# ‘Defining Terrorism’ Issues Paper

Submission to INSLM review of the definition of ‘terrorist act’ in section 100.1 Criminal Code Act (Cth) 1995

**National Legal Aid**

28 October 2025

## Acknowledgement of Country

National Legal Aid acknowledges Traditional Owners of Country throughout Australia and recognises the continuing connection to lands, waters and communities. We pay our respects to Aboriginal and Torres Strait Islander cultures, and to Elders both past and present.

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## Executive Summary

National Legal Aid (NLA) welcomes the opportunity to contribute to the INSLM's review of the definition of 'terrorist act' in section 100.1 of the *Criminal Code Act 1995 (Cth)*.

Drawing on the casework experience of Legal Aid NSW in assisting clients charged with terrorism offences under the current definition and, where relevant, examples from other Legal Aids, this submission highlights:

- The extraordinary practical and legal challenges involved in defending terrorism prosecutions, and
- The disproportionate impact of the current definition on children, minority groups and vulnerable individuals.

Our submission is informed by Legal Aids' experience of the range of conduct captured under the current definition of 'terrorist act' in the *Criminal Code Act 1995 (Cth)*, and how terrorism law and policy impacts on defendants, case preparation and outcomes throughout the criminal trial process and beyond.

There are significant practical challenges for Legal Aid clients defending terrorism-related charges. Bail is rarely granted for individuals charged with Commonwealth terrorism offences, resulting in prolonged periods of remand under restrictive conditions. This not only impedes legal preparation but can also exert undue pressure on defendants to plead guilty due to delays and sentencing incentives. The psychological toll and barriers to meaningful engagement in the legal process are considerable. This is particularly the case for children and young people who are especially vulnerable to these impacts, including the risk of radicalisation in custody.

Commonwealth terrorism trials are uniquely complex and place significant strain on defendants, particularly those from vulnerable backgrounds. Prosecutorial discretion in charging decisions in relation to terrorism offences, restricted access to evidence, and mandatory jury trials often result in prolonged proceedings, heightened stress, and limited ability of defendants to engage meaningfully in the legal process. Procedural hurdles, such as repeated jury discharges and constrained defence access can compound confusion, delay justice, and exacerbate mental health challenges, especially for young people navigating these systems.

Commonwealth terrorism offences also attract significantly harsher penalties than comparable state offences, with federal sentencing provisions and limited judicial discretion contributing to disproportionately severe outcomes. These constraints are particularly problematic for children and young people, with limited sentencing options and inconsistent approaches across jurisdictions.

Federal terrorism offenders are often subjected to extremely restrictive prison conditions including prolonged isolation, frequent lockdowns, and limited access to rehabilitation, education, or even basic human contact. These conditions have been described as damaging to mental health and counterproductive to deradicalisation efforts. Case examples show that young or first-time offenders may spend years in near-solitary confinement, raising concerns about psychological harm, lack of meaningful engagement, and risk of reinforcing extremist views. We also see that the current settings for parole leave individuals without meaningful support for reintegration, and in some cases prolong incarceration unnecessarily.

Based on Legal Aids' casework experience, NLA does not support broadening of the definition of 'terrorist act' in the *Criminal Code Act 1995 (Cth)* or lowering of the threshold by removal of the requirement to prove specific elements. In particular, we recommend that:

**The definition of 'terrorist act' should not be broadened**

NLA opposes any expansion of the definition or lowering of the threshold by removing key elements such as motive or intent.

**'Threat' should be removed from the definition**

NLA supports removing "threat" from the primary definition in section 100.1 and recommends creating a separate, lesser offence for threats, consistent with UN guidance.

**The requirement to prove terrorist motive should be retained**

The motive element is essential to distinguish terrorism from other serious crimes. However, NLA supports removing "religious" causes from the list of motives to reduce the risk of reinforcing Islamophobia.

**The scope of 'ideological cause' should be clarified and narrowed**

The term "ideological" is overly broad and undefined. NLA recommends clearer legislative guidance to avoid overreach.

NLA holds concerns about the consequences of a broad approach to what constitutes a terrorist act and the scope of 'terrorism offences'. In the context of the proliferation of online violent extremist material and vulnerability of children and other socially isolated people to radicalisation, **we strongly recommend investment in evidence based, therapeutic early intervention and the exercise of greater prosecutorial discretion.**

# About National legal Aid

## Who are we?

NLA represents the eight independent Legal Aids (LAs) in each state and territory of Australia. These commissions work collaboratively to deliver essential legal services, making sure that justice is accessible to all Australians. We strive to support those who are most in need, ensuring fair and equitable legal outcomes.

## What do we do?

LAs are the main publicly funded providers of criminal law representation in Australia. Each year LAs deliver 1.7 million legal assistances, including 150,000 legal representation grants – 65 per cent of which are for criminal law. LAs deliver early intervention and advice services, duty lawyer services in courts including for people facing criminal charges, ongoing case representation including serious criminal matters and assistance for appeals. Within their criminal law divisions, LAs provide representation in terrorism-related matters.

This submission draws primarily on the experience of Legal Aid NSW, which provides legal assistance in a significant proportion of these matters, supplemented with the experience of other LAs where relevant.

Legal Aid NSW appears in criminal matters in the Children's, Local, District and Supreme Courts, as well as the Court of Criminal Appeal and High Court. Within the Criminal Law Division, specialist units including the Commonwealth Crimes Unit, Indictable Appeals Unit, High Risk Offender Unit and Prisoners Legal Service provide advice and casework services in terrorism related matters. This encompasses prosecutions and appeals to parole and post sentence orders.

## Why do we do it?

LAs are the 'safety net' of the legal system – offering to assist families and individuals in times when they are in highest need. NLA's vision for the future is one where all people experiencing disadvantage have access to legal assistance and fair justice outcomes that contribute to safe, thriving families and communities.

# 1. The definition of 'terrorist act' in practice

## Practical issues in terrorism prosecutions

The Issues Paper identifies several key rules, presumptions and powers that apply when a person is charged with a terrorism offence.[1] We address some of the unique challenges from a defence perspective in further detail below.

1. **Bail**

   Under section 15AA of the *Crimes Act 1914* (Cth) a bail authority must not grant bail to a person charged with a terrorism offence unless satisfied that exceptional circumstances exist.[2] Section 15AA has been described as "an extremely high hurdle".[3]
   In *R v NK* [2016] NSWSC 498, Hall J summarised the relevant principles in determining whether exceptional circumstances have been established under section 15AA, including the relevance of youth:

   - Exceptional circumstances requires the applicant to point to a situation which is out of the ordinary in some respect.
   - The relevant circumstances may include a combination of factors "*which taken together render the case exceptional*".[4]
   - The circumstances may include the personal or subjective circumstances of an applicant for bail. They may also include circumstances relating to a strength or weakness of a Crown case. It is a flexible concept, which needs to be applied on a case-by-case basis.[5]

   Section 15AA(3AA) now provides that, in cases involving an accused person under 18 years of age, the court may have regard to the protection of the community and the best interests of the person in determining whether exceptional circumstances exist.

   While there have been cases where an accused has successfully applied for the grant of bail,[6] in practice, the high threshold almost always results in refusal of bail pending trial in cases involving allegations of a terrorist act or threat.

   Refusal of bail presents challenges in any criminal matter. However, the extraordinary legislative and policy provisions that apply in terrorism prosecutions make remand particularly onerous on the accused and consequential for legal preparation. Long periods on remand, delay of years pending trial and the discounts for pleading guilty may act to disincentivise appropriate not guilty pleas in some cases.

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[1] Issues Paper, [3.31]-[3.45].
[2] *R v NK* [2016] NSWSC 498 (***R v NK***); *R v Naizmand* [2016] NSWSC 836; *R v Khayat (No 11)* [2019] NSWSC 1320; *Director of Public Prosecutions (Cth) v Saadieh* [2021] NSWSC 1186; *Commonwealth Director of Public Prosecutions v Saadieh* [2021] NSWCCA 232 (***DPP Cth v Saadeih***).
[3] *R v NK* at [26].
[4] Ibid.
[5] *R v NK* at [31].
[6] *DPP Cth v Saadeih*. See also *R v Tukiterangi Lawrence*, where the accused was granted bail by the Supreme Court of NSW on 7 April 2022 after suffering a catastrophic spinal cord injury whilst in detention at HRMCC which rendered him a tetraplegic.

## 2. Remand classification and trial preparation

Placement of violent extremist inmates at the system level is debated domestically and internationally, with questions about whether a strategy of concentration or dispersal best minimises the risk of radicalisation of other inmates.[7] Another consideration relates to creating the optimal environment for disengagement and reducing recidivism.[8] Policies and practices concerning and placement of persons charged with terrorism offences vary between Australian states and territories.

In NSW, CSNSW policy provides that persons received into custody in NSW who are charged with terrorist offences will be managed under the maximum security 'Category AA and Category 5' regime.[9] This subjects remand inmates charged with terrorism offences to the most restrictive regime in the system before a court has determined their guilt, irrespective of the nature of their individual risk profile or alleged offending.

In a 2018 report into the Management of Radicalised Inmates in NSW, the NSW Inspector of Custodial Services ('**ICS**') observed that while inmates were to be designated based on individual risk of their threat to the system, in practice, all inmates charged with or convicted of national security offences including terrorism were designated 'Extreme High Risk Restricted' ('**EHRR**').[10]

In practice, adult inmates remanded on terrorism charges are usually held at the High Risk Management Correctional Centre ('**HRMCC**') at Goulburn. HRMCC houses not only convicted terrorist offenders, but also non-convicted inmates and those displaying extremist behaviour in custody. Of this, the ICS observed:

> "*[a]lthough unsentenced and sentenced offenders subject to terrorism charges are not allowed to mix, limited communication is still able to occur. This* ***creates a risk that some inmates will become radicalised to violence within prison****. This is the risk that the national security classifications were first introduced to prevent…"* (Emphasis added).

This is reflected in a more recent study examining the *Terrorism (High Risk Offender) Act 2017* (**THROA**) in NSW, which enables the State to apply for post sentence detention or supervision orders against individuals alleged to pose an unacceptable risk of committing a terrorist act despite no prior convictions for terrorism. The study identified that prison was an influence on, or location of, radicalisation in over 45% of all cases, observing: "*[i]n practice protective responses can lead to harsh prison conditions and treatment that risks reinforcing extremist views and group-identification. It is concerning that the State may play a role in establishing the conditions for radicalisation*."[11]

Designation as an EHRR or national security interest (**NSI**) inmate has significant consequences for access to legal representatives and the logistics of case preparation.

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[7] Hart, A, (2020) Risks, radicalisation and rehabilitation: imprisonment of incarcerated terrorists, *Journal of Policing, Intelligence and Counter Terrorism*, 15:3, 189-208. Available: 10.1080/18335330.2020.1817527.

[8] Inspector of Custodial Services, *The Management of Radicalised Inmates in NSW* (Report, May 2018) (**ICS Report 2018**) p 45, 60.

[9] Corrective Services New South Wales, 'Initial Classification and Placement of Cat5 and AA Inmates' (Policy Document, February 2023) p 3, 4. See also *Crimes (Administration of Sentences) Regulation 2014* (NSW) ss 12–13, 15.

[10] ICS Report 2018 p 45, 60.

[11] Stimpson, C. (2024). Unfortunate, unforgivable and unacceptable? A comprehensive review of applications under Terrorism (High Risk Offenders) Act 2017 NSW. Current Issues in Criminal Justice, 37(3), 387–408. https://doi.org/10.1080/10345329.2024.2386433

While CSNSW has streamlined processes in recent years, legal representatives are still required to obtain extraordinary approval to visit any EHRR or NSI inmate. In-person visits can be facilitated, although HRMCC is located approximately 2.5 hours' drive from Sydney. AVL legal visits are generally limited to between 30 minutes to 1 hour per booking, meaning it can take several appointments to take instructions on even discrete issues. AVLs are also sometimes subject to cancellation for reasons including lockdown which can impede preparation.

