

‘What’s in a Name?’

The Role of Motive in the Definition of a ‘Terrorist Act’ under the Australian Commonwealth Criminal Code

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Introduction

Motive is traditionally considered to be an unwelcome guest in criminal trials, a *bête noire* that should only appear at a sentencing. The common law draws an important distinction between *mens rea* and motive in criminal proceedings. The principle of *mens rea*, meaning ‘guilty mind’, provides that ‘criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences, it may have’.¹ Motive refers to personal reasons, such as vengeance or financial gain, from which criminal intent may be inferred. While most offences require *mens rea* to be proven beyond reasonable doubt, the motive is traditionally considered irrelevant to criminal liability.² The inclusion of a ‘political, religious or ideological cause’³ element in the definition of ‘a terrorist act’ in Australia has invited the concept of motive back into criminal liability. In addition to the evidential issues of proving motive beyond reasonable doubt, defining terrorism is commonly regarded as a Sisyphean task due to the political, ideological and jurisprudential questions it raises about the legitimate exercise of violence and the role of criminal law.

Rather than viewing anti-terrorism laws as a vanguard in a broader trend towards the inclusion of motive in criminal liability, this article asserts that the unique nature of terrorism as strategically targeted violence necessitates a motive element. Whilst the physical

elements of terrorist acts can be covered by existing criminal offences, such as murder or conspiracy, the underlying motive to influence socio-political outcomes through the use of violence adds a distinct layer of criminality. Hacker describes terrorism offences as ‘triadic’⁴ because it involves not only the offender and the victim but also the general public through the targeted perpetuation of fear. Premised on the notion that the motive behind terrorism is what creates a moral distinction from other criminal offences, this article presents three central arguments. Firstly, a discrete category of terrorism offences is necessary in accordance with community expectations that political, religious and ideologically oriented violence warrants distinct classification under criminal law as an affront to the democratic process. Secondly, that terrorism offences should be fairly labelled with reference to a motive element in the definition of a ‘terrorist act’ to adequately reflect the nature and extent of an offender’s criminality, particularly when many terrorist offences are inchoate. Thirdly, the inclusion of a motive element in terrorism offences substantially broadens the scope of admissible evidence at trial and thereby heightens the importance of safeguards in criminal procedure to protect the fairness of criminal proceedings.

I. The legal definition of ‘a terrorist act’

The Australian definition of ‘a terrorist act’ under Section 100.1 of the *Commonwealth Criminal Code* was introduced by the *Security Legislation Amendment (Terrorism) Act 2002 (Cth)* as part of a legislative response to the September 11 attacks. The anti-terrorism laws

1 Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press 2013) 155.

2 *De Gruchy v The Queen* [2002] HCA 33 [28] per Gaudron J, McHugh J and Hayne J.

3 Criminal Code 1995, (Cth) s. 100.1.

4 Frederick J Hacker, ‘Terror and Terrorism: Modern Growth Industry and Mass Entertainment’ (1980) 4 *Terrorism: An International Journal* 143.

include a wide range of offences that can only be enlivened once the three limbs of the definition of ‘a terrorist act’ are proven beyond reasonable doubt:

I. ‘the action is done, or the threat is made with the intention of advancing a political, religious or ideological cause’ (‘the motive element’);⁵

II. ‘the action is done or the threat is made with the intention of: (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or (ii) intimidating the public or a section of the public’;⁶ and

III. the ‘action’ falls within subsection (2) and does not fall within subsection (3). Subsection (2) includes actions such as causing a person’s death, serious damage to property and endangering a person’s life. Subsection (3) provides that advocacy, protest, dissent or industrial action are not terrorist acts.⁷

This definition blurs the legal distinction between intention and motive by focusing on the reasons *why* the accused engaged in the prohibited conduct (for advancing a political, religious or ideological cause) rather than an intention to commit the act itself. Thus, the ‘motive element’ under subsection (1)(b) presents a departure from intent as the cornerstone of criminal liability⁸ and ventures into the hearts and minds of the accused.

