

PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

Review of 'Declared Areas' Provisions

Sections 119.2 and 119.3 of the Criminal Code

Parliamentary Joint Committee on Intelligence and Security

© Commonwealth of Australia

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Membership of the Committee

Chair

Mr Andrew Hastie MP (until 22/12/2020)

Senator James Paterson (from 04/02/2021)

Deputy Chair

Hon Anthony Byrne MP

Members

Senator the Hon Eric Abetz

Dr Anne Aly MP (from 03/09/2020)

Hon Mark Dreyfus QC MP

Senator the Hon David Fawcett

Ms Celia Hammond MP (from 03/02/2021)

Senator the Hon Kristina Keneally

Mr Julian Leeser MP

Senator Jenny McAllister

Senator Amanda Stoker (until 22/12/2020)

Mr Tim Wilson MP

Terms of Reference

Section 29(1)(bb)(iii) of the Intelligence Services Act 2001 requires the Parliamentary Joint Committee on Intelligence and Security to review, by 7 January 2021, the operation, effectiveness and implications of sections 119.2 and 119.3 of the Criminal Code and any other provision of the Criminal Code Act 1995 as far as it relates to those sections.

Abbreviations

AFP	Australian Federal Police
AGD	Attorney-General's Department
AHRC	Australian Human Rights Commission
ASIO	Australian Security Intelligence Organisation
CDPP	Commonwealth Director of Public Prosecutions
COVID-19	SARS-COVID-2 virus
DFAT	Department of Foreign Affairs and Trade
Foreign Fighters Bill	Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014
Home Affairs	Department of Home Affairs
ICCPR	International Covenant on Civil and Political Rights
INSLM	Independent National Security Legislation Monitor
PJCIS	Parliamentary Joint Committee on Intelligence and Security
UK	United Kingdom

List of Recommendations

Recommendation 1

- 2.44 The Committee recommends that section 119.2 and 119.3 of the *Criminal Code Act 1995* be extended a further three years, with a new sunset date of 7 September 2024.

Recommendation 2

- 2.45 The Committee recommends that the *Criminal Code Act 1995* be amended to provide that the Parliamentary Joint Committee on Intelligence and Security *may* review the operation, effectiveness and proportionality of the ‘declared areas’ provisions prior to the new sunset date.

Recommendation 3

- 2.48 The Committee recommends that, within 18 months of tabling this report, the Parliamentary Joint Committee on Intelligence and Security receive a briefing, from relevant government agencies on the use, proportionality and effectiveness of provisions 119.2 and 119.3 of the *Criminal Code Act 1995*.

Recommendation 4

- 2.56 The Committee recommends that the *Criminal Code Act 1995* be amended to allow Australian citizens to request an exemption from the Minister for Foreign Affairs to travel to a declared area for reasons not listed in section 119.2, but which are not otherwise illegitimate under Australian Law.

The Committee recommends that the Minister for Foreign Affairs’ decision is not subject to merit review.

1. Introduction and Background

- 1.1 Section 119.2 of the *Criminal Code Act 1995* makes it an offence to enter, or remain in, an area in a foreign country that is declared by the Minister for Foreign Affairs under section 119.3 of the Criminal Code.
- 1.2 Sections 119.2 and 119.3 (the ‘declared area’ provisions) were added to the Criminal Code in November 2014, following the passage of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Foreign Fighters Bill).
- 1.3 To date, the following two areas have been declared:
 - al-Raqqa Province, Syria (on 4 December 2014). The declaration for al-Raqqa Province was revoked by the Minister of Foreign Affairs on 27 November 2017.
 - Mosul district, Ninewa Province, Iraq (on 2 March 2015 and re-declared on 2 March 2018). The declaration for Mosul district was revoked by the Minister for Foreign Affairs on 19 December 2019.
- 1.4 The Parliamentary Joint Committee on Intelligence and Security (the Committee) is required, under subparagraph 29(1)(bb)(iii) of the *Intelligence Services Act 2001*, to review, by 7 January 2021, the operation, effectiveness and implications of sections 119.2 and 119.3 of the Criminal Code (which provide for declared areas in relation to foreign incursion and recruitment).
- 1.5 Unless extended by the Parliament, section 119.2 will cease to have effect at the end of 7 September 2021.