To meet legal and ethical obligations, legal representatives need to build trust and rapport with their clients. This is inherently challenging where a client is remanded in a high security custodial environment. Factors like limited privacy, frequent lock ins, reduced access to open air environments, and reduced mental health supports may all contribute to high levels of stress and difficulty engaging in the legal process. These challenges are intensified by the extraordinary restrictions imposed on EHRR remand inmates, including limited communication with staff and other inmates, and infrequent contact with family and friends.

In order for HRMCC inmates to access their brief of evidence, a special laptop must be approved for issue. Brief material served throughout the course of a case must be sent on a USB device to CSNSW, who retrieve the laptop from the inmate to upload the electronic material. Although this process has been streamlined over recent years, the ICS previously found that "*[d]espite national security being a legitimate reason for encroaching on usual inmate entitlements, some security protocols were found to interfere with confidential legal communications, and the ability for unconvicted inmates to prepare for trial.*"[12] Navigating a large brief can also be challenging from a single screen device, and inmates are not permitted to bring the laptop with them to legal visits.

In contrast to the concentration approach of NSW, Victoria chooses to implement a concentrated dispersal system, whereby the radicalised prisoners are dispersed throughout various prisons, dependent on their specific risk.[13] Classifications are open to all prisoners, regardless of the offence involved.

Children under the age of 18 charged with terrorism offences face similar issues in Youth Detention. In NSW, the *Children (Detention Centres) Regulation 2015* (NSW) provides for classification and designation of detainees. Under section 7, children charged with or convicted of a terrorism offence are by default classified at the highest level, and "*should be detained with a secure physical barrier at all times…*" Section 7A sets out the broad considerations in determining to designate a young person as a "National Security Interest" **(NSI)** detainee, including that the young person has been charged with a terrorism offence, has any associations with a terrorist organisation, or has previously made "*any statement"* advocating support for any terrorist act or violent extremism.

Under section 7B, NSI detainees may be detained separately from each other. While this does not authorise a NSI detainee to be segregated merely because the detainee is designated as NSI, in practice these young people are often subject to effectively similar and onerous conditions. For example, in our experience they are limited to their cells for longer periods, are not able to go to school with other students, and are not able to socialise with other young people. Some young people have disclosed

[12] Inspector of Custodial Services, *The Management of Radicalised Inmates in NSW* (Report, May 2018) p 11.
[13] Hart, above n7, p193-194.

thoughts or intentions to engage in self-harm as a way of getting time out of the confines of their cell and isolation.

There is also some inconsistency in how these regulations apply in practice. For example, in one NSW case a young person charged with a terrorism offence involving accessing violent extremist material (not involving a terrorist act) was held in harsh conditions with a high degree of daily isolation. The young person was moved back and forth between different youth detention centres in NSW. He found this very stressful and disruptive. He was brought to and from court in shackles. In contrast, another young person charged with more serious terrorism offence was not subject to any of these restrictions. Although there is no Youth Justice policy explicitly suggesting this kind of treatment of a detainee, the breadth of the power under the Regulations and policies which we are aware of does allow for this extraordinary type of security and isolation of a young person charged with terrorism related offences.

**3. Brief size and disclosure**

Terrorism matters have similarities with other criminal prosecutions such as murder, large-scale fraud or drug importations, which usually involve months or years of investigative work. In our experience, what sets a modern-day terrorism prosecution apart is the additional 'trawl' of electronic data retrieved from phones, other devices and data servers:[14] material referred to by the UK Reviewer as "mindset material"[15] obtained by investigators to identify direct or circumstantial evidence establishing the elements of the offence, including motive and intent.

A typical terrorism brief of evidence will comprise tens of thousands of pages and terabytes of electronic material, encompassing digital or social media content, videos which have been downloaded, viewed or shared. In the 2018 report into the Prosecution and Sentencing of Children for Terrorism Offences,[16] the former INSLM considered the experience of courts in England and Wales. Of the complexity of cases in the Terrorism Cases List and need for specialist case management, the INSLM was informed that:

> "*it is quite often the case that there is a **vast amount of material** discovered by the prosecution which, as one judge put it to me, is **beyond the capacity of a single human brain to analyse** and therefore requires search by computer (often **complicated because the material may be encrypted or in a foreign language**)*..."[17] (Emphasis added).

This description aptly demonstrates the enormity of the task faced by lawyers in reviewing a terrorism brief of evidence. The task is even more difficult for defence lawyers who, unlike police and prosecution, will not have had access to the information over months or years during the investigative phase. Defence will generally have much shorter periods of time to get across the material, which is often served in large tranches.

The task of then explaining the evidence, providing legal advice and taking instructions from a defendant in custody, is extraordinarily difficult. This is compounded where the accused requires an interpreter or has other vulnerabilities such as mental illness or cognitive impairment.

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[14] Hall, J (13 March 2025) *Independent Review on Classification of Extreme Violence Used in Southport Attack on 29 July 2024* (Report, Independent Reviewer of Terrorism Legislation) at [2.11]-[2.14]. [3.3] (**TIRTLE Report 2025**).
[15] TIRTLE Report 2025, [3.3].
[16] Renwick, J, *The Prosecution and Sentencing of Children for Terrorism* (Report, Independent National Security Legislation Monitor, 26 November 2018) (**INSLM Report 2018**).
[17] INSLM Report 2018 [8.77].

Additionally, it is the practice of the Australian Federal Police (**AFP**) to serve the brief in electronic format only. This, the size of the brief, and continual service of material up to and throughout trial present unique practical challenges to defence, as outlined below:

**Electronic briefs too large to copy**

In a recent case, the brief was too large to be copied onto in-house systems. Six separate briefs were served pre-committal, followed by hundreds more documents before and during trial. Legal Aid requested a consolidated brief, and the AFP agreed to provide two e-brief copies, which took about two weeks for them to complete. As two barristers were briefed, the solicitor had to work from the original brief spread across multiple USBs.

**Briefs served in multiple parts up to and during trial**

In a recent Legal Aid case, the brief was served in six tranches, with ongoing piecemeal disclosures up to and during trial. Around 25,000 pages of encrypted messages were served in varying formats, requiring constant cross-checking. Delays in receiving overseas Mutual Assistance Request (MAR)[18] material from platforms like Facebook and Telegram—outside the AFP's control—meant hundreds of pages were served mid-trial.

## 4. Resourcing

Terrorism prosecutions are high-cost and resource intensive proceedings across all aspects of the criminal justice system. From the dedicated law enforcement and prosecution services, purpose-built court rooms and security measures, high security custody accommodation, witness expenses, and legal representation, terrorism prosecutions consume a significant amount of public resources. It has been noted that these kinds of 'mega-trials' also have disproportionate impacts upon other aspects of the criminal justice system.[19]

In 2011, former Commonwealth Director of the Commonwealth DPP, Chris Craigie (now Judge of the District Court of NSW), described counter terrorism prosecutions within Australia as "…*certainly …characterised by their size, convolution and a propensity to raise unpredictable and intricate legal challenges*." [20] To illustrate the scale of these trials, the then Commonwealth Director outlined key features of the NSW trial of five accused before the Supreme Court at Parramatta, which involved:

- 8 months of pre-trial argument, resulting in 60 pre-trial rulings (over 100 judgments would be handed down in total)
- 10 months of trial in the purpose-built Parramatta Supreme Court complex

[18] This is a process which enables the Commonwealth Attorney General to request material from overseas law enforcement agencies. See Mutual assistance | Attorney-General's Department
[19] See for example Craigie, C, '*Management of lengthy and complex counter terrorism trials An Australian prosecutor's perspective*', AIJA Criminal Justice In Australia and New Zealand – Issues and Challenges for Judicial Administration Conference, Sydney (8 September 2011),p 1. Available: here. (**CDPP Perspective Paper 2011**).
[20] CDPP Perspective Paper.

- 127,000 telephone calls, 30,000 of which were in the brief of evidence and 448 of which were ultimately played to the jury.

This example involved a relatively large number of co-accused, and the novelty of the offences at the time contributed to the overall length of the trial and number of interlocutory proceedings and appeals. While more recent cases that NLA members have been involved in have tended to involve only one or two co-accused, terrorism matters still take years to reach trial, involve significant numbers of electronic and telecommunications records, require several pre-trial and other interlocutory rulings about evidence and procedure, take months of preparation, and may run for weeks to months before a jury.

Due to the volume of material involved, even discrete tasks such as preparation of evidence bundles for trial can take a significant amount of time:

**Review of the brief to determine what is relevant for the jury**

In one recent case involving tens of thousands of pages of telecommunications records, the Crown and defence sought to rely on different messages from the brief of evidence. This was a protracted process, involving identification of what was relevant and negotiation about whether these should be put before the jury. Defence had to manually review thousands of pages to apply dates and create extracts for the jury by hand. That discrete task took weeks including after hours and on weekends. As there was no agreement on a combined exhibit, the jury were provided with two separate bundles. These had to be printed for each of the jurors, the Judge and the Crown at significant cost.

Accused persons who are unable to afford private legal representation may apply for legal aid subject to applicable eligibility policies such as the means test. NLA notes that legal assistance has been chronically underfunded for decades, and as a result only 8% of Australian households are eligible for legal aid, despite the fact that more than 13% of households live below the poverty line.

Legal Aid organisations are only able to provide legal representation in terrorism trials due to funding provided under the Expensive Commonwealth Criminal Cases Fund (**ECCCF**). The ECCCF was established in 2000 to provide funding to state and territory LAs to represent defendants in serious, high-cost Commonwealth criminal prosecutions, in order to prevent stays in court proceedings where defendants cannot afford representation. In 2021-22 the ECCCF was expanded to allow LAs to use the funding to represent clients in Commonwealth post-sentence order matters, such as preventative detention orders and control orders.

The majority of Australians cannot afford to pay for the significant costs of representation in ECCCF matters, in part due to the type of matter but also due to the resource-intensive nature of these matters which can include extensive and detailed briefs and the release of evidence over an extended period of time. A significant portion of these cases fall within the remit of Legal Aid NSW and Victoria Legal Aid however several other LAs also receive funding under the ECCCF.

The services delivered by LAs under the ECCCF provide value for money, particularly when fees are compared to commercial or private rates. However, the time and effort to complete the administrative processes required for the ECCCF is resource intensive and provided in kind by LAs. This draw on resources necessarily has implications for broader access to justice.

Costs are not recoverable in Commonwealth trials.[21]

## 5. Sentence

Commonwealth terrorism offences attract substantial penalties which generally exceed comparable state criminal offences to a significant degree, as the following cases demonstrate:

***Alou v R* [2019] NSWCCA 231**

Alou's conviction was the first in Australia for aiding and abetting a terrorist act, and the first time an offence of committing a (completed) terrorist act had come before a sentencing court. He was 18 years old at the time of the offence, which involved supplying a firearm to the young person who ultimately shot NSW Police employee, Curtis Cheng.

Alou pleaded guilty to aiding and abetting a terrorist act (section 101.1(1); 11.2(1)) and received a sentence of 44 years imprisonment with a non-parole period of 33 years. The offence of murder carries a maximum penalty of life imprisonment with a standard non-parole period of 25 years.

On appeal, by majority the court (Bathurst CJ, Price J agreeing) held that while the sentence was severe it was not manifestly excessive. N Adams J (in dissent) did not doubt the criminality involved was "very high". Her Honour held that "*to categorise it simply as the provision of a weapon to the offender who [committed murder] does not give full effect to the facts upon which he came to be sentenced*."

Despite being satisfied about findings made by the sentencing judge however, Her Honour said "*I find myself unable to accept that a starting point of 52 years' imprisonment for this one offence committed by a barely 18-year-old man does not disclose error in the exercise of the sentencing discretion*."

At [215]-[221], Her Honour considered sentencing statistics from New South Wales for a range of offences carrying life imprisonment, including cases involving gang-related shooting incidents resulting in death, the murder of a child following prolonged abuse, and pre-planned "thrill kill" murder. Her Honour found the statistics showed that the non-parole period imposed on the applicant was "*the highest imposed on any offender for a single offence in New South Wales for the 10 year period between 2008 and 2018*."

Factoring in applicable discounts, Her Honour also observed that the applicant had received "*a higher non-parole period and higher head sentence than any offender sentenced for a single offence of murder in New South Wales in the last ten years*" concluding that a starting point of 52 years was "*just too high*".