II. The role of motive in criminal responsibility

Criminal offences ordinarily comprise a physical element (*actus reus*) and subjective fault element (*mens rea*). The fault element is based on intention, whereby criminal liability is restricted to ‘those who, from a subjective perspective, intended, knew or at least were aware of the risk of a particular harm occurring’.⁹ However, what is the difference between motive and intention? In *Hyam v Director of Public Prosecutions (Cth)* [1974] UKHL 2, Lord Halisham explained that ‘motive is entirely distinct from intention or purpose. It is the emotion that gives rise to an intention, and it is the latter and not the former which converts an *actus reus* into a criminal act’.¹⁰ By considering the emotional and subjective reasons *why* someone intended to commit an offence, criminal liability becomes perilously intermixed with moral and political judgments. Norrie argues that it is the link between social conflicts and individual motives that drives the exclusion of motive from criminal responsibility.¹¹ For example, the mental element of larceny is the *intention to steal* rather than motivating factors or emotions such as hunger or poverty. The

5 Criminal Code (n 3) 100.1(1)(b).

6 Criminal Code (n 3) 100.1(1)(c).

7 Criminal Code (n 3) 100.1(1)(a).

8 The requirement for proof of *mens rea* is described by the Commonwealth Attorney-General’s Department as ‘one of the most fundamental protections in criminal law’ (Attorney-General’s Department (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2011) [2.26]). The principle of *mens rea* is confirmed in the Australian High Court case of *He Kaw The v The Queen* (1985) 157 CLR 523, 582.

9 Bernadette McSherry, ‘Terrorism Offences in the Criminal Code: Broadening the Boundaries of Australian Criminal Laws’ (2004) 27 UNSW Law Journal 354, 360.

10 *Hyam v Director of Public Prosecutions (Cth)* [1974] UKHL 2 [73].

11 Alan Norrie, *Law and the Beautiful Soul* (The Glasshouse Press 2005) 37.

primacy of intent over motivation protects the criminal law from ‘moral infection’¹² and attributes fault to the autonomous individual rather than the broader structural and societal issues that contribute to crime. Notwithstanding this, Horder claims that a ‘privileged class’ of offences permit motive into criminal liability.¹³ For example, the motive is important for offences where there is no *prima facie* wrong.¹⁴ In the case of terrorism, a significant portion of terrorist offences are constituted by preparatory acts whereby the criminality of the offence is unclear without the motive. Furthermore, it is the motivation behind the intention – to advance a political, religious or ideological cause through coercion or intimidation – that captures the ‘wrongfulness’ of the offence. For example, terrorism prosecutions in Australia have included the possession of a magazine published by Al-Qaeda¹⁵ and attempting to seek a *fatwa* against an army base.¹⁶ In these cases, the criminality of possessing a magazine or seeking a religious declaration is not adequately understood until the motive behind these acts is established. There is indeed merit to the longstanding view that motive should be excluded from criminal liability to keep the offender’s political, religious or ideological orientations outside of the courtroom and thereby reducing the risk of bias. However, in the case of terrorism, it is these very motivations that differentiate terrorism from other serious offences. As noted by former Attorney-General Phillip Ruddock, ‘it would be short signed to divorce these motivational contexts from the crimes themselves when they directly inform the gravity of the conduct’.¹⁷ The incorporation of a motive element to advance political, religious or ideological causes into the statutory definition of a ‘terrorist act’ ensures that the essential characteristics and criminality of terrorism is sufficiently particularised within the legislation.

III. The moral distinction between terrorism and other offences

‘Terrorism’ is a politically and ideologically contentious term that incites extreme moral outrage and public indignation. But what makes terrorism distinct from other offences which are also considered morally wrong? Offences that are violent, indiscriminate or otherwise evoke widespread terror will inevitably provoke media attention and emotive public response. However, on a deeper level, terrorism is an attack on the fundamental principles of a peaceful and democratic society. It was expressed by the United Nations Commission on Human Rights that ‘terrorism poses a severe challenge to democracy, civil society and the rule of law’.¹⁸ While arguably all criminal offending may inadvertently undermine the rule of law, Ben Saul asserts that terrorism ‘should be specifically criminalised because it strikes at the constitutional framework of deliberative public institutions which make the existence of all other human rights possible’.¹⁹ By replacing politics and dialogue with intimidation and violence, terrorism represents an affront to the Western liberal ideal of the peaceful democratic process. Ultimately,

12 *ibid* 67.