Conduct of the Inquiry

- 1.6 The Chair of the Committee, Mr Andrew Hastie MP, announced the review by media release on 18 June 2020 and invited written submissions from members of the public.
- 1.7 The Committee received ten submissions and two supplementary submissions from the Government, academia, and other stakeholders. A list of submissions received by the Committee is at Appendix A.
- 1.8 The Committee held one public hearing on 22 September 2020. A list of witnesses who appeared before the Committee is included at Appendix B.
- 1.9 Copies of unclassified submissions and transcripts of public hearings can be accessed on the Committee's website at www.aph.gov.au/pjcis.

Overview of the Declared Areas provisions of the Criminal Code

Section 119.2 – Entering into, or remaining in, declared areas

- 1.10 Section 119.2(1) of the Criminal Code provides the following:
 - (1) A person commits an offence if:
 - (a) the person enters, or remains in, an area in a foreign country; and
 - (b) the area is an area declared by the Foreign Affairs Minister under section 119.3; and
 - (c) when the person enters the area, or at any time when the person is in the area, the person:
 - (i) is an Australian citizen; or
 - (ii) is a resident of Australia; or
 - (iii) is a holder under the Migration Act 1958 of a visa; or
 - (iv) has voluntarily put himself or herself under the protection of Australia.
- 1.11 The offence carries a maximum penalty of imprisonment for 10 years.
- 1.12 The declared area offence does not apply if the person enters, or remains in, an area solely for one or more of the following 'legitimate purposes':

- a. providing aid of a humanitarian nature;
- b. satisfying an obligation to appear before a court or other body exercising judicial power;
- c. performing an official duty for the Commonwealth, a State or a Territory;
- d. performing an official duty for the government of a foreign country or the government of part of a foreign country (including service in the armed forces of the government of a foreign country), where that performance would not be a violation of the law of the Commonwealth, a State or a Territory;
- e. performing an official duty for:
 - i) the United Nations or an agency of the United Nations;
 - ii) the International Committee of the Red Cross
- f. making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist;
- g. making a bona fide visit to a family member;
- h. any other purpose prescribed by the regulations.¹

1.13 The offence also does not apply if a person enters, or remains in, an area solely in the course of, and as part of, the person's service with the armed forces of a foreign government or any other armed force declared by the Minister.² Further, the offence does not apply to conduct engaged in by 'a person acting in the course of the person's duty to the Commonwealth in relation to the defence or international relations of Australia'.³

1.14 The defendant bears an evidential burden in relation each of the above exceptions.

¹ *Criminal Code Act 1995*, section 119.2(3).

² *Criminal Code Act 1995*, section 119.2(4).

³ *Criminal Code Act 1995*, section 119.9.

- 1.15 The consent of the Attorney-General is required for any prosecution.⁴ However, a person can be charged, a warrant issued for their arrest, be remanded in custody, or on bail under the declared areas provisions.⁵

Section 119.3 – Declaration of areas for the purpose of section 119.2

- 1.16 Section 119.3(1) of the Criminal Code provides the following:

The Foreign Affairs Minister may, by legislative instrument, declare an area in a foreign country for the purposes of section 119.2 if he or she is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country.

- 1.17 For the purpose of subsection (1), a ‘listed terrorist organisation’ is an organisation, specified by regulations under section 102.1 of the Criminal Code, that the Minister is satisfied on reasonable grounds

a. is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or

b. advocates the doing of a terrorist act.⁶

- 1.18 Listings of terrorist organisations are subject to review by the Committee within the parliamentary disallowance period and cease to have effect after three years (if not re-listed).⁷

- 1.19 The term ‘engage in a hostile activity’ is defined in section 117.1 as follows:

a person engages in a hostile activity in a foreign country if the person engages in conduct in that country with the intention of achieving one or more of the following objectives (whether or not such an objective is achieved):

(a) the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country);

(b) the engagement, by that or any other person, in action that:

⁴ *Criminal Code Act 1995*, section 119.11.