An application for Special Leave to the High Court was refused.

[21] *Solomons v District Court (NSW)* (2002) 211 CLR 119.

***Khan v R* [2022] NSWCCA 47**

The applicant had been found guilty after trial of engaging in a terrorist act (section 101.1(1)) for the stabbing of a man who lived in his neighbourhood. He had unsuccessfully raised a mental illness defence at trial. He received a sentence of 36 years with a non-parole period of 27 years.

In appealing the severity of the sentence imposed, the applicant submitted that punishment for a terrorist act must still be proportionate to the conduct that is the subject of the offence. A comparison was made with sentences for attempted murder, which carries a maximum sentence of 25 years and a standard non-parole period of 10 years.

In dismissing the appeal, the CCA held that "*terrorism, while ultimately concerned with the risk to human life, is fundamentally concerned with the threat to civil society by those advancing a political, religious, or ideological agenda who intend to intimidate governments or the public*." The court held that comparison with attempted murder, in those circumstances, was "*misplaced*".[22]

There are several provisions unique to Commonwealth sentencing which constrain the exercise of sentencing discretion in terrorism cases. These include:

- State sentencing options generally available to federal offenders are not available if imprisonment must first be imposed. In practice, this means that community-based sentences of imprisonment such as Intensive Corrections Orders in NSW are not available.[23]
- An order cannot be made under section 20(1)(b) of the *Crimes Act 1914* (Cth) which allows for the imposition of a sentence along with an order for conditional release either immediately or after a specified period.[24]
- If the court imposes a sentence of imprisonment, section 19AG *Crimes Act 1914* (Cth) provides that a minimum non-parole period of at least 75% of the sentence must be imposed in terrorism offences unless the offender is under 18 and there are exceptional circumstances. This contrasts with the general approach in Commonwealth matters where it is ultimately a matter for the sentencing judge to determine what the appropriate ratio is. It is also markedly different to some state sentencing legislation such as the *Crimes (Sentencing Procedure) Act 1999* (NSW) which permits a finding of special circumstances to be made to vary the statutory ratio in appropriate cases. Common reasons for doing so include:[25]
    - An offender's youth (a common ground for finding special circumstances in NSW);
    - It is the offender's first time in custody, or there is evidence that the conditions of the offender's incarceration will be more onerous than usual;

[22] *Khan v R* [2022] NSWCCA 47 at [109].
[23] Section 19AG; section 20AB(6) *Crimes Act 1914 (Cth)*. See also s 67(1)(c) of the *Crimes (Sentencing Procedure) Act 1999* which provides that in intensive corrections orders are not available for terrorism offences.
[24] *Crimes Act 1914* (Cth), s 20(6).
[25] For a summary of relevant principles and authorities in NSW, see Judicial Commission of NSW, Sentencing Benchbook, *'Setting Terms of Imprisonment'*, [7-510] – [7-518]. Available: Setting terms of imprisonment

- An offender's prospects of rehabilitation would be assisted by a longer parole period. For example, where an offender requires substantial help to overcome drug and alcohol addiction; and
- The risk of institutionalisation. For example, even in the face of entrenched and serious recidivism, the focus may be on ensuring that there is a sufficient period of conditional and supervised liberty to ensure protection of the community and to minimise the chance of recidivism.

The *Criminal Code Amendment (Hate Crimes) Act 2025* (Cth) passed in early 2025 has now also introduced mandatory minimum sentences for most terrorism offences. With limited exception,[26] offences under Division 101 or 102 now carry a uniform mandatory minimum of 6 years imprisonment, despite the significant difference in applicable maximum penalties (ranging from 10 years to life imprisonment).

Following the approach set out by the High Court in *Hurt v The King; Hurt v The King; Delzotto v The King* [2024] HCA 8, the mandatory minimum acts as "*a yardstick representing the least worst possible case warranting imprisonment against which the case before the court at the time can be measured*."[27] That is, the mandatory minimum "*imposes an increased starting point for the appropriate term of imprisonment for the offence in the least serious circumstances*" and as such, "*the minimum term operates to increase the appropriate term of imprisonment generally for that offence*."[28]

There are very limited options for sentencing children for terrorist act offences. Section 4J of the *Crimes Act 1914* (Cth) allows for indictable offences to be dealt with summarily where the penalty does not exceed 10 years' imprisonment and where there is consent from both the prosecutor and defendant. Several terrorism offences fall within that category, allowing those offences[29] to be dealt with in the Children's Court. However, many offences involving a terrorist act do not fall within this category irrespective of the objective seriousness involved.

Although under section 20C of the *Crimes Act 1914* (Cth), state Children's Court penalties may be imposed for Commonwealth offences, the report of the previous INSLM on the Prosecution and Sentencing of Children for Terrorism raised concerns about the inconsistent approaches which resulted between jurisdictions. In practice, at least in NSW, many offences involving a terrorist act are Serious Children's Indictable Offences and must be dealt with according to law. [30]

## Technical aspects and complexity of trials

Commonwealth terrorism trials are among the most complex dealt with by Australian criminal courts. The following factors contribute to the unique nature of these matters:

[26] Offences against section 102.8(1) and (2) 'associating with terrorist organisations' which each carry a maximum penalty of 3 years imprisonment have a separately specified mandatory minimum of 12 months.
[27] *Hurt v The King; Hurt v The King; Delzotto v The King* [2024] HCA 8, at [33] per Gageler CJ and Jagot J.
[28] Ibid, at [54] per Edelman, Steward and Gleeson JJ.
[29] For example, s.102.3 of the *Criminal Code 1995* (Cth), membership of a terrorist organisation; s.102.8 – associating with terrorist organisations; s.119.7 – recruiting persons to serve in/with an foreign armed force
[30] Under section 3 of the *Children (Criminal Proceedings) Act 1987* (NSW), serious children's indictable offences include offences punishable by life or for 25 years. Section 17 of that Act provides that serious children's indictable offences are to be dealt with according to law.

1. **Prosecutorial discretion**

Most acts and conduct which may be prosecuted as terrorism may also be charged under separate state and territory criminal laws. As outlined in this submission, there are many significant consequences of electing to prosecute the matter as terrorism, rather than a substantive offence such as murder, kidnap, or offences of conduct likely to involve serious risk to life or personal injury or damage to property.

The decision about whether to prosecute a matter as terrorism under the *Criminal Code (Cth)* is one for the Commonwealth Director of Public Prosecutions, applying the relevant prosecution guidelines. The extension of criminal responsibility to cover preparatory acts requires prosecutorial and law enforcement agencies to exercise a considerable degree of discretion when determining whether to charge and prosecute.

With increasing youth engagement with 'violent extremism', increased mixed, unclear and unstable ideologies[31] and the prevalence of 'online world' participation, opportunities to prosecute inchoate and association-related terrorism offences will only increase. The very nature of the criminal trial is altered as soon as terrorism related provisions are engaged.

2. **Access to evidence and protective orders**

Terrorism prosecutions often involve special procedures and protective orders over evidence which is determined to be national security information, or designated terrorism evidence. The issues paper notes that these rules can result in the exclusion of public or media from a trial and can impose limits on what an accused person or their lawyer can see and how they must manage their defence.[32] Prosecutions in which Legal Aid NSW has been involved have required additional security measures around designated terrorism evidence, such as storage in a locked metal box, and additional restrictions on showing material to the client. The sensitivity of the evidence and protective orders mean that terrorism briefs cannot be stored electronically on usual case management systems and the number of Legal Aid staff who can work on briefs must be limited.

3. **Jury trials**

The right to trial by jury conferred under section 80 of the Constitution is incapable of being waived in federal trial by indictment, even if both the CDPP and the accused agree.[33] In some states and territories, legislation provides for application for a judge alone trial.[34] Reasons commonly considered in favour of a judge alone trial include where there has been significant adverse pre-trial publicity, concern about community prejudice, or the length and complexity of the trial. Verdicts must be unanimous, with no provision for majority verdict in Commonwealth matters.

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[31] Issues Paper [2.18].
[32] Issues Paper [3.34].
[33] The requirement for a jury trial was challenged by the accused in *Alqudsi v The Queen* [2016] HCA 24. The applicant, Alqudsi was charged with offences under the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth). He filed a Notice of Motion in the Supreme Court of NSW seeking a trial by judge order. The matter was removed to the High Court, with French CJ stating a case for consideration by the full court in terms "Are ss 132(1) to (6) of the *Criminal Procedure Act 1986* (NSW) incapable of being applied to the Applicant's trial by s 68 of the *Judiciary Act 1903* (Cth) because their application would be inconsistent with s 80 of the Constitution?" By majority, the Court answered in the affirmative: Kiefel, Bell and Keane JJ, Nettle and Gordon JJ, and Gageler J agreeing, in separate reasons; French CJ (dissenting).
[34] See for example section 132 *Criminal Procedure Act 1986* (NSW).

The requirement of a trial by jury means that trials generally take longer, and lead to more interlocutory applications regarding evidence and directions. The following cases demonstrate the unique challenge of jury trials in terrorism matters:

***R v Khan* – 6 juries over 12 months**

The accused was convicted of committing a terrorist act by the sixth jury empanelled to hear that case. The first trial commenced in April 2018. The jury was discharged following concerns about potential juror misconduct.[35] The second jury was discharged after decline in the accused's mental health mid-trial and concerns were raised about his fitness to stand trial.[36] A third jury was discharged after concern that a female member of the public had approached jurors outside court.[37] A fourth jury was discharged the day after empanelment after one juror obtained a medical certificate to say she was not fit for jury duty.[38] The fifth jury could not reach a verdict, and were discharged. A sixth jury found the accused guilty in May 2019 – 12 months following commencement of the first trial.

***R v WE***

The accused was a young person charged with doing acts in preparation for a terrorist act. He stood trial initially in July 2018 with a co-accused who was convicted. The jury could not reach a verdict in relation to WE. In July 2019, the re-trial of WE proceeded. That jury was discharged on day four because the accused acknowledged members of the jury in court.[39] A third jury was empanelled on 15 July 2019, with one member discharged on day 5 following observations that they were falling asleep.[40] The trial continued with 11 jurors. A note was then received indicating a juror had plans to travel overseas and enquiring about a majority verdict direction. The trial judge gave further directions and deliberations continued. The following day a medical certificate was produced stating a juror was under severe stress, advising it was in her best interests to be withdrawn from jury duty. A separate note was provided indicating there had been a verbal altercation between jurors during deliberations. All remaining members of the third jury were discharged.[41] On 12 February 2019, a fourth jury was empanelled. On day 2 of the evidence, it was drawn to the trial judge's attention that a member of the jury was not paying attention and was asleep at times. Orders were made for the discharge of that juror, and the trial continued with a jury of 11.[42] The Crown case closed on 5 March 2020. On day 4 of the accused's evidence in chief he withdrew his instructions from his lawyers and proceeded self-represented. The jury commenced deliberation on 26 March 2020. A medical certificate was then produced indicating a juror would be sick for a week. The trial judge discharged that juror and deliberations continued

[35] *R v Khan (No 1)* [2018] NSWSC 577.
[36] *R v Khan (No 2)* [2018] NSWSC 663.
[37] *R v Khan (No 4)* [2019] NSWSC 42.
[38] *R v Khan (No 5)* [2019] NSWSC 56.
[39] *R v WE (No.3)* [2019] NSWSC 881.
[40] *R v WE (No.6)* [2019] NSWSC 930.
[41] *R v WE (No.8)* [2019] NSWSC 1030.
[42] *R v WE (No.11)* [2020] NSWSC 92.

with only 10 jurors.[43] The same day, on 7 April 2020, the jury of 10 found WE guilty, nearly two years after the commencement of his first trial.

## 4. Distilling the elements and directions to be given

Since its introduction, the definition of terrorist act has been widely regarded as problematic.[44] From a practical perspective, there is some ambiguity arising from the breadth key terms such as 'thing', 'preparation' and 'assistance'.

In *R v Lodhi* [2006] NSWSC 584 (***Lodhi***), Justice Whealy considered the interaction between the definition of 'terrorist act' and several of the terrorist offence provisions including 101.6 (doing an act in preparation or planning), 101.4 (possess thing connected with) and 101.5 (collect or make document). His Honour's description of what the Crown must prove for the offence of act in preparation (at [71]-[74]) highlights the complexities faced by a jury in assessing intent within a highly abstract legal framework.

