division and increasing polarisation, we ask that INSLM carefully consider the ramifications that any changes to the terrorism definition will have on the operational effectiveness of the law. Now is not the time to risk the lives of citizens and the sanctity of our democracy by reducing our law enforcement and security agencies' ability to pre-empt attacks.

We would be happy to discuss this submission with the Monitor, including at any forthcoming hearing.

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