⁵ Department of Foreign Affairs and Trade, Department of Home Affairs, Attorney-General’s Department, Australian Security and Intelligence Organisation, Australian Federal Police, and Commonwealth Director of Public Prosecutions (hereafter referred to as DFAT et al), *Submission 6*, p. 7.

⁶ *Criminal Code Act 1995*, section 102.1(2). See also sections 117.1(1) and 100.1(1).

⁷ *Criminal Code Act 1995*, section 102.1(3) and section 102.1A.

(i) falls within subsection 100.1(2) but does not fall within subsection 100.1(3);
and

(ii) if engaged in in Australia, would constitute a serious offence;

(c) intimidating the public or a section of the public of that or any other foreign country;

(d) causing the death of, or bodily injury to, a person who is the head of state of that or any other foreign country, or holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country);

(e) unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country).⁸

- 1.20 A declaration by the Foreign Affairs Minister must not cover an entire country; however, a single declaration may cover areas in two or more foreign countries.⁹ Before making a declaration, the Foreign Affairs Minister must arrange for the Leader of the Opposition to be briefed in relation to the proposed declaration.¹⁰
- 1.21 A declaration by the Foreign Affairs Minister ceases to have effect after three years.¹¹
- 1.22 Section 119.3(5) provides that, if the Foreign Affairs Minister ceases to be satisfied that a listed terrorist organisation is engaging in a hostile activity in a declared area, the Minister must revoke the declaration.
- 1.23 Section 119.3(7) provides that the Committee may review a declaration and report to the parliament before the end of the parliamentary disallowance period (15 sitting days after the declaration is tabled).¹² In addition, section 119.3(8) provides that the Committee may review a declaration and report to parliament any time while the declaration is in effect.¹³

⁸ *Criminal Code Act 1995*, subsection 117.1.

⁹ *Criminal Code Act 1995*, subsections 119.3(2) and (2A).

¹⁰ *Criminal Code Act 1995*, section 119.3(3).

¹¹ *Criminal Code Act 1995*, section 119.3(4).

¹² *Criminal Code Act 1995*, section 119.3(7).

¹³ *Criminal Code Act 1995*, section 119.3(8).

Previous reviews

2014 PJCIS Advisory Report

- 1.24 The Committee first reviewed the ‘declared areas’ provisions in 2014. The Committee’s findings and recommendation were recorded in the Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, and tabled on 17 October 2014.
- 1.25 The Committee made four recommendations in relation to the ‘declared areas’ provisions, which were all agreed by the Government and implemented through amendments to the Bill. These recommendations were:
- That the proposed provision subsection 119.3(2)(b), which explicitly enabled the Minister to declare an entire country for the purposes of prohibiting persons from entering or remaining, in that country, be removed from the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014.
 - That the Foreign Fighters Bill be amended to insert a clause that enables the PJCIS to conduct a review of the declaration made under proposed section 119.3, within the disallowance period for each declaration.
 - That the sunset provisions be reduced from ten years to two years after the next federal election (which resulted in the sunset date of 7 September 2018).
 - That the *Intelligence Services Act 2001* be amended to require the PJCIS to complete a public inquiry into the ‘declared areas’ provisions 18 months after the next federal election.¹⁴
- 1.26 The report further recommended that the Independent National Security Legislation Monitor (INSLM), review the provisions 12 months after the next federal election.¹⁵

2017 INSLM Review

- 1.27 The Independent National Security Legislation Monitor (INSLM) published his report on the declared areas provisions on 7 September 2017. The INSLM

¹⁴ Parliamentary Joint Committee on Intelligence and Security (PJCIS), Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 17 October 2014, pp. xv - xvi.