13 Jeremy Horder, ‘On the Irrelevance of Motive in Criminal Law’ in Jeremy Horder (ed) *Oxford Essays in Jurisprudence*, (4th edn, Oxford University Press 2000) 114.

14 *ibid*.

15 *DPP v Karabegovic* (2013) 41 VR 319.

16 *Director of Public Prosecutions (Cth) v Fattal* [2013] VSCA 276.

17 Phillip Ruddock, ‘Law as a Preventative Weapon Against Terrorism’ in Andrew Lynch, Edwina MacDonald, and George Williams (eds) *Law and Liberty in the War on Terror* (The Federation Press 2007) 5.

18 *United Nations Human Rights Commission*, UNComHR Res 2001/37: Human Rights and Terrorism (2001) Preamble.

19 Ben Saul, *Defining Terrorism in International Law* (Oxford University Press 2006) 36.

it is the public-oriented motive that most clearly reflects the core normative judgments about the wrongfulness of terrorism and distinguishes it from other offences.

One of the main criticisms of the inclusion of a motive in the definition of 'a terrorist act' is that terrorist offences can be prohibited through existing criminal offences. Roach argues that 'although anti-terrorism laws have been enacted on the basis that existing criminal law is inadequate, we should not lightly assume that the existing criminal law is not up to the task'.²⁰ Roach asserts that offences of murder, conspiracy, incitement and attempt can be applied to apprehended acts of terrorist violence and 'from the perspective of public safety, it should not matter why someone explodes a bomb'.²¹ In contrast, the Parliamentary Joint Committee on Intelligence and Security stated that 'terrorism is qualitatively different from other types of serious crime' because it is typically directed toward the public to create fear and promote political, religious or ideological goals.²²

This distinction between public and private motives is illustrated in the case of *R v Mallah*.²³ Mallah was indicted on two counts of preparation for a terrorist act and a third count of recklessly making a threat to cause serious harm to a Commonwealth public official.²⁴ The alleged facts were that Mallah applied for a passport which was subsequently refused by the Department of Foreign Affairs and Trade (DFAT). Following an appeal to the Administrative Appeals Tribunal, police executed a search warrant in his house and located a rifle, ammunition, a document entitled '*How can I prepare myself for Jihad*', and a manifesto setting out his grievances and identifying DFAT as his target. During a covert phone call, Mallah admitted to an undercover operative that he was planning an attack on a government building and made threats to kill ASIO and DFAT officers. After a trial by jury, he was acquitted of Counts 1 and 2 and convicted of Count 3. Despite the facts of the case having the hallmarks of a terrorist offence, such as the targeting a government institution, possession of religious manuscripts and references to 'jihad', the sentencing Judge remarked that 'by its verdict, it is clear that the jury was not satisfied beyond reasonable doubt...having regard to the definition of a "terrorist act"'.²⁵ Chief Justice Wood found that Mallah did not possess a publicly-oriented motive to advance a political, religious or ideological cause but rather was an 'embittered young man' who 'personally felt that he had been the subject of an injustice' as a result of his passport refusal.²⁶ While the physical elements of the charge appeared to be terrorist in nature, Mallah's motive was considered to be a personal one. This case illustrates the important distinction between public and private motives in signifying the unique wrongfulness of terrorism, whereby a threat to a government institution out of personal frustration cannot be considered a terrorist attack.

20 Kent Roach, 'The Case for Defining Terrorism with Restraint and Without Reference to Political or Religious Motive' in Lynch, MacDonald and Williams (n 17) 39.

21 *ibid*.

22 Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terror Legislation* (December 2006) 5.25.

23 *R v Mallah* [2005] NSWSC 317.

24 Criminal Code (n 3) s. 147.2.

25 *Mallah* [2005] NSWSC 317 [26].

26 *Mallah* [2005] NSWSC 317 [38].