Several appellate decisions since *Lodhi* demonstrate the complexity of distilling the content of the physical and fault elements of terrorism offences,[45] and phrases such as "connected with".[46]

The confusion that arises from the definition itself is compounded in trials where conspiracy, joint criminal enterprise, or accessorial liability are relied upon by the Crown as a basis for liability. Even shorter trials involving one or two accused may involve complex legal questions about the way the Crown case can be left to a jury. For example, in the first trial of *Lucas* in NSW which involved a co-accused, considerable trial time was taken up determining what evidence was admissible against each of the accused, and what use the jury was permitted to make of that evidence.[47] This in turn required careful finessing of the directions given to the jury both during the course of the trial and its conclusion when the jury retired. The second trial, while more streamlined, also necessitated consideration about appropriate jury directions to be given concerning unanimity of the "two or more acts" done in preparation or planning and the "category of target", given the Crown case was particularised as based on a course of conduct.[48] See further Appendix Case Study A: *R v Lucas*.

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[43] *R v WE (No.18)* [2020] NSWSC 373.

[44] Law Council of Australia, '*Anti-Terrorism Reform Project: a consolidation of the Law Council of Australia's advocacy in relation to Australia's anti-terrorism measures*.' (October 2013) at [3.2.1].

[45] See for example *Faheem Khalid LODHI v Regina* [2006] NSWCCA 121; *Faheem Khalid Lodhi v Regina* [2007] NSWCCA 36 *Benbrika v The Queen* (2010) 29 VR 593; *R v Abdirahman-Khalif* [2020] HCA 36; (2020) 271 CLR 265.

[46] See for example the case of Belal Khazaal, who was convicted in 2008 of an offence against s 101.5(1) of making a document connected with assistance in a terrorist act knowing of that connection. An appeal to the NSWCCA was upheld by majority on only one of several grounds advanced: that the trial judge erred in declining to leave to the jury the defence, under s 101.5(5). The majority (Hall and McCallum JJ) wrote in separate decisions. A separate but unsuccessful ground of appeal concerned the correctness of the trial judge's direction in relation to the words "connected with" having regard to the decision of the Victorian Court of Appeal in *Benbrika v The Queen* (2010) 29 VR 593. In dismissing that ground by majority, McClellan CJ at CL and McCallum JJ each distinguished *Benbrika* but adopting different paths of reasoning. Hall J in dissent on this ground held that the trial judge's direction was erroneous as it "did not provide information or guidance to the jury on the particular meaning attaching to that statutory formulation". The subsequent appeal to the High Court by the Crown resulted in four separate judgments: a joint judgment by Gummow, Crennan and Bell JJ, with French CJ and Heydon J agreeing in separate decisions: *The Queen v Khazaal* [2012] HCA 26. The High Court set aside the orders of the NSW CCA, dismissed the conviction appeal and remitted the matter to the CCA for consideration of the sentence appeal.

[47] See for example *R v J Lucas; R v B Lucas* [2022] NSWSC 1807; *R v J Lucas; R v B Lucas (No 4)* [2022] NSWSC 1810; *R v J Lucas; R v B Lucas (No 5)* [2022] NSWSC 1811; *R v J Lucas; R v B Lucas (No 7)* [2022] NSWSC 1814; *R v J Lucas; R v B Lucas (No 8)* [2022] NSWSC 1813; *R v J Lucas; R v B Lucas (No 9)* [2022] NSWSC 1815.

[48] *R v Lucas* [2023] NSWSC 1195.

## Post sentence implications

**1. Classification and placement of sentenced inmates**

Classification and placement of sentenced federal offenders varies between states and territories.

As noted above, in NSW, CSNSW policy provides that any person received into custody for terrorism offences is managed under the maximum-security classification policy and designated as EHRR. In practice, offenders convicted of a terrorism offence are generally held at HRMCC for several years before they may be considered for placement elsewhere.

In her 2018 report, the ICS set out the fundamental principle that inmates should be subject to the least restrictive environment necessary for the protection of the public, staff and other inmates.[49] In the Inspector's 2022 report, she observed that inmates at HRMCC were generally allowed outside their cell for certain activities between 8.45am-9am and 2pm, rather than the "normal" hours of 8.30am and 2.30pm.[50] The Inspector noted that exceptional lockdowns occurred 34% of the time over the two month inspection period, noting that they were mostly caused by "unplanned staff absences", with only one triggered by a security incident.[51] Of this, the ICS said:

> *This not only impacts the inmates who are already subject to the harshest management regime in the correctional system but also inhibits service delivery. CSNSW has invested significant resources in disengagement programs to address violent extremism but lockdowns impede the ability of relevant staff to deliver these programs and other services such as health appointments, case planning and phone calls. Moreover, there is a risk of reinforcing violent, or extremist views when inmates are subjected to harsh regimes. It was disappointing to see the lack of real progress in this area and it seemed little had changed since our last inspection almost five years ago.*

The ICS observed that there were limited opportunities for positive engagement with staff and no access to programmes, work or education in the HRMCC.[52] She found that there was a reluctance of staff to engage with inmates and raised some concerns about persistent discrimination and a tendency amongst staff to confuse the practice of Islamic faith with radicalisation.[53]

The policy of placing inmates in HRMCC and conditions of custody there has also been the subject of comment in a number of decisions of the NSW Supreme Court and Court of Criminal Appeal. A particularly illustrative example of the adverse impact of automatically transferring an offender from juvenile detention to HRMCC contrary to expert advice is set out in the case study of *AH*. See Appendix Case Study B: *AH v R*. Other examples include:

[49] ICS Report 2018, p43.
[50] Inspector of Custodial Services, *Inspection of Goulburn Correctional Centre and the High Risk Management Correctional Centre 2021* (Report, June 2022) **(ICS Report 2022)** p64.
[51] ICS Report 2022, p65.
[52] ICS Report 2022, p74.
[53] ICS Report 2022, p65.

### *R v Dakkak* [2020] NSWSC 1806

Radwan Dakkak pleaded guilty to two offences of association with members of a terrorist group. He was 23 and had no prior criminal record. In sentencing remarks, Hamill J referred to evidence about the appropriateness of the conditions of custody:

*[28] Mr Dakkak was arrested on 2 July 2019 and has been in custody for almost 18 months. During that time, he has been incarcerated at the HRMCC at Goulburn. That gaol is largely, although not exclusively, used to house offenders charged with terrorism offences. Part of a report prepared by the Inspector of Custodial Services New South Wales was tendered on the hearing. It demonstrates* ***the onerous nature of the custodial conditions and raises questions as to whether being imprisoned at the facility in question may have an adverse impact in terms of de-radicalisation****. The inspection team found:*

*"[T]here was no clear policy to guide prison staff on placement to prevent the risk of radicalisation to violence, or to prevent vulnerable inmates being subjected to violent behaviours of other inmates."*

*[29] For example, one officer was reported as saying "If you were to measure extremist views, they wouldn't diminish in here".*

…

*[31] The* ***wisdom of placing a young offender with no previous record on remand in an institution such as this is questionable*** *but it is not something over which the Court has any control.*

*[32] There was more particular evidence of the conditions to which Mr Dakkak has been subjected while on remand. They are very onerous. The evidence shows that* ***he is kept in isolation for many hours per day and that on at least 61 occasions (and possibly up to 75 days) he has been in solitary confinement for the whole day.*** *This was due to the institution being "locked down" and not through any fault of Mr Dakkak. That, on its face, appears to be contrary to the mores of a civilised society but, putting aside such emotive language, it is relevant to an assessment of an appropriate sentence.*

In the course of sentencing remarks, Hamill J noted evidence that Dakkak was not eligible to participate in custody based deradicalisation programs during his remand period because he was not a "sentenced prisoner".

On 18 December 2020, Hamill J imposed a total sentence of 18 months, with a single non-parole period of 14 months. The effect of the sentence was that his total term would expire on 1 January 2021. The AFP then brought urgent proceedings in the Federal Court for a Control Order. On release from custody Dakkak was subject to control orders.[54]

### *Al Maouie v R* [2022] NSWCCA 30

The applicant was sentenced in 2017 to a term of 9 years imprisonment with a non-parole period of 6 years and 9 months for making a document connected with the preparation of a terrorist act. On appeal, the Crown conceded error and the applicant was resentenced taking into account additional material about the conditions of custody in HRMCC:

*[40] The applicant has been at the high-risk management unit and classified as an extreme high-risk inmate* ***for virtually the entire time of his sentence up until last year*** *when he was transferred to South Coast*

[54] *Booth v Dakkak* [2020] FCA 1882. See also a subsequent interim control order made in *McDonald v Dakkak* [2022] FCA 1065 and confirmed in *McDonald v Dakkak (No 2)* [2022] FCA 1578.

*Correctional Centre. Approximately* ***twenty percent of the time that he has spent at the HRMU has been spent in lockdown in his cell****. That cell is* ***two metres by three metres*** *wide. This has led to an extremely difficult custodial sentence. His classification has now been changed to A2, although he is still regarded as a maximum security prisoner. Since moving from the HRMU, he was permitted to have his* ***first contact visit in six years****.*

*[41] The applicant is* ***now considered to be in the low risk category*** *for violent re-offending. His overall risk profile for extremist violence offending/re-offending has been assessed as being in the* ***low to moderate range****.*

…

The appeal was allowed, with a sentence of 8 years with a non-parole period of 6 years imposed.

***R v J Lucas*** **[2022] NSWSC 1206**

Joshua Lucas was convicted at trial of advocating for a terrorist act while between the age of 20 and 21. He had been remanded in custody at HRMCC throughout trial. The sentencing judge took into account evidence about the nature of that environment:

*[20] …as one would expect of any person charged with terrorist offences, the offender has been held in extremely constrained conditions of custody. But they have extended beyond what I would regard as the usual conditions, even for those unusual prisoners. In my opinion,* ***the conditions of custody experienced by the offender are so profoundly isolated that they would damage the emotional well-being of a completely psychologically well person, let alone that of a person like the offender, who, I am satisfied, is not completely psychologically well.***

*[21] To give but two examples: as at the date of the proceedings on sentence, the offender was* ***entitled to have contact with absolutely no other prisoner****. That is harsh indeed, perhaps soul-destroying.* *Furthermore, although he has been permitted to speak to persons by mobile telephone,* ***he has not been permitted to see either of his parents for two and a half years, not just by way of a contact visit, nor through glass, but even by way of AVL contact****.*

*[22] Finally, the strictures in Australia of the pandemic, and in particular, their effect on incarcerated persons, commenced almost exactly at the time when the offender was arrested, in March 2020. I am well entitled to take judicial notice of the fact that they have made incarceration even more difficult than it usually is for every person in prison, and triply difficult, as it were, for a young man in gaol, for the first time, in conditions far more restrictive than maximum security.*

*[23] It is not my place to criticise those conditions of custody, not least because I have not heard from those who have imposed them, and I know nothing of the asserted reasons for them. Even so, I* ***think I am obliged to take them into account as a form of extra-curial punishment, first visited upon a young man of 21 years of age with no criminal record whatsoever.***

## 2. Parole

An extraordinary feature of the federal system is that parole has been determined by the Attorney-General, rather than an independent authority. Section 19ALB of the *Crimes Act 1914* (Cth) has required the Attorney-General to be satisfied that exceptional circumstances exist in order to grant parole to a person who has been convicted of a terrorism offence ( the parole consideration relates to the terrorism offence or not). It has been held that this requires the Attorney-General to "*reach a positive state of satisfaction that [the applicant's] circumstances in some way had a character that was, or was akin to*

*being… out of the ordinary course, unusual, special, uncommon, or going beyond what is regularly, routinely, or normally encountered, but not necessarily unique, unprecedented, or very rare.*"[55]

We note that at the time of writing this submission, the Attorney-General has introduced legislation in the Parliament to establish an independent Commonwealth Parole Board to make decisions about whether convicted federal offenders are released into the community on parole, and the conditions under which they are released.[56] We welcome the introduction of this important legislation which will promote high quality, evidence-based decision-making, and guard against the risk of politicisation. If passed, the Bill will address a number of problems with the current system, and a lack of transparency around decision making. The legislation will amend Part IB in the *Crimes Act 1914* (Cth) to replace the Attorney-General with the Board as the decision-maker for federal offenders.