¹⁵ Parliamentary Joint Committee on Intelligence and Security (PJCIS), Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 17 October 2014, p. xvi.

recommended that the provisions be continued, and in the case of a positive review from the PJCIS in 2018, be extended for a further five years.¹⁶ The INSLM recommended that a declaration may be reviewed by the PJCIS at its discretion at any time prior to the declaration ceasing to have effect or being revoked by the Minister for Foreign Affairs.¹⁷

- 1.28 The INSLM further recommended that members of the public be allowed to seek permission from the Minister for Foreign Affairs to enter or remain in declared areas outside of the listed exceptions.¹⁸ This recommendation was not supported by the government.¹⁹

2018 PJCIS Review

- 1.29 The most recent PJCIS review into declared areas provisions was announced on 10 August 2017 and the report published on 1 March 2018. The Committee made five recommendations, including:
- 1 that the provisions be continued for a further period of three years.
 - 2 that the provisions be amended to include humanitarian work beyond direct aid as an exception to the offence of entering or remaining in declared areas.²⁰
 - 3 that the key non-legislative factors that are considered by ASIO to guide and prioritise the selection of areas in foreign countries for consideration be specifically addressed in the unclassified Statement of Reasons that is provided to the Minister and made publicly available in relation to each declared area.
 - 4 that section 119.3 of the Criminal Code be amended to provide that the Minister for Foreign Affairs may revoke a declaration at any time.
 - 5 that the Government implement the Independent National Security Legislation Monitor's recommendation to empower the Committee to review and report back to the Parliament on any declaration made

¹⁶ 'Commonwealth of Australia, Independent National Security Legislation Monitor, *Declared Areas*,' p. 38.

¹⁷ 'Commonwealth of Australia, Independent National Security Legislation Monitor, *Declared Areas*,' p. 38.

¹⁸ 'Commonwealth of Australia, Independent National Security Legislation Monitor, *Declared Areas*,' p. viii.

¹⁹ DFAT et al, Submission 6, p. 11.

²⁰ PJCIS, Review of the 'declared areas' provisions, February 2018, p. xi.

under section 119.3 of the Criminal Code at its discretion 'at any time prior to the declaration ceasing to have effect or being revoked by the Minister'.²¹

1.30 The government supported recommendations one, four and five, and supported in principle recommendations two and three.²²

1.31 In May 2018, the Government introduced the Counter-Terrorism Legislation Amendment Bill (No. 1) 2018 which, among other things, implemented Recommendations 1 (in full), 2 (in part), 4 (in full) and 5 (in full) of the Committee's 2018 report. It did so by amending:

- 1 subsection 119.2(6) of the Criminal Code to change the sunset date from "7 September 2018" to "7 September 2021" (Recommendation 1);
- 2 paragraph 119.2(3)(e) of the Criminal Code to include the performance of an official duty for the International Committee of the Red Cross as a new exception to the offence of entering or remaining in declared areas (Recommendation 2);
- 3 subsection 119(3)(6) of the Criminal Code to empower the Minister for Foreign Affairs to revoke a declaration at any time (Recommendation 4); and
- 4 subsection 119.3(7) of the Criminal Code to empower the Committee to review and report back to the Parliament on any declaration made under section 119.3 (Recommendation 5).

In respect of Recommendation 3 of the Committee's 2018 report, the Committee heard evidence that agencies, including the Department of Home Affairs and the Department of Foreign Affairs and Trade, were still in the process of "revising the protocol around"²³ the issues referred to in that recommendation.

²¹ PJCIS, Review of the 'declared areas' provisions, February 2018, p. xii.

²² DFAT et al, *Submission 6*, p. 13 - 15.

²³ Mr Richard Feakes, Deputy Counter-Terrorism Co-ordinator, Department of Home Affairs, *Committee Hansard*, 22 September 2020, Canberra, p. 30.

PJCIS Reviews into declarations

- 1.32 Both of the declarations (and the re-declaration of Mosul) made under the provisions to date—al-Raqqa Province in Syria and Mosul District in Ninewa Province, Iraq—were reviewed and supported by the Committee.²⁴

²⁴ PJCIS, *Review of the declaration of al-Raqqa province, Syria*, March 2015; PJCIS, *Review of the declaration of Mosul district, Ninewa province, Iraq*, May 2015; PJCIS, *Review of the re-declaration of Mosul district, Ninewa province, Iraq*, June 2018.