IV. Terrorism & the declaratory function of the law

Ashworth outlines the three key functions of criminal law: to declare that certain conduct is a public wrong, to institute the threat of punishment as a deterrent, and to censure those who nevertheless commit the offence.²⁷ These three functions are not equally applicable to every offence. In the case of terrorism, it is unlikely that criminalisation and the risk of censure will significantly deter terrorists from committing a terrorist act. Anti-terrorism laws have 'marginal deterrent value'²⁸ because criminal sanctions are not believed to dissuade terrorists from their political, religious or ideological cause, particularly if they are willing to die in pursuit of their motive or reject the legitimacy of the legal system, to begin with. Adopting this view, the enactment of anti-terrorism laws serves a declaratory rather than punitive function to publicly condemn acts of terrorism, satisfy public indignation and placate demands for justice.

The declaratory function of anti-terrorism laws is supported by the Sheller Committee's Parliamentary Review of Security Legislation. The Committee noted that 'Parliament intended that the definition of a 'terrorist act' reflect contemporary use of that term in political and public discourse to stigmatise certain political acts...' and that the motive element under subsection (1)(b) 'appropriately emphasises a publicly understood quality of terrorism'.²⁹ From this review, it is apparent that Parliament's primary focus on the motive element in the definition of 'a terrorist act' is an alignment with community expectations and popular understandings of terrorism. However, there is a fine balance between legitimating criminal laws by aligning offences with community standards and moral values and exercising penal populism to satisfy public demands for vengeance.

V. The terrorist label & fair labelling

Despite its evolving definition, the concept of terrorism has retained significant political and moral currency. From the 'Reign of Terror' during the French Revolution to radical Islamic terrorism after the September 11 attacks, the 'terrorist' label has endured a longstanding capacity to stigmatise and de-humanise those upon whom the label is imposed. The moral potency of the terrorist label beyond its legal signification has rendered the term 'slippery and much-abused'.³⁰ It has been deployed to censure various manifestations of violence, from revolutions, and political protests to State terrorism. This debate over how violence is represented and defined becomes a struggle over its legitimacy.³¹ In the absence of a clear definition, the label of terrorism becomes more vulnerable to misappropriation. Borradori argues that this 'semantic instability' and 'conceptual chaos in public or political language' privileges dominant powers to de-legitimise or criminalise conduct according to prevailing political interests.³²

27 Ashworth and Horder (n 1) 22.

28 Saul (n 19) 16.

29 Security Legislation Review Committee (Sheller Committee), Parliament of Australia, *Report of the Security Legislation Review Committee* (Australian Parliament House, 2006) 6.22.

30 Paul Wilkinson, *Terrorism and the Liberal State* (Macmillan 1977) 47.

31 Michael V Bhatia, 'Fighting Words: Naming Terrorists, Rebels and Other Violent Actors' (2005) 26(1) *The World Quarterly* 13.

32 Giovanna Borradori, *Philosophy in a Time of Terror: Dialogues with Jurgen Habermas and Jacques Derrida* (University of Chicago Press 2013) 105.

Given the strong moral and political stigma attached to the term 'terrorist', careful attention must be given to the principle of fair labelling when defining terrorism offences. Labelling, in its literal sense, as the process of classifying, describing, and identifying, plays a significant role in criminal law. Criminal offences are defined and categorised into a statutory framework that demarcates degrees of wrongdoing and sentencing options depending on the seriousness of the offence. Chalmers and Leverick argue that labels are important in describing the offences to the general public and differentiating the offending behaviour for those working within the criminal justice system.³³ This process of labelling is a declaratory enterprise whereby the label of an offence communicates the nature of a crime and the degree of condemnation that should be attributed to an offender by the general public and criminal justice system. Ashworth notes that one of the primary aims of criminal law is to ensure a proportionate response to law-breaking and that fairness demands that offenders be labelled and punished commensurate with their wrongdoing.³⁴

In the context of terrorism, it must first be asked who the intended audience of the label is?