The establishment of an independent Commonwealth Parole Board is also consistent with some state and territory systems - such as NSW and Victoria - where an independent statutory authority is empowered to make decisions about release of offenders to parole. The NSW State Parole Authority (**SPA**) is comprised of a judicial member, with other official members holding relevant expertise and working knowledge representing organisations such as Police and Community Corrections.

The key purpose of parole is to promote community safety by supervising and supporting the conditional release and re-entry of prisoners into the community, thereby reducing their risk of reoffending. Supervision on parole can address risk factors associated with re-offending, but can also serve to detect reoffending early. The cost of community supervision is low compared to the cost of incarceration.[57]

Parole serves an important role within the custodial system, providing offenders with an incentive for rehabilitation through the prospect of eligibility for release after a prescribed period of imprisonment. There are related benefits including the increased likelihood of reform of prisoners and better overall prisoner discipline. The NSW Law Reform Commission's comprehensive review of the NSW parole regime in 2015 concluded that parole works to reduce reoffending and contribute to the protection of community safety, and so is in the community's interest:

> *[We] consider that there is sufficient evidence to conclude that parole reduces reoffending. On this basis, we consider that parole is in the community interest and brings a long term benefit that outweighs any risk to the community of an offender reoffending when released on parole.*[58]

A recent study by the NSW Bureau of Crime Statistics and Research (**BOCSAR**) found that NSW prisoners who receive parole supervision after their release reoffend less than similar prisoners who

[55] *Lodhi v Attorney-General (Cth)* [2020] FCA 1383, at [19] per Bromwich J at [24].
[56] Commonwealth Parole Board Bill 2025 and Commonwealth Parole Board (Consequential and Transitional Provisions) Bill 2025
[57] The Steering Committee for the Review of Government Service Provision, *Report on Government Services, Part C 'Justice'* (2023) at page 115 states that the net cost per prisoner per day was $405.18. The Productivity Commission's 2021 research paper, *Australia's Prison Dilemma* finds at page 47 that a 1% shift in the prison population to Community Corrections would save taxpayers approximately $45 million per year nationwide.
[58] New South Wales Law Reform Commission, *Parole* (Report No 142, 2015) p24.

are released unconditionally.[59] The findings of this study suggested parole was particularly effective in reducing serious reoffending among high-risk prisoners and First Nations prisoners..[60]

These studies suggest that releasing offenders without parole at the end of their sentence would not promote community safety in the long term.

In the context of terrorism, there is also evidence which suggests that post-release recidivism rates among political (extremist/terrorist) offenders are significantly lower than other offenders: that while political offenders do reoffend, their rates of recidivism are low when compared to an apolitical population and that, when they do reoffend, it tends to be for minor or personally motivated crimes or parole violations.[61]

Despite this, in our experience, terrorism offenders are never granted parole. Information obtained by Legal Aid NSW under Freedom of Information provisions reveals that of the 53 offenders serving sentences for terrorism offences who applied for parole between 1 January 2018 and 11 November 2022, all were refused parole irrespective of recommendations by Community Corrections supporting release. With the exception of Faheem Lodhi, who was granted parole in the final year of his 20-year sentence in 2023, we are unaware of any terrorism offender being granted parole since 2018.

We are aware from casework experience that the practice of refusing parole to all terrorism offenders has disincentivised some offenders from participating in case plans and CVE programs in custody. It has also been the subject of judicial comment in several NSW Supreme Court and Court of Criminal Appeal cases, including applications for Commonwealth post-sentence orders.

In *AH v R*,[62] the Court observed at [111]: "*the utility of including a non-parole period in such cases may be queried, if for all practical purposes, no offender will be released on parole.*"

In dismissing an application for an Extended Supervision Order (**ESO**) in *Attorney-General of the Commonwealth of Australia v Ghazzawy (Final)* [2024] NSWSC 208, Button J observed at [66]:

> *Finally, I accept that this outcome – whereby the defendant will have spent eight years in continuous custody for serious offending, followed by a mere three months subject to conditional liberty – is not conducive to his continuing rehabilitation. But that is the consequence of a system of sentence administration that permits parole to be granted only on establishment of exceptional circumstances.*

In *Attorney-General of the Commonwealth of Australia v Amin (Final)* [2023] NSWSC 1586, Dhanji J dismissed an application for an ESO. His Honour made the following observations, which aptly summarises the invidious position that individuals convicted of a terrorism offence may face:

> *[125] That a defendant may be unhappy with the making of an order is not a reason of itself to refuse to make the order. But,* ***in the present case, it is also significant that any sense of injustice that might be engendered would be far from irrational.*** *From the defendant's perspective,*

[59] BOCSAR found that, compared with equivalent unsupervised prisoners, prisoners released to supervised parole were 10.0 percentage points less likely to be convicted within a year (a decrease of 17.5%), and 5.0 percentage points less likely to be imprisoned within a year (a decrease of 18.2%). Importantly, lower than expected reoffending rates were still observed 24 months after release from prison. See Ooi, E. J. & Wang. J. J. (2022), *The effect of parole supervision on recidivism* (Crime and Justice Bulletin No. 245). Sydney: NSW Bureau of Crime Statistics and Research.

[60] Ooi, E. J. & Wang. J. J. (2022), *The effect of parole supervision on recidivism* (Crime and Justice Bulletin No. 245). Sydney: NSW Bureau of Crime Statistics and Research.

[61] Hodwitz, O, (2021) 'The Terrorism Recidivism Study', 15(4) *Perspectives on Terrorism* p.27-38: https://www.jstor.org/stable/27044233

[62] [2023] NSWCCA 230.

> ***he has served the entirety of his sentence. He no longer holds extremist views*** *(or at least, I accept that this is overwhelmingly likely). His behaviour in custody has generally been positive, despite the inevitable tensions expected to arise in the extremely restrictive circumstances in which he was held for the majority of his imprisonment.* ***Despite this generally positive behaviour, he was denied parole.*** *That determination was, no doubt, related to the statutory test for release to parole for offenders such as the defendant, which requires establishing exceptional circumstances. This explanation is, however, unlikely to provide a salve for the defendant given that parole has traditionally existed as a means to both promote rehabilitation and protect the community by supporting the transition of offenders from gaol to the community.* ***The application for the ESO, to my mind, and likely to the defendant's, smacks of an attempt to curtail his liberty beyond his sentence in circumstances where a supported release by means of parole would have provided both assistance to the defendant and comfort to the plaintiff with respect to concerns raised by him on this application.***
>
> *[126] The denial of parole was also likely to have been affected by the fact that the* ***defendant's progress through the prison classification system was slow, with him spending much of his sentence at the HRMCC. This was despite his repudiation of violent extremism and generally positive prison behaviour.*** *That a person such as the defendant might feel some unfairness being denied a less restrictive environment in custody, contributing to a denial of parole, in turn contributing to a curtailment of his liberty beyond his sentence, is understandable. Potentially exacerbating the potential for the defendant to feel a sense of injustice on this basis is that,* ***having been kept for a majority of his sentence in the HRMCC with other terrorism related offenders, the plaintiff raises as a concern the fact that he has formed associations with other terrorism offenders.*** *As he said to Dr Davis "(I was) stuck in with them, who else are we going to talk to? The wall?". Indeed, Dr Dewson accepted that, had the defendant kept to himself and not formed relationships, he may potentially have been regarded as a greater risk of offending on the basis that he was a person who finds difficulty in forming personal connections.* ***In other words, he was damned if he made connections and potentially, at least, damned if he did not.*** (Emphasis added).

NLA strongly supports the establishment of an independent Commonwealth Parole Board to ensure decision making is transparent, fair and accountable, and that release planning is based on high-quality, relevant information, balancing the protection of the community with rehabilitation and reintegration of offenders. We also emphasise the need to ensure offenders are able to access legal advice and/or representation to ensure that all relevant information is placed before the relevant decision maker.

Government has indicated that the Board is expected to commence operations in the second half of 2026.[63]

### 3. Post sentence orders

Division 105A *Criminal Code (Cth)* creates a scheme empowering State and Territory Supreme Courts to order that a person who has been convicted of and served a sentence of imprisonment for one or

[63] The Hon Michelle Rowlnd MP, Media Release: Albanese Government to establish a Commonwealth Parole Board, 8 October 2025

other 'terrorist offences' remain in detention in a prison (a continuing detention order) or be subject to orders that restrict that person's freedom (an extended supervision order). This is in addition to the Control Order scheme under Division 104. The former INSLM, Grant Donaldson, conducted a review into the effectiveness and implications of Division 105A, with a final report provided in March 2023.[64] Legal Aid NSW made a submission to that review.

The cumulative effect of laws and policies that apply to individuals convicted of terrorist acts are illustrated in the case of *R v Pender*, set out in Appendix Case Study C.

## 2. Changing the scope of a 'terrorist act'

NLA **does not** support broadening of the definition of terrorist act or lowering of the threshold by removal of the requirement to prove specific elements. We make the following comments about specific consultation questions:

### Threat should be removed from the definition of 'terrorist act'

NLA **supports** removal of 'threat' of action from definition in section 100.1 and creation of a separate offence with a lesser maximum penalty.

As noted in the Issues Paper, UN bodies recommend that where threats are criminalised this should be in a separate offence, *'[t]o avoid conflating offences of lesser gravity with the act of committing terrorism'*.[65] In 2008, the UNHRC specifically recommended that Australia should "… *address the vagueness of the definition of terrorist act"* in the Criminal Code in order to ensure that its application is limited to offences that are *"indisputably terrorist offences"*.[66]

Despite this, and several previous Australian reviews expressing concern that inclusion of threat renders the definition unclear, the only legislative amendment proposed to date has been the addition of the words '*or is likely to cause*' the relevant harm.[67] In our view, such an amendment would do little to promote clarity, and would serve only to widen the definition further.[68]

A threat is materially different to a completed offence, and distinguishable from the kind of conduct captured through accessorial liability. Given the very different nature of the conduct and prospective harm involved, it is inappropriate for a threat of action to be included in the primary definition of a terrorist act. Exposure to life imprisonment for a mere threat is also disproportionate and inconsistent with the way in which other threats are recognised and punished under criminal law.[69]

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[64] Donaldson, G, INSLM Report (2022) *Review into Division 105A (and related provisions) of the Criminal Code Act 1995 (Cth).*
[65] Issues Paper, at [4.73]
[66] UN Human Rights Committee, *Concluding Observations: Australia UN Doc CCPR/C/AUS/CO/5,* 2 April 2009, available at: Concluding observations of the Human Rights Committee :at [11].
[67] Dalla-Pozza, D et al, 'Commonwealth Reviews Considering the Definition of a "Terrorist Act" in s 100.1 of the *Criminal Code Act 1995* (Cth)', *Independent National Security Legislation Monitor* (Commissioned Report, June 2025) at p14, available: https://www.inslm.gov.au/system/files/202508/commonwealth_reviews_considering_the_definition_of_a_terrorist_act.pdf
[68] The Law Council of Australia expressed the same view in its October 2013 paper, '*Anti-Terrorism Reform Project: a consolidation of the Law Council of Australia's advocacy in relation to Australia's anti-terrorism measures.*'.
[69] For example: s 474.15(1) CCC - Using a carriage service to make a threat (maximum penalty 10 yrs imprisonment).

If separately legislated, we anticipate Parliament may choose to include an offence of 'threat to commit a terrorist act' in the definition of 'terrorism offence' in section 3 the *Crimes Act 1914 (Cth)*. This would in turn engage the various special rules that currently apply to such offences, including in bail and sentence proceedings, parole and eligibility for post-sentence orders. In this way, the establishment of a separate threat offence would not ameliorate the various practical issues discussed above. It would however be a principled approach to law reform, promoting legislative clarity and reflecting the distinct criminality involved.

## Requirement to prove 'terrorist motive'

NLA **does not** support removal of a 'terrorist motive' as an element of a terrorist act.