2. The Committee's Review

- 2.1 In fulfilling its obligation to review the operation, effectiveness and implications of the 'declared areas' provisions, the Committee considered the following matters:
- the current and evolving international security threat environment;
 - the purpose of, and the necessity for, the provisions;
 - the operation and effectiveness of the provisions, with reference to their usage to date and their deterrent effect;
 - the intersection of the provisions with human rights and civil liberties; and
 - proposed additional exceptions for legitimate travel to declared areas.
- 2.2 In conducting its review, the Committee also took into account the current and future uncertain geopolitical environment exacerbated by the COVID-19 global pandemic. The Committee acknowledges that global recessions, political tension and the eventual reversal of travel preventions could very quickly have an effect on the global threat environment. The Committee has taken this into account when making recommendations.

Current and evolving security threat

- 2.3 Government agencies stated that the current level of terrorism remained at 'probable', where it has sat since 2014.¹
- 2.4 According to the Australian Security Intelligence Organisation (ASIO), the volatility in the security environment globally is increasing. ASIO believes that the threat environment is potentially being exacerbated by COVID-19 in

¹ Ms Heather Cook, Deputy Director – General, ASIO, *Committee Hansard*, 22 September 2020, Canberra, p. 14.

terms of the isolation, economic downturn, and the ability of groups to mobilize in this period. ASIO remains concerned that there are circumstances where a prescribed terrorist organisation could occupy and carry out hostilities in an ungoverned space.²

- 2.5 ASIO noted terrorist hotspots which could see an increase in activity going forward. These areas include Libya, Yemen, Somalia, the Philippines, as well as the Middle East more generally. Further, ASIO is concerned about the rise of far-right extremist ideologies and are closely monitoring whether or not groups meet the criteria to be prescribed as terrorist organisations under the current legislation.³
- 2.6 Despite COVID-19 border restrictions limiting movement of people, according to the relevant Government Agencies, the declared areas provisions are still necessary in the current global strategic context. The nominal defeat of the Islamic State Caliphate in Syria and Iraq has not reduced the ongoing threat from foreign terrorist fighters to the Australian community.⁴

Purpose and necessity

- 2.7 The Deputy Counter-Terrorism Co-ordinator, Department of Home Affairs, stated that the declared areas provisions allow for the prosecution of foreign terrorist fighters and their associates on their return to Australia, where it can be proven that the person was in a specified region without legitimate reasons, where listed terrorist organisations were engaged in hostile activities.⁵
- 2.8 The Deputy Counter-Terrorism Co-ordinator further stated that the provisions also act as a potential deterrent to prevent Australians from

² Ms Heather Cook, Deputy Director – General, ASIO, *Committee Hansard*, 22 September 2020, Canberra, p. 15.

³ Ms Heather Cook, Deputy Director – General, ASIO, *Committee Hansard*, 22 September 2020, Canberra, p. 15.

⁴ Department of Foreign Affairs and Trade, Department of Home Affairs, Attorney-General's Department, Australian Security and Intelligence Organisation, Australian Federal Police, and Commonwealth Director of Public Prosecutions (hereafter referred to as DFAT et al), *Submission* 6, p. 4.

⁵ Mr Richard Feakes, Deputy Counter-Terrorism Coordinator, Department of Home Affairs, *Committee Hansard*, 22 September 2020, Canberra, p. 26.

travelling to areas where terrorist organisations are active, unless they have a legitimate purpose to do so.⁶

2.9 In its submission, the Australian Federal Police (AFP) stated that:

The offences continue to form a necessary part of the suite of powers available to the AFP and law enforcement partners to combat terrorism. The AFP considers that the provisions should be retained.⁷

2.10 ASIO assessed that since 2012, approximately 230 Australians travelled to Syria and Iraq to engage in activity in support of either the Islamic State or other groups. ASIO believed 100 of that number are deceased, 40 have returned and approximately 80 remain in the area including in detention camps.⁸