The legal definition of terrorism is intended for the offender, operatives of the criminal justice system and the community at large. In terms of the offender, labelling is important in communicating what constitutes a terrorist offence and how the commission of such an offence will impact findings of guilt, sentencing, and the offender's criminal record. While it is argued that anti-terrorism laws have a minimal deterrent effect, it remains essential that acts of terrorism are clearly defined due to the harsh penalties involved (maximum penalty of life imprisonment) and strong social stigma. This is particularly pertinent in the prosecution of inchoate offences, such as the possession of documents or financing of groups with terrorist affiliations. These preparatory acts carry heavy sanctions and stigma under the wide umbrella of 'terrorism'. Agents of the criminal justice system, such as judges, lawyers and parole officers, also rely on the labelling of offences. Prior to conviction, the labelling of offences dictates the elements that need to be proven beyond a reasonable doubt, plea negotiations and jurisdiction of the court. After conviction, labels also affect the sentencing outcome, notations on criminal records and classifications within prisons. The labelling of an offence as an act of terrorism can have a significant impact on an offender's prospects of bail, procedural implications such as control orders and the length of detention without charge, as well as the level of media and political attention. In addition to the practical implications of labelling, offence labels also convey to the community the seriousness of an offence and the extent of the offender's wrongdoing. Labels may draw upon existing social values and signify the degree of moral condemnation and 'othering' to be imposed on an offender.

Accepting that labels play an essential role in criminal law, consideration must then turn to how terrorism offences can be fairly labelled. Ashworth notes that fair labelling has a more direct connection with common patterns of thought in society, and 'where people generally regard two types of conduct as different, the law should try and reflect that difference'.³⁵ The distinguishing feature of a terrorist act (as opposed to existing offences such as murder or conspiracy) is the motive element to advance a political, religious or ideological cause. Simester and Sullivan note that 'the criminal

law speaks to society as well as the wrongdoers when it convicts them, and it should communicate its judgement with precision, by accurately naming the crime of which they are convicted'.³⁶ Under the Australian Commonwealth *Criminal Code Act 1995*, the category of terrorism offences is far-reaching, ranging from large-scale terrorist acts causing significant casualties³⁷ to 'possessing things connected with terrorist acts'.³⁸ Despite the significant variation of harm caused by such actions, the strong stigma of the 'terrorist' label remains constant.

In light of the severe moral stigma attached to terrorism, liberal use of the term would dilute its declaratory function and cause unfairness to an accused due to the lack of certainty regarding what constitutes a terrorist offence. Given the broad ambit of conduct that may be considered terrorist in nature, the inclusion of a motive element under statute provides greater legal clarity to criminal justice practitioners and accused persons. From a declaratory standpoint, the legislature has defined a terrorist motive to publicly declare that the use or threatened use of violence for a political, religious or ideological cause is considered distinctly wrongful and will attract distinct legal sanctions. The inclusion of a motive element ensures that the 'terrorist' label is appropriately directed towards offenders who intend to use violence to advance their political, religious or ideological causes and safeguards offenders who do not harbour such public-oriented motives, as in the case of *Mallah* above.³⁹

Terrorism offences often attract media attention that draws upon popular preconceptions of terrorism rather than its legal definition. As a result, many accused persons are branded with the 'terrorist' label without being proven to have committed 'a terrorist act' to the requisite legal standard. An example is the '2019 Sydney CBD Stabbings', which was initially reported in the media as a terrorist attack but was ultimately prosecuted under non-terrorism offences. In this case, Mert Ney stabbed one woman to death, stabbed a second woman indiscriminately and then proceeded to run through the Sydney CBD yelling '*Allahu Akbar*'. The Supreme Court ultimately ruled that the offender possessed the requisite intent to kill, partly informed by his mental disorder, but did not have a terrorist motive: 'The evidence indicates that the Offender had no commitment to any faith and was not a religious zealot. He had become obsessed with the Christchurch massacre, but not because he was adherent to radical and extremist beliefs himself.'