NLA **does** however support removal of 'religion' as an expressly provided motive in section 100.1(b).

1. **Breadth of an 'ideological cause'**

   Ideology is undefined within the *Criminal Code*, but it is evidently broad in potential application. While political and religious causes are expressly included in the current definition, the general reference to an 'ideological' cause is without exclusion or express criterion. This leaves open broad scope for prosecution where there is evidence of a system of beliefs, ideas, values, aims or a particular worldview.

   In his March 2025 review of the Southport Attack, the UK Independent Reviewer of Terrorism Legislation (**'the UK Reviewer'**) observed (of the UK definition) that, subject to considerations such as whether a cause is purely personal, social, or incapable of being adopted by others or affecting public affairs, there is "*no limit to the type of religion and politics or ideology that may underpin a cause, and there is no required level of coherence or depth; a cause need not contain a fully worked out blueprint for an ideal future.*"[70] The UK Reviewer noted that, in the UK, causes prosecuted as terrorism offences have included incel, environmental and anti-Covid causes.[71]

   In NSW, the Supreme Court has considered the concept of ideological causes in the context of the *THROA* and assessment of a defendant's future risk of a terrorist act. The courts appear to have distinguished 'extremism' or 'violent extremism' from ideology or an ideological cause under the definition of 'terrorist act'.[72] The Court has made observations about the relationship between terrorist motive and intent in the definition of a 'terrorist act' as well as conduct that *does not* amount to an ideology.

   In *State of New South Wales v Richardson (Final)* [2023] NSWSC 1048, Justice Fagan observed: "*[t]he critical aspect of the definition of "terrorist act" is the twin intents of "advancing a political, ideological or religious cause" and of "coercing, or influencing by intimidation" an Australian government or intimidating the public or section thereof."* In dismissing the State's application for an ESO, his Honour said at [88]-[90]:

[70] Hall, J (13 March 2025) *Independent Review on Classification of Extreme Violence Used in Southport Attack on 29 July 2024* (Report, Independent Reviewer of Terrorism Legislation) at [2.11]-[2.14].
[71] Ibid, at [2.14].
[72] For example, in *Hardy v State of New South Wales* [2021] NSWCA 338 at 30, his Honour, Justice Basten considered that the concept of extremism in its ordinary usage "refers to extreme views, usually of a political religious or *ideological* character". He however held that whether extremism or violent extremism extends "*beyond the scope of the definition of 'terrorist act'* need not be determined".

> *I cannot discern in any of the defendant's statements, either individually or in the whole of them taken together,* ***any cluster or sequence or system of beliefs or ideas that could reasonably be characterised as an ideology or as the expression of a political cause or objective****. In the defendant's depressed, disordered and delusional state, he has shown by his expression of hostile and at times violent sentiments that he is* ***dissatisfied with many aspects of societal relations, inter-ethnic relations, government policies and the conduct of government institutions and agencies****. However, he* ***has expressed no alternative arrangement that he would like to bring into being****. Nor has he expressed any desire to* ***disrupt or to destroy the working of the whole of government*** *without replacement.*
>
> *The defendant has* ***expressly disavowed any desire to change the beliefs or behaviours of others****, or to bring about change in anything that is being done by governments or by any section of the public. Despite his disgruntlement with so much, he espouses no cause, political, ideological or otherwise. He has no objective towards which he desires to coerce any government. The defendant has neither expressed nor implicitly revealed any wish to intimidate the public or any section of it for any purpose.* ***He is just disgruntled, and if taken at his word, he is in a mood to express his disgruntlement by killing people****.*
>
> *The defendant has stated a plan to kill a number of victims at random or alternatively to kill up to 15 indigenous adult males. That* ***plan bears the character of a proposal for violent expression of personal grievance****. I reject the submission of counsel for the State that it represents a one man "idiosyncratic ideology". (Emphasis added).*

To date, there has been no direct consideration we are aware of as to what constitutes an ideological cause. Clearer legislative guidance may assist in promoting consistency and avoiding overreach by conflation of mere personal views and beliefs that are espoused with ideology.

### 2. Effect of dispensing with the motive element

We endorse the view that the motive element is critical to differentiating a terrorist act from other forms of extreme violence and criminal activity.[73] It is the motive element that distinguishes terrorism from other types of serious crime motivated by reasons such as personal grievance, hatred, greed, revenge or selfishness.

Dispensing with the motive element would effectively lower the threshold for terrorism prosecution and broaden significantly the range of circumstances falling within the definition of a terrorist act. This would not reflect the extraordinary nature of terrorism offences.

### 3. Removing 'religious' causes

NLA **supports** removing the word religious from the definition of a terrorist act.

While it was not the intention of Parliament that anti-terrorism laws should have a negative impact on any sector of Australian society,[74] previous reviews have repeatedly demonstrated that these laws put

[73] Dalla-Pozza, D et al, above n65 at p18-19 (referencing the Human Rights and Equal Opportunity Commission, Submission No 11(b) to Security Legislation Review Committee (March 2006); Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of Security and Counter Terrorism Legislation* (Report, 4 December 2006) ('*2006 PJCIS Review*').
[74] PJCIS Review 2006 at [3.8].

Arab and Muslim Australians under significant pressure and lead to incidences of discrimination and prejudice. This has resulted in increased experiences of fear, a growing sense of alienation from the wider community, and an increase in distrust of authority.[75]

The report of the Office of the Special Envoy to Combat Islamophobia ('OSECI') published in September this year[76] provides further evidence that Australia's anti-terrorism laws continue to have a detrimental impact on Muslim communities. During consultation with members of the Muslim community, the Special Envoy noted "…[*m]any told me that they were called "terrorists", "murderers" and "killers" by strangers in everyday settings and spaces*."[77] The report observes that, against the wave of unprecedented counterterrorism legislation, public expectations and demands to condemn terror attacks, many Muslim Australians "*feel isolated, marginalised and disenfranchised, as they are perceived to be framed as the threat from within, and divided along the lines as "good Muslim, bad Muslim*".[78]

In addition the Islamophobia Register Australia reported that its most recent report on Islamophobic incidents that there had been a 250% increase of reported online incidents, and a 150% increase in offline incidents from the previous reporting period. This included harassment, vilification, discrimination and assaults.[79]

Removing religion from the definition is not only in line with the recommendation of previous reviews but would also signal to Muslim communities in Australia that their faith is not equated with terrorism. This also accords with the experiences of NLA members working with Muslim clients, their families and communities who have at times felt discriminated against by Australia's police and security agencies.

Noting the concerns consistently raised that the inclusion of religion as a terrorist motive perpetuates Islamophobia in Australia, NLA supports its removal from section 100.1(b).

4. **The inclusion of mental harm in the definition**

We consider that the inclusion of mental harm in the definition would carry the risk of unintended consequences, as illustrated by Legal Aid SA's experience in South Australia's High Risk Offender jurisdiction. In that jurisdiction, Serious Harm can be interpreted very broadly and can expand criminal jurisdiction in ways that are unanticipated and inconsistent with the original purpose of a regime. We hold concerns that the inclusion of mental harm in the definition could result in similar challenges – for example a scenario where a misguided young person plans a hoax or prank without intention of hurting anyone, yet their expectation of surprising or shocking people gets converted into a risk of causing 'mental harm'.

To illustrate these potential challenges, in South Australia's High Risk Offender jurisdiction the risk of causing mental harm does not have a subjective element (similar to the definition of terrorism). The jurisdictional requirement of 'committed a Serious Offence' can be satisfied if the offence carried a risk of serious harm to a person, which can include mental harm, and Serious Mental Harm is a type of

[75] Sheller Review 2006 at [10.96]; PJCIS Review 2006 at [3.5].
[76] Malik, A, *A National Response to Islamophobia: A Strategic Framework for Inclusion, Safety and Prosperity*, Report of Australia's Special Envoy to Combat Islamophobia (September 2025) (**A National Response to Islamophobia**). Available: A National Response to Islamophobia: A Strategic Framework for Inclusion, Safety and Prosperity
[77] A National Response to Islamophobia, p.18.
[78] A National Response to Islamophobia, p.15, citing Mamdani, M. (2004). *Good, Muslim, bad Muslim: America, the Cold War, and the roots of terror*. Pantheon.
[79] Islamophobia in Australia Report V, 2023-2024, Dr Susan Carland Dr Naser Alziyadat Associate Professor Matteo Vergani Professor Kerry O'Brien, Islamophobia Register Australia, pages 21-22, Islamophobia-in-Australia-Report-5.pdf

harm that can be alleged as an element in numerous offences. In Legal Aids' experience, the qualifying offences have rarely, if ever, included an element of causing any form of mental harm, yet the Applicant has relied on the risk of that conduct having caused serious mental harm to qualify the offence - generally with little or no evidence. The Supreme Court of South Australia has therefore been required to form its own view on this difficult factual question, typically informed through 'judicial notice' as opposed to evidence.

## 3. Implications of a broad definition for children and vulnerable adults

Australia has an extensive suite of legislative frameworks to respond to the threat of terrorism and violent extremism through empowerment of law enforcement and intelligence agencies and criminalisation. We are unaware of any evidence to suggest that there are legislative gaps necessitating expansion of the definition of a terrorist act.

In this submission we have outlined some of the unique practical challenges that flow from the decision to prosecute alleged offences as terrorism, rather than under the general criminal law. Given the evolving threat landscape -particularly the challenges in keeping online platforms safe - we are concerned that, without substantial investment in the use of discretion to pursue non-criminal diversionary options, there may be a surge in terrorism prosecutions involving young people and vulnerable individuals.

### Children and the internet

Assessments by security and intelligence agencies repeatedly raise concern about the overrepresentation of minors in counter-terrorism investigations and operations. In its submission to the Federal Inquiry into right wing extremist movements in Australia, the AFP noted:[80]

> "*in the AFP's operational experience, young people are more susceptible and vulnerable to radicalisation by extremists, particularly online. The AFP is encountering an increase in young people being investigated by the JCTTs across several Australian state and territory jurisdictions. Since July 2021, the AFP has commenced investigations and conducted operational activity against a number of individuals 16 years old or younger, with the youngest being 11 years old. This caseload includes a number of youths on a path to radicalisation or demonstrating concerning behaviours…*"

While the specific factors that may render an individual more susceptible to radicalisation or indoctrination are complex and varied,[81] it is apparent that exposure to violent extremists and extremist material online is a significant, and as yet unanswered, problem.

[80] AFP Submission to the Senate Legal and Constitutional Affairs Reference Committee Inquiry into right wing extremist movements in Australia (19 April 2024) at [35] (**'AFP Submission'**).

[81] Campion, K., & Colvin, E. (2025). Community, More than Conviction: Understanding Radicalisation Factors for Young People in Australia. *Studies in Conflict & Terrorism*, 1–18. Available: https://doi.org/10.1080/1057610X.2025.2478957;

In its submission to the Federal Inquiry into right wing extremist movements in Australia, the AFP noted online environments are becoming "*increasingly saturated with violent extremist content, with extremists making 'gamified' content to make extremist concepts more relatable.*"[82]

The 2025 Australian Counter-Terrorism and Violent Extremism Strategy (**CTVE Strategy**) notes that social media has become "*a key enabler of volatility*", and that algorithms on which these platforms' are business models are based "*can create an echo chamber by delivering content which drives self-reinforcing behaviours*".

This was reinforced in the 2025 Annual Threat Assessment delivered by the Director General of ASIO, who noted that "*if technology continues its current trajectory, it will be easier to find extremist material, and AI field algorithms will make it easier for extremist material to find vulnerable adolescent minds that are searching for meaning and connection.*"[83] Despite Australia having some of the most significant legislation to regulate social media companies and maintain online safety, the capacity of governments to effectively regulate content hosted on social media appears limited in practice.[84]

Against this background, in 2023 the *Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols And Other Measures) Bill* was passed, creating new offences for using a carriage service for violent extremist material (new section 474.45B), and possessing or controlling such material that has been accessed or obtained using a carriage service (new section 474.45C). These offences are classed as terrorism offences despite there being no requirement to establish an associated terrorist purpose, motive, plan or harm intended.