2.11 The Government submission stated that Australians currently or previously in the conflict zones may seek to return to Australia either directly or by transiting through third countries. These individuals may return with enhanced capabilities which could be used to facilitate or support terrorist acts in Australia.⁹

2.12 The Government submission acknowledged that the use of offence provisions under section 119.2 of the criminal code has been limited. However, they argued it is a necessary part of the countering terrorism toolkit, as it allows for prosecution of suspected terrorists in circumstances where it is challenging to collect evidence relating to intention elements. This is often a challenge in conflict zones.¹⁰

2.13 The Deputy Director of the Commonwealth Director of Public Prosecutions (CDPP) noted that a revocation of the declared areas provisions would not prevent prosecution of cases where the person was deemed to illegitimately be in a declared area while the provisions were in force.¹¹

⁶ Mr Richard Feakes, Deputy Counter-Terrorism Coordinator, Department of Home Affairs, *Committee Hansard*, 22 September 2020, Canberra, p. 26.

⁷ Australian Federal Police, *Submission 4*, p. 6.

⁸ Ms Heather Cook, Deputy Director – General, Australian Security and Intelligence Organisation (ASIO), *Committee Hansard*, 22 September 2020, Canberra, p. 14.

⁹ DFAT et al, *Submission 6*, p. 4.

¹⁰ DFAT et al, *Submission 6*, p. 4.

¹¹ Mr Scott Bruckard, Deputy Director, Commonwealth Director of Public Prosecutions, *Committee Hansard*, Canberra 22 September 2020, p.20.

- 2.14 The above fact is one of the reasons why the Law Council of Australia and the Australian Human Rights Commission (AHRC) asserted that the declared areas provisions should be allowed to sunset.
- 2.15 While the Law Council and the AHRC did not oppose, in principle, “the enactment of laws that place some limitations on the freedom of movements of individual Australians, to prevent people from engaging in terrorism-related activities in foreign countries,” they did not agree that the declared areas offence was necessary or proportionate enough to warrant its continuation.¹²

Operation and effectiveness

- 2.16 To date, there has been one charge made under the section 119.2 offence provisions. This person was not ultimately prosecuted for the offence as he pleaded guilty to an offence under section 119.1 of the *Criminal Code Act 1995* which carried a higher penalty.
- 2.17 According to the CDPP, the offender pled guilty to a section 119.1 offence relating to engaging in hostile activities. As this offence resulted in more serious penalties, he was ultimately not convicted of the declared areas charge.¹³
- 2.18 As of August 2020, the AFP had 20 outstanding arrest warrants that included a charge of entering or remaining in a declared area. All of those warrants related to individuals who remained overseas. The AFP advised the Committee that it knew where all of the subjects of the 20 warrants were located, that they were predominately in Syria and that most of them were in detention.¹⁴
- 2.19 The Deputy Commissioner of Investigations in the AFP stated that there are eight arrest warrants in place for persons that may return from conflict zones, where the only charge able to be listed is entering into or remaining in, a declared area.¹⁵

¹² Law Council of Australia, *Submission 2*, p. 5.

¹³ Mr Scott Bruckard, Deputy Director, Commonwealth Director of Public Prosecutions, *Committee Hansard*, Canberra, 22 September 2020, p.18.

¹⁴ Deputy Commissioner Ian McCartney, Investigations, Australian Federal Police, *Committee Hansard*, Canberra, 22 September 2020, p. 21–22.

¹⁵ Deputy Commissioner Ian McCartney, Investigations, Australian Federal Police, *Committee Hansard*, Canberra, 22 September 2020, p.19.

2.20 All these instances could be prosecuted regardless of whether the provisions remain in place going forward. As such, there has been some discussion of whether the provisions are now redundant in the wake of similar and more recently introduced counter terrorism powers.