On 13 August 2019, he took on the trappings, gestures and language of a terrorist in the apartment after murdering Ms Dunn and in the streets of Sydney. All who saw him would be forgiven for concluding that he was a fixated person with a commitment to a terrorist cause involving violent jihad. However, the evidence does not support such a conclusion'.⁴⁰

Bhatia notes that 'rarely is the combatant's decision attributed to a complex array of factors and events'⁴¹, such as mental illness or discrimination, and media outlets often focus solely on the terrorist motive 'in the belief that simplicity is a stronger pull than context'.⁴² This gives rise to the argument that a statutory distinction between terrorism and non-terrorism offences through a motive

36 Andrew Simester and G R Sullivan, *Criminal Law: Theory and Doctrine* (3rd edn, Hart Publishing 2007) 30.

37 Criminal Code (n 3) s. 101.1.

38 *ibid* s. 101.4.

39 Saul (n 19) 5.

40 *R v Ney* [2021] NSWSC 529[166-167] per Johnson J.

41 Bhatia (n 31) 18.

42 Bhatia (n 31) 19.

33 James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) MLR 217-46.

34 Ashworth and Horder (n 1) 77.

35 Ashworth and Horder (n 1) 79.

element does not necessarily translate into a practical distinction. Conduct which bears the hallmarks of a terrorist offence, such as indiscriminate public violence, may result in a person being labelled a terrorist without possessing a legally defined motive.

VI. Proving motive at law: prejudice, evidential difficulties & the importance of procedural safeguards

The inclusion of a 'political, religious or ideological cause' in the definition of 'a terrorist act' raises evidential difficulties and a risk of prejudice against the accused. Accordingly, evidence of motive in proving an element of the offence must be adduced cautiously in criminal trials and longstanding procedural safeguards, such as the exclusion of unfairly prejudicial evidence under section 137 of the *Evidence Act 1995 (NSW)*, carries great importance. This section will consider the practical application of the 'motive element' in a number of terrorism prosecutions and analyse the evidential implications of proving a political, religious or ideological motive beyond a reasonable doubt.

Counter-terrorism policies have placed a strong emphasis on preventative strategies and the containment of risk.⁴³ This is understandable given the threat of large-scale casualties and destruction inflicted by previous terrorist attacks. Section 137 of the *Evidence Act 1995* provides that a court must refuse to admit evidence if its probative value is outweighed by the danger of unfair prejudice against the defendant. Unfair prejudice refers to the risk that evidence may be used to make a decision on an improper, perhaps emotional, basis, such that it 'appeals to the fact-finder's sympathies, arouses a sense of horror, or provokes an instinct to punish'.⁴⁴ This can present difficulties in the prosecution of terrorism offences where proving that an accused sought to advance a political, religious or ideological cause can require the admission of prejudicial or highly subjective evidence, such as extremist religious views or anti-nationalistic sentiments.

The use of prejudicial evidence to prove the mental element of a terrorist act was considered by the NSW Supreme Court of Criminal Appeal (CCA) in the case of *Elomar*.⁴⁵ Five co-offenders were convicted of conspiracy to do an act in preparation for a terrorist act. One ground of appeal was that the trial judge erred in admitting evidence that the co-offenders were associated with a group of Islamic fundamentalists who were convicted of terrorism offences in Melbourne. It was argued that there was a real risk that the appellants would be prejudiced by the evidence of their association with the Melbourne group, and the jury would conflate their criminality with that of the Islamic fundamentalist group. The CCA ruled that the expressed attitudes of the leader of a terrorist group with whom the appellants associated and allegedly took religious guidance 'had the capacity to significantly affect the assessment of the probability of the existence of that fact. The evidence, therefore, had probative value to a significant degree'.⁴⁶ Whilst it is peculiar to tender the violent extremist views of one person to evince the state of mind of another, the legal threshold of the probative value outweighing the prejudicial effect means that such evidence is often admissible in terrorism trials.

43 Commonwealth of Australia, *National Counter-Terrorism Plan* (4th edn, Australia and New Zealand Counter-Terrorism Committee, 2017) 10.

44 *Papakosmas v The Queen* (1999) 196 CLR 297[97].

45 *Elomar v R*; *Hasan v R*; *Cheikho v R*; *Cheikho v R*; *Jamal v R* [2014] NSWCCA 303.

46 *Elomar* [2014] NSWCCA 303, 248.