The effect of continued expansion of the scope of 'terrorist offences' is resulting in prosecution of more young and marginalised people for conduct that is increasingly remote from any actual plan or genuine risk of the commission of a terrorist act and may be simply exploratory. This is particularly so in circumstances where studies have found that young people are less able to regulate their exposure to extremist content.[85]

## Early intervention and alternatives to criminalisation

Individuals prosecuted for terrorism offences are often initially exposed to violent extremist ideology as children or young adults, and there are a range of complex reasons that may lead them to plan or commit a terrorist offence. Based on review of sentencing cases and our in-house case work, a high proportion of terrorism offenders appear to be young people or young adults, with a prevalence of vulnerabilities such as mental health conditions, neurodiversity, social isolation, marginalisation or discrimination, and a history of socioeconomic disadvantage.

A study reviewing the demographic data of individuals subject to an application for post-sentence orders under the THROA (NSW) between 2017 to June 2023 found that over 90% had a mental illness, and most had experienced alcohol or drug abuse, social isolation and having one or more parent absent.[86]

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[82] AFP Submission, [37].
[83] Burgess, M, 'Director-General's Annual Threat Assessment' (Speech, ASIO, 19 February 2025) (**2025 Annual Threat Assessment**).
[84] Smith, M, Nolan, M, & Gaffey, J. (2024). Online safety and social media regulation in Australia: *eSafety Commissioner v X Corp. Griffith Law Review*, *33*(1), 2–18. https://doi.org/10.1080/10383441.2024.2405760
[85] Bowland, V, and Schumann, S, (2025)"Perceptions of people radicalised online: Examining the victim-perpetrator nexus." *Legal and Criminological Psychology*. https://doi.org/10.1111/lcrp.12317
[86] Stimpson, above n11 p.7

Over 40% had not completed high school and most were from a lower socioeconomic background. The study concluded that this reflected the "*generally disparate outcomes for offenders from structurally disadvantaged communities, including those with less access to education and low socio-economic status, and the criminalisation of people with psychosocial disability*."[87]

The CTVE Strategy acknowledges that the most effective way to protect Australia from terrorism and violent extremism is through prevention and early intervention.[88] Despite what is known about the complex and multifaceted range of factors that can contribute to radicalisation, recent research suggests that the radicalisation of young Australians remains relatively under-researched.[89]

While the AFP prioritises therapeutic pathways and other strategies to prevent and disrupt radicalisation of young people at an early stage where possible,[90] some young people and families have reported feeling insufficiently supported by intervening authorities.[91] In a 2018 study exploring the experiences of families of young people living in Melbourne who joined or attempted to join violent extremist foreign conflict, participants reported mixed experiences when dealing with law enforcement and government security agencies concerning their young family member's involvement in either foreign conflict or domestic violent extremism:[92]

> "*Several family members recounted **feeling disrespected** by police and other agencies. One **felt violated** and had 'no idea what was going on', saying it was the 'first time' she had experienced 'anything like that.' This participant was **shocked by how 'blunt' and 'rude' she felt the authorities were with her family.** She remarked that there was 'no family liaison officer.' Another felt insulted by a government agency representative for not speaking English, and felt that **more cultural sensitivity is needed** during interactions between authorities and family members. Another female participant said in her view the government security agency **did not behave transparently or helpfully**, in spite of her efforts to assist them with their investigation*." (Emphasis added)

In our experience, while law enforcement agencies are experienced to assess and manage risks, when a young person's alleged offending is categorised as terrorism, harsh and punitive risk assessments have a significant impact on opportunities for early intervention and rehabilitation. Early intervention which is led by law enforcement involves an inherent tension between relationship building to provide support on the one hand, and intelligence or evidence gathering on the other. This tension was highlighted in *CDPP v Carrick (a pseudonym)* [2023] VChC 2 (*Carrick)* where a 13-year-old boy with autism was charged with terrorism offences. A permanent stay was granted in that matter in circumstances where the police were found to have essentially groomed the defendant.

While we agree that there needs to be robust ways of addressing and monitoring behaviours of concern in young people, our experience in matters such as *Carrick* reveal that police responses to terrorism

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[87] Ibid p.13, citing Stubbs, J., Russell, S., Baldry, E., Brown, D., Cunneen, C., & Schwartz, M. (2023). *Rethinking community sanctions.* Emerald Publishing Limited. https://doi.org/10.1108/978-1-80117-640- 820231008

[88] Australian Government, 'A Safer Australia: Australia's Counter-Terrorism and Violent Extremism Strategy 2025 (January 2025) p15. (**CTVE Strategy**)

[89] Campion, K et al, above n81; see also Kasinathan J; Parsons A, 2025, 'Radicalisation in adolescents: mental health considerations for violent extremism', *Australasian Psychiatry*, 33, pp. 57 - 63, at p59. Available: http://dx.doi.org/10.1177/10398562241292209

[90] AFP submission, [38].

[91] See for example Appendix Case Study B: *AH v R.*

[92] Gerrand, V, & Grossman, M (2018) '*Interviewing the families of young people who have joined or attempted to join violent conflict'*. Available: 10.13140/RG.2.2.12634.18885 (**Interview Study**), p25.

concerns in young people do not provide the support needed for young people with complex needs and can act as counterproductive to community safety.

Previous studies have also highlighted that a barrier influencing whether family and friends will share concerns with authorities is worry that the information would lead to a punitive response and prosecution rather than diversion and rehabilitation.[93] The need for this is underscored by social isolation having been identified as a key risk factor linked to a higher likelihood of radicalisation and use of terrorist violence.[94]

NLA strongly supports the development and appropriate funding of evidence-based, developmentally appropriate and trauma informed intervention models which provide necessary clinical support for vulnerable people at risk of radicalisation, as well as their families who may experience grief and stigma and require support.[95] There may be benefits in utilising non-government organisations and community groups for this purpose to ensure responses are culturally appropriate, and that therapeutic aims are not undermined.

[93] Thomas, P., Grossman, M., Miah, S., & Christmann, K. (2017). *Community Reporting Thresholds: Sharing information with authorities concerning violent extremist activity and involvement in foreign conflict: A UK replication study*. Centre for Research and Evidence on Security Threats (CREST). Available: http://eprints.hud.ac.uk/id/eprint/33161/ 25-26.
[94] Belton, E, *Understanding the Progression to Violence: Background Characteristics and Risk Factors for Radicalisation to Violent Extremism* (PhD Thesis, University of Queensland, 2023) p111.
[95] Interview study, p23.

# Appendix 1

**Case Study A: *R v Lucas***

Joshua Lucas, aged 20, was charged with one count of doing acts in preparation for or planning a terrorist act or acts and one count of advocating terrorism. His brother, Benjamin, aged 22, was charged with one count of jointly committing acts in preparation or planning for a terrorist act or acts.

**Basis of liability alleged**

Joshua was charged as a principal, whereas Benjamin was charged on the basis of a joint criminal enterprise with Joshua, where Joshua would carry out the terrorist act.

The Crown did not specifically allege what the proposed terrorist act was but suggested it may involve firearms or an improvised explosive device attack on a mosque, synagogue, utility station or military facility.

**Evidence**

The Crown case relied on two bodies of activity: online activity and real-life activity.

In relation to the online activity, this primarily involved Joshua. The Crown relied on Telegram chat groups that Joshua had been a member of and participated in, as well as various things Joshua had searched online, including explosive recipes, firearms and a number of right-wing publications.

For the real-life activities, the Crown case was that the brothers had constructed and detonated at least three "sparkler bombs" (essentially a large number of sparklers tied together), graffitied cars with right wing slogans, attempted to join The Base (a right wing extremist group), purchased gel blasters (plastic guns that shoot gel pellets which are illegal in NSW but legal in Queensland), conducted reconnaissance at power sub-stations and Sydney airport and prepared a Boogaloo kit (in essence, a kit containing supplies required to live 'off-grid').

The defence case was that Joshua was not a terrorist. His online posts were nothing more than "shitposting" (essentially, posting to get a reaction) and his real-life activities were interests that many people growing up in the country might have and nothing out of the ordinary.

**First trial before Button J**

The trial commenced before Justice Button on 14 February 2022 with three weeks of pre-trial argument. This involved rulings in relation to what evidence in Joshua's case could be relied on by the Crown in Benjamin's, and for what purpose. The Judge's rulings regarding the use of evidence in Benjamin's case eventually led to the jury receiving a 6-step direction on how it could use the representations relied on by the Crown.

It also involved consideration of what expert evidence the Crown could rely on to "educate" the jury about right wing extremism and the extent to which the expert could delve into the history of the movement. The experts had not been briefed with material from the brief of evidence, but rather were being called to provide general context and history of right-wing extremism. The Defence argued that this had the potential to be prejudicial to the accused, because events and ideas wholly unconnected to the accused would be introduced into evidence and could be taken by the jury to be associated with the activities of the accused.

A jury of 15 was empanelled in early March 2022. The trial was complicated by various Covid related interruptions. The jury eventually retired to consider its verdict on 23 May 2022 and was out deliberating for approximately one month. During that time, 3 jurors were discharged.

The jury found Joshua guilty of the advocacy charge but was hung in relation to the acts in preparation charges against both Joshua and Benjamin.

Following the trial, both brothers applied for bail. Joshua was refused bail, but it was granted in Benjamin's case.

For the advocacy charge, Joshua received a sentence of 2 years commencing on 14 March 2020 (the day he went into custody), with a non-parole period of 1 year and 6 months.

**Second trial before Lonergan J**

Joshua was tried for a second time on the acts in preparation charge before her Honour Justice Lonergan. This trial commenced on 28 August 2023 and was significantly more streamlined by virtue of it being a second trial. In addition, the parties were able to reach agreement on various aspects of the evidence. Unlike in the first trial, no expert evidence was called, and instead the jury was provided with a glossary of relevant concept and terms. In addition, the parties prepared a joint bundle of telegram messages.

The trial ran for 5 weeks. The jury retired on 10 October 2023 and returned a verdict of not guilty on 26 October 2023. Following the not guilty verdict, Joshua was released from custody.

By the time the second trial concluded, Joshua had spent over 3 and a half years in custody housed at the HRMCC, exceeding the total period of the sentence he ultimately received by more than a year.

**Case example B: *AH v R* [2023] NSWCCA 230**

**Early detection by Counter-Terrorism Police**

AH was 15 years old when he came to the attention of the Joint Counter Terrorism Team (JCTT) for accessing violent extremist material online. The JCTT searched his home, alerting his activities to his family for the first time.

On 30 June 2015, the JCTT referred AH to a diversionary programme administered by the National Disruption Group (NDG) within the Australian Federal Police (AFP).

Members of the NDG met AH and his father in October 2015. At that meeting, it became clear that AH had been bullied at two schools and as a result had withdrawn from them both.

In early November 2015, a member of the NDG enquired with AH's father about his progress and recommended that AH spend time with his peers. At the time, AH was working up to 12 hours a day, six days a week. AH and his father toured a gym where membership, boxing and religious mentoring were available, but due to his work hours AH had not been attending.

**Lack of mutual engagement in earlier diversion**

AH's father expressed the view that he had expected more active and ongoing intervention from the NDG and that AH felt "abandoned". The NDG on the other hand expected AH and his father to take responsibility in this regard.

**Access to extremist material and contact with covert officers**

Five months later when AH was 16 years old, he searched for and accessed online violent extremist material. He started messaging two individuals who were in fact covert officers (COs), telling them he was a Muslim Australian who supported the Islamic State, he planned to attack "infidels" at a memorial service on Anzac Day and that he wanted help making a bomb and obtaining a gun.

**Arrest and charge**

On 24 April 2016, following further online exchanges, AH was arrested by the JCTT. Following his arrest he was found to have downloaded and viewed a range of extremist material, and admitted to creating a handwritten note pledging allegiance to sharia law and the Caliphate. In his interview with police, he expressed anger at Australia's role in the conflict in Syria, acknowledged the significance of Anzac Day, and admitted donating $50 to the wife of an accused terrorist.

**Plea of guilty**

AH pleaded guilty in the Children's Court to one count of doing an act in preparation for, or planning, a terrorist act. On sentence, four experts gave evidence that AH was suffering a major depressive disorder at the time of the offence, and two experts explained the link between the depressive disorder, the applicant's experience of bullying, withdrawal, low self-esteem, loss of identity and his susceptibility to extremist views.