2.21 The President of the Law Council of Australia stated, if the intention is to capture criminal and terrorist activity, as opposed to innocent activity, there are sufficient other laws in place:

There are a range of new preventative and disruptive powers that have been brought into play since the enactment of the declared areas regime in 2014. Taken together all of those would mean that the declared areas regime is neither necessary nor proportionate.¹⁶

2.22 As an example, the Law Council noted that the ability to cancel passports and travel documents on the basis of a reasonable suspicion someone may be intending to travel to a conflict zone to engage in hostile activities.¹⁷

2.23 In conclusion, the Law Council reiterated:

It's simply a redundant law that doesn't achieve its goals and criminalises a large number of activities that aren't intended to be criminalised, with the only fall back being that we wouldn't prosecute them, even though there's all the activity that is criminalised.¹⁸

2.24 The International Commission of Jurists Victoria agreed with the Law Council of Australia, and submitted that the foreign incursion offences under section 119.1 and 119.4 of the Criminal Code Act, and the membership or support provisions in Part 5.3 Division 3 address the same intended criminal activities and serve the same preventative function as the declared areas provisions.¹⁹

2.25 The Australian Federal Police (AFP) said that the declared areas provisions are not redundant. According to the AFP, the provisions allow a person returning from a declared area to be charged with the offences when they are assessed to be a threat to the community, but where it has been difficult

¹⁶ Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, Canberra 22 September 2020, p.4.

¹⁷ Ms Pauline Wright, President, Law Council of Australia, *Committee Hansard*, Canberra 22 September 2020, p.4.

¹⁸ Mr Richard Wilson SC, Co-Chair, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, Canberra 22 September 2020, p.4.

¹⁹ International Commission of Jurists Victoria, *Submission 5*, p. 6.

to obtain evidence that would result in a charge or prosecution for a more serious offence.²⁰

Civil liberties and human rights

- 2.26 A concern for non-government inquiry participants was the impact the offence provisions have on various freedoms, and it may criminalise otherwise legitimate actions.
- 2.27 Dr Nicola McGarrity and Professor George Williams AO, from UNSW Sydney, stated that the declared areas offence makes a considerable incursion into Human Rights.²¹ According to the academics, the limited use of section 119.2, and the fact that the only charge under the provisions was not ultimately prosecuted, means that the impact on civil liberties is neither proportionate nor necessary.
- 2.28 The academics noted that the provisions are meant to deter travel with the intention of joining a terrorist organisation or commit a hostile offence. However, they stated that the provisions go further, and criminalise the mere act of travel, without the proof of engagement, or intention to engage, with extremism in any form.²²
- 2.29 The AHRC agreed that the criminalisation of freedom of movement without having committed any other offence is not sufficiently justified in the case of the section 119.2 provisions.²³
- 2.30 As such, the AHRC believed the provision may infringe impermissibly on article 12 of the International Covenant on Civil and Political Rights (ICCPR) (freedom of movement) and on other rights such as the right to family life, which is protected by article 23 of the same charter.²⁴

Proposed exemptions

- 2.31 When considering proposed additions to the list of exceptions, the Attorney-General's Department stated that careful consideration would need to be

²⁰ Deputy Commissioner Ian McCartney, Investigations, Australian Federal Police, *Committee Hansard*, Canberra 22 September 2020, p.19.

²¹ Dr Nicola McGarrity and Professor George Williams AO, *Submission 1*, p. 3.

²² Dr Nicola McGarrity and Professor George Williams AO, *Submission 1*, p. 4.

²³ Australian Human Rights Commission, *Submission 3*, p. 4.