In *Elomar*, there was also an objection to the tendering of 'gruesome imagery', including video footage of beheadings, photographs depicting dead bodies and footage of the September 11 attacks.⁴⁷ The trial judge permitted the admission of this evidence due to its high probative value, stating 'it will enable the jury to see, according to the Crown case, that the state of mind of the accused, both individually and as a group, has gone well beyond mere anger and outrage, beyond jubilation at the success of the 2001 destruction, to a point where it exults in the cruel humiliation and gross murder of innocent persons'.⁴⁸ While the inclusion of a motive element significantly increases the probative value of evidence which would have otherwise been excluded, the Courts retain an important discretion to mitigate the prejudicial effect of admissible evidence through procedural rulings and judicial directions. In this case, the quantity of material was restricted to playing only one of six executions, without the actual beheading and audio track to minimise unfair prejudice contrary to s.137 of the *Evidence Act 1995* and distress to the jury.⁴⁹ Furthermore, the judge gave directions to the jury as to how this evidence could be appropriately used in their deliberations and that its relevance was contained to assessing the state of mind of the accused. In the case of *Fattal*,⁵⁰ the appellant was convicted of conspiring to do acts in preparation for a terrorist act. The proposed terrorist act was to attack the Holsworthy Army Barracks by shooting as many soldiers as possible, and Fattal's involvement was to assess the susceptibility of the target. In support of the motive element, there was a substantial body of evidence, mostly intercepted telephone calls, proving that Fattal possessed a hatred for Australian 'kuffars' (non-believers) and institutions, particularly Australia's military involvement in the Middle East. Generally, the admission of evidence indicating an accused's hatred for a country and its citizens would be highly prejudicial as it can evoke an emotional response from the jury or sentencing judge. However, for terrorism offences, the evidence goes directly to an element of the offence. As with the *Elomar* case, the inclusion of this evidence is indeed prejudicial; however, not *unfairly*, so it warrants exclusion under Section 137 due to its high probative value in proving motive.

It is argued that the addition of a motive element to the definition of 'a terrorist act' creates a further hurdle for the prosecution, which can be difficult to prove because of its subjective nature. In the case of *AB*⁵¹, the accused faced two charges of doing an act in preparation for a terrorist act and using a telecommunications network with the intention to commit an offence. The accused was seventeen years of age and was diagnosed with an intellectual disability and Asperger's syndrome. The Crown alleged that AB published a series of posts on a website stating he intended to kill members of the public with a knife in a suicidal attack in a crowded area in Sydney. The Crown did not allege that AB planned his attack in association with any religious or political affiliation but rather wanted to make a statement about the mistreatment of persons with mental illness. In AB's bail application, Justice Beech-Jones considered the Crown case, noting, 'I have great difficulty in accepting that that material is capable of demonstrating an intention to advance a 'political, religious or ideological cause'.⁵² While AB's plan displayed the physical hallmarks of a terrorist act, namely indiscriminate violence on members of the public to advance a cause, it did not meet the

47 *Elomar* [2014] NSWCCA 303, 156.

48 *Elomar* [2014] NSWCCA 303, 419.

49 *Elomar* [2014] NSWCCA 303, 409.

50 *Fattal* [2013] VSCA 276.

51 *AB v Director of Public Prosecutions (Cth)* [2016] NSWSC 1042.

52 *AB* [2016] NSWSC 104 [226].

legislative requirement that the cause is ‘political, religious or ideological’. Whilst it may be arguable that raising awareness of mental health issues is a political issue, a broad interpretation of the motive element carries inherent dangers in the misuse of terrorism offences and disproportionate labelling, as discussed above.