**Sentence and recommendations about placement**

AH was sentenced to a term of imprisonment of 12 years with a non-parole period of 9 years. The sentencing judge ordered that AH be detained as a juvenile until he reached 21 years of age.

Dr Le, one of the psychiatric experts who gave evidence on sentence explained that AH was exceptionally vulnerable to propagandistic material and that his developmentally appropriate longing for acceptance and belonging impaired his ability to form judgements about right and wrong. Dr Le warned that AH remained impressionable and any endorsement of his offending by other inmates with sympathetic views towards the Islamic State may be regressive.

**Transfer into HRMCC from juvenile custody**

On resentence on his appeal, the Court of Criminal Appeal observed at [88]:

*Despite the observation of Dr Le in his report before the sentencing judge that the applicant should not be housed with other terrorism offenders, that is precisely what occurred on his transfer to adult detention on turning 21 in late 2020; he was transferred to the highest security area of the HRMCC. The applicant explained that he felt disappointed about this as he had hoped he would be placed elsewhere given his good behaviour and progress and felt it was a setback in his rehabilitation and progress to parole.*

Of the conditions in HRMCC, the court referred to images of the cells from the report of the ICS, noting they were only 2.5 metre x 4 metre cells, with no access to fresh air (unless the door to the adjoining rear yard is open) and the mesh ceiling obscures the sky. The court said at [89]-[90]:

*Whilst at the HRMCC he was handcuffed whenever he was outside his cell and double handcuffed and shackled whenever he was outside his unit. He described his small cell and the lack of direct light in the yard as it is filtered by a mesh metal grill. He was also locked in his cell for 24 hours a day during lockdowns for just under 20 percent of the days he was there. The applicant was transferred to a lower security area but still within the HRMCC in January 2021. This meant that he was allowed to leave his cell once or twice a week to attend programmes and to attend a common room with two to four other approved inmates. He was unable to work or do further study at the HRMCC and felt bored and restless. He explained that he contracted Covid-19 in July 2022, which was a "frightening experience". It spread through the area and the inmates were locked in their cells for 13 days straight.*

*AH received a few non-contact visits from his family while at the HRMCC, but he found it hard to communicate with them through the thick glass and struggled not being able to hold their hands or hug them. He called his family regularly over the phone and AVL.*

In accepting that onerous conditions of custody were relevant on resentence, the Court observed at [108]:

*It is difficult to understand why an offender such as the applicant, who had disavowed all his previously held views and demonstrated such excellent rehabilitation in juvenile detention over a period of more than*

*four years would be housed, contrary to the expert evidence, along with other terrorism offenders once he reached the age of 21 years.*

And further, at [114]:

*Whilst we acknowledge the difficulties faced by those tasked with the job of managing prisons, it is very difficult to understand how it could be that having reached the lowest available security classification in juvenile detention, it could have been warranted, on his transfer to adult gaol, to house him in the HRMCC to be managed according to Extreme High Security protocols. It is to the applicant's credit that he has overcome this setback and made the progress referred to above. Further, apart from the manner in which the applicant's experience in custody may have tested his resolve, it is necessary to have regard to the onerousness of the conditions the applicant has experienced.* (Emphasis added).

**Transfer out of HRMCC**

After approximately 20 months at the HRMCC, AH was transferred to Hunter Correctional Centre. He described breathing more easily, seeing the sun and sky again, walking around the centre and not being shackled for routine movements.

At the time of his appeal in 2023 he was working in the café in a senior, trusted position as a clerk. He was doing the Tertiary Preparation Program and expressed interest in further studies. He was meeting regularly with a Services Programs Officer and a psychologist to plan future activities.

While in adult custody AH completed several education and skills courses and a Quran recitation programme run by a Muslim Chaplain.

**Resentence**

Taking into account his reduced moral culpability due to his youth and mental illness (which had a causative impact on his offending), his prior good character, the period at the HRMCC, serving the sentence during Covid-19, and his rehabilitation in custody, the Court of Criminal Appeal reduced AH's sentence to 7 years and 6 months with a non parole period of 5 years 7 months and 15 days.

**Parole**

The effect of resentencing was that AH's total term would expire in 6 weeks. The Court observed at [119]:

*We are also conscious that…the effect of the sentence we have imposed…is that it will be difficult or impossible for the applicant to apply for parole before the expiration of the term. However, the evidence suggests that, despite his apparent suitability, parole would not be granted to the applicant, just as it has not been granted to any of the 53 applicants serving sentences for terrorism offences. The inevitable consequence of that policy is that such offenders will complete their sentences without the benefit of supervision under parole.*

**Case example C: *R v Pender***

Blake Pender pleaded guilty to intentionally possessing a knife in connection with the preparation for a terrorist act contrary to s.101.4 *Criminal Code (Cth)* and threatening injury to a judicial officer contrary to s.326(1)(b) *Crimes Act 1900 (NSW)*.

**Facts on sentence**

Mr Pender was observed by police in the early hours of 14 June 2017. He was assumed to be intoxicated or affected by drugs as he was swearing and muttering to himself. He then approached police with his hands in a monkey grip, speaking in a language other than English. Police introduced themselves and asked Mr Pender to separate his hands. Mr Pender swore at

police and appeared to be getting something from his jumper sleeve. Police saw that he had a knife up his sleeve and then struggled with Mr Pender to remove the knife and arrest him. During this time Mr Pender continued to swear at and threaten police, making references to returning to Supermax and beheading.

While at Surry Hills Police Centre he made threats of violence to police and their families. This behaviour continued when he was taken before the Local Court where he referred to Abu Bakar al-Baghdadi, the founder of Islamic State, made threatening gestures to the Magistrate, repeatedly threatened to kill those present and referred to being at war.[96]

The sentencing judge found that Mr Pender's mental illness – schizophrenia or schizoaffective disorder - contributed to his offending and that his adherence to Islam at the time of his offending was questionable. Justice Harrison considered that:

"*Mr Pender's so-called Islamic rhetoric was a manifestation of his propensity for violence rather than his violence being an expression of an entrenched or enduring religious fanaticism. I consider that the prospect of Mr Pender committing further offences of the type with which I am presently dealing is quite limited. I am less optimistic about Mr Pender's general ability to overcome his difficulties with impulsive and violent behaviour having regard to his indifferent criminal history and his mental health.*"[97]

For the *Criminal Code* offence Mr Pender was sentenced to a total of 4 years with a non-parole period of 3 years, which ended on 13 September 2020. He was given a fixed term of 6 months for the *Crimes Act* offence.

**Sentencing judge's observations about post-sentence orders**

In warning Mr Pender about a possible future application for post sentence orders, his Honour said:

"[*a]lthough in the circumstances of this case it seems difficult to conceive of it occurring, I am required by s 105A.23 of the Criminal Code to warn Mr Pender that it is at least possible that an application may be made under Division 105A of the Criminal Code for a continuing detention order at the end of his sentence*."[98]

**Placement and Parole**

On arrest. Mr Pender was first taken to the Metro Reception and Remand Centre (MRRC) at Silverwater. He was transferred to the HRMCC in January 2018 and remained there until February 2020. After this, he was transferred to a specialist mental health unit in another complex. Aside from a short period of segregation, Mr Pender spent his remaining time in custody in that unit.

Mr Pender was first eligible for parole on 13 September 2020. He was refused parole by the Attorney General. His sentence expired on 13 September 2021.

**Application by the Minister for a CDO and by the AFP Control Order**

In July 2021, approximately 2 months prior to Mr Pender's total sentence expiry, the Minister for Home Affairs made an application in the Supreme Court of NSW under Division 105A that Mr Pender be subject to a 3 year CDO. This was the first application of its kind made in NSW.

At the time of this application community based Extended Supervision Orders (**ESO**) were not available under the Code. As a result Mr Pender was subject to parallel proceedings filed by the AFP in the Federal Court of Australia, where an interim control order was made on 7 October 2021. This would not come into force until his release from custody.

[96] *R v Pender* [2019] NSWSC 1814 at [5] – [18].
[97] *R v Pender* [2019] NSWSC 1814 at [55].
[98] *R v Pender* [2019] NSWSC 1814 at [67].

**First CDO granted**

On 9 November 2021, following two interim detention orders, Justice Walton found that Mr Pender posed an unacceptable risk of committing a serious Part 5.3 offence if released into the community and that there was no less restrictive measure than a CDO that could prevent this risk from eventuating. In doing so his Honour ordered that Mr Pender be subject to a CDO for 12 months. These reasons were published on 15 December 2021.

In acknowledging that the index offence was one that was found to be in the "lower range of objective seriousness", his Honour Walton J still held that "nonetheless" his offence "involved the intention element of the definition of a 'terrorist act'". He also held that this "definition is broad and extends to conduct done with the intention of advancing a political, religious or ideological cause with the intention of coercing that government or intimidating the public or a section of the public" (at 434).

On 8 December 2021 the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021 (Cth)* was assented to. This amendment provided for ESOs under Division 105A.

**Review of the CDO - withdrawn**

In January 2022 Mr Pender sought a review of the continuing detention order. This application was withdrawn after he was charged with assault for which he was sentenced to a fixed term of 6 months which ended on 18 October 2022.

**Application for an ESO - granted**

In October 2022 Justice Lonergan ordered that Mr Pender be subject to an Interim Supervision Order (ISO) and he was released into the community at the end of his term of imprisonment. That ISO was extended by consent for an additional 28 days.

In November 2022 Mr Pender was charged with breaching the conditions of his ISO and returned to custody. None of the alleged contraventions involved conduct related to terrorism or religious extremism, or behaviours of concern such as drug taking.

In December 2022 Justice N Adams made an order that Mr Pender be subject to an ESO for 3 years.

**Difficulty complying with the ISO**

While generally accepting of his ISO conditions as fair and appropriate, understanding their importance as a 'safety net' that would provide him with discipline and order, Mr Pender expressed some frustration with them. He often experienced difficulty complying with his weekly plan of his proposed movements in advance of each week (his schedule), which was attributed to his ADHD and noted to friends, family and carers that he felt 'trapped', and that there was 'nothing to do' in the community.[99]

**Further sentences delay commencement of ESO**

On sentence for the breach of his ISO, a number of expert reports were tendered as well as statements from Mr Pender's support workers in the community. A report prepared by a forensic psychiatrist, Dr Ellis, opined that at the time of the offending, Mr Pender was receiving sub-optimal treatment for his schizophrenia. He was also experiencing mild cognitive impairment, mild thought disorder, periodic hallucinations and delusions, in the context of significant adjustment, ostensibly from being in custody to being in community, and strict expectations of his behaviour. Dr Ellis considered that the defendant's wrongdoing likely related to his general

[99] *Attorney-General of the Commonwealth of Australia v Pender* [2024] NSWSC 1111 [12]

boredom, impulsivity and need to connect with social supports, rather than from any extremist ideation.

Mr Pender received a 22 month term of imprisonment for contravening the ISO, expiring on 6 September 2024. Parole for this offence was refused.

In January 2024 Mr Pender was charged with common assault and received a backdated 6 month term of imprisonment, expiring 19 June 2024.

**Review of ESO**

In February 2024 the Attorney General sought a review and variation of Mr Pender's ESO. In September 2024, just prior to his release from custody for the breach of ISO offence, Justice Ierace varied and affirmed Mr Pender's ESO. His Honour found that Mr Pender's "*primary diagnoses have been schizophrenia with co-morbid diagnoses of substance use disorders (involving cannabis, stimulants, opioids, inhalants and hallucinogens); borderline personality disorder, antisocial personality disorder, attention deficit hyperactivity disorder (ADHD) and a cognitive impairment.*"[100]

**Release to community and expiry of post sentence orders**

Mr Pender was finally released to the community on 6 September 2024. His ESO expired on 4 September 2025 – four years after the initial order for a Control Order and then CDO.

Mr Pender completed his four year sentence, without the benefit of the year of parole. He then spent approximately an additional 3 years in custody following the expiry of his sentence, subject to either a CDO or imprisonment for breach of the ISO.

[100] *Attorney-General of the Commonwealth of Australia v Pender* [2024] NSWSC 1111 at [11].