VII. Constitutional challenges

The constitutional validity of the inclusion of a ‘political, religious or ideological cause’ in the definition of ‘a terrorist act’ has been challenged in Australia and abroad. Returning to the *Fattal* case, one ground of appeal was that the appellant El-Sayed had a constitutional right to freedom of religion under s.116 of the Commonwealth Constitution and thus was free to seek an Islamic fatwa to carry out a planned attack on the Holsworthy Army Barracks. It was held by the Victorian Supreme Court that s.116 of the Constitution does not confer absolute freedom of religion, and Parliament is acting within its constitutional authority to enact laws prohibiting the *violent* practice of religion if reasonably necessary for the protection of the community and the interests of social order.⁵³

This reasoning is echoed by the Canadian Supreme Court in the case of *Khawaja*.⁵⁴ Under the Canadian *Criminal Code*, section 83.01(1)(b)(i)(A) provides that terrorist activity must be ‘for a political, religious, ideological purpose, objective or cause’.⁵⁵ It was argued that this motive clause was an infringement of the freedom of expression encoded in s.2(b) of the *Canadian Charter of Rights and Freedoms*. The Supreme Court upheld the constitutional validity of the motive clause ruling that, while the prohibited terrorist activities are in a sense expressive, threats and acts of violence fall outside the protection of s.2(b) of the Charter.⁵⁶ A purposive interpretation of the *actus reus* and *mens rea* requirements of the terrorism legislation excludes liability for non-violent conduct that a reasonable person would view as capable of facilitating terrorist activity.⁵⁷ Furthermore, the secondary argument that the motive clause would encourage unfair profiling on the basis of ethnicity or religious belief was rejected by the Court. It was held that improper conduct by State actors and law enforcement agencies ‘cannot render what is otherwise constitutional legislation unconstitutional’,⁵⁸ and the provision is clearly drafted in a manner respectful of diversity, allowing for the non-violent expression of political, religious, or ideological views.

Conclusion

This article presents a discussion on the role of motive in terrorism offences and whether the definition of a ‘terrorist act’ under section 100.1 of the *Criminal Code* should include the intention to advance a political, religious or ideological cause. Contrary to the longstanding principle that motive is irrelevant in criminal liability, it is argued that the motive element behind terrorism offences is what makes it distinctly wrongful. By delineating a moral distinction between terrorism offences and other crimes which share the same *actus reus* (such as murder), it is argued that the exclusion of motive would defeat the declaratory function of the criminal law to signify the use of violence for political, religious or ideological purposes as a discrete public wrong.

However, in light of the strong social stigma and legal sanctions attached to the terrorist label, careful consideration must be given to the principle of fair labelling when defining ‘a terrorist act’. Fair labelling demands that offenders be labelled and punished in proportion to the degree of wrongdoing. In order to fairly label terrorism offences, the inclusion of a motive provides a clear indication of the degree of wrongdoing and, consequently, the level of legal and social sanctions which should be imposed on the offender. Furthermore, the strong political and moral judgment attached to the ‘terrorist’ label means that the term can be subject to misuse. The added specificity of a motive element in the definition of a terrorist act can prevent the misappropriation of the label.

Whilst this article ultimately supports the inclusion of a motive in the definition of ‘a terrorist attack’, there are clear evidential issues arising from the onus on the prosecution to prove the accused intended to advance a political, religious or ideological cause beyond a reasonable doubt. The motive element significantly broadens the scope of admissible evidence that would otherwise be impermissible, such as the accused’s religious beliefs or hatred for their country. Consequently, the admission of evidence to establish motive must be balanced against conventional safeguards in criminal procedure to protect the fairness of the trial and integrity of the criminal trial, such as the exclusion of prejudicial evidence under Section 137 of the *Evidence Act*. Finally, the motive element under section 100.1 is constitutionally valid as it does not violate the freedom of religion under section 116 of the Commonwealth Constitution and only prohibits the advancement of a religious cause through *violent* means. Ultimately, it is imperative that terrorism is carefully defined with reference to a clear motive element to accurately distinguish it from other types of offences and serve the criminal law’s declaratory function of communicating to offenders and society what makes terrorism distinctively wrongful.

⁵³ *Fattal* [2013] VSCA 276 [126] – [127].

⁵⁴ *Khawaja v The Queen*, 2012 SCC 69.

⁵⁵ *Criminal Code* (Canada), RSC 1985, s. 83.01(1)(b)(i)(A).

⁵⁶ *Khawaja* (n 54) 7.

⁵⁷ *Khawaja* (n 54) 6.

⁵⁸ *Khawaja* (n 54) 47.