²⁴ Australian Human Rights Commission, *Submission 3*, p. 4.

given to ensure new exceptions do not risk undermining the objective of the offence. The Department defined this purpose as deterring travel unless absolutely necessary.²⁵

- 2.32 In his September 2017 report, the Independent National Security Legislation Monitor (INSLM) recommended that consideration be given to allowing individuals to “seek permission from the Minister for Foreign Affairs to enter into and remain in a declared area for such a period and on such conditions as the minister may choose to impose.”²⁶ As such, while the INSLM suggested a permission system in his report in 2017, other organisations to this inquiry suggested expansions to the list of the legitimate exceptions.
- 2.33 The Law Council’s primary recommendation was that the provisions should be allowed to sunset in 2021. However, should that not be agreed to, it proposed two additional exceptions: where a person travels to, or remains in, a declared area for the purposes of a bona fide, necessary and urgent business to protect legitimate businesses; and for providing legal advice to an Australian detained in a declared area.²⁷
- 2.34 The Attorney Generals Department’s view was that there would be difficulties incorporating these two proposed exceptions in an appropriately limited way to ensure that the offence continues to achieve its intended effect, while ensuring clarity as to its operation for potential travellers and the courts.²⁸
- 2.35 According to the Attorney General’s Department, they, alongside relevant agencies, “will continue to consider the need for additional exceptions at such time when it becomes apparent that there are further legitimate reasons for travel to a declared area, that are not addressed by the existing exceptions.”²⁹
- 2.36 The Law Council of Australia expressed the concern that the narrow scope of the exemptions are disproportionate to the breadth of the offence,

²⁵ Attorney-General’s Department, *Submission 7*, p. 2.

²⁶ ‘Commonwealth of Australia, Independent National Security Legislation Monitor, Declared Areas,’ September 2017, p. 38.

²⁷ Attorney-General’s Department, *Submission 7*, p. 2.

²⁸ Attorney-General’s Department, *Submission 7*, p. 2.

²⁹ Attorney-General’s Department, *Submission 7*, p. 3.

especially as there are significant numbers of Australians with connections to countries that could be subject to a declaration under schedule 119.3.

- 2.37 The Law Council stated that offences under section 119.2 may conflict with Article 14(2) of the ICCPR which provides for the presumption of innocence as part of the right to a fair trial. According to the Law Council, the provisions place a possibly insurmountable evidential burden on the defendant to ‘prove a negative’ in the context of a limited exception in a foreign conflict zone.³⁰
- 2.38 The United Kingdom’s (UK) designated area provisions came into effect from 12 April 2019. The provisions allow the Foreign Secretary to designate an area outside the UK that is associated with a risk of terrorism. This makes it an offence for UK nationals to enter a designated area without a reasonable excuse, or for a non-exempt purpose.³¹
- 2.39 Unlike the Australian provisions, the UK legislation permits travel to visit a terminally ill relative, attend a funeral; provide care for a family member or another reasonable excuse. The provisions are not retrospective so will therefore be used for future conflicts.³²

Committee comment

- 2.40 The possible economic and security fall outs from COVID-19 mean that the Committee is disinclined to allow a provision to sunset at a time when international borders may be reopening.
- 2.41 While the Committee acknowledges the limited use of the offence and the fact that there are no current declared areas, the Committee believes it would not be prudent to repeal these provisions during a period of great uncertainty.
- 2.42 As such, Committee recommends extending the life of the provisions by a further three year period, to sunset on 7 September 2024, and that the Committee *may* review the operation, effectiveness and proportionality of the provisions by 7 January 2024.

³⁰ Law Council of Australia, *Submission 2*, p. 18.

³¹ Attorney-General’s Department et al, *Submission 6*, p. 16.

³² Attorney-General’s Department et al, *Submission 6*, p. 16.

- 2.43 This will allow for reassessment of the provisions after the geopolitical, economic and political outcomes of COVID-19 begin to be felt, which should provide clarity on whether these provisions remain a necessary measure.

Recommendation 1

- 2.44 **The Committee recommends that section 119.2 and 119.3 of the *Criminal Code Act 1995* be extended a further three years, with a new sunset date of 7 September 2024.**

Recommendation 2

- 2.45 **The Committee recommends that the *Criminal Code Act 1995* be amended to provide that the Parliamentary Joint Committee on Intelligence and Security *may* review the operation, effectiveness and proportionality of the ‘declared areas’ provisions prior to the new sunset date.**
- 2.46 The Committee notes the evidence received from civil society organisations regarding the proportionality of the ‘declared areas’ provisions and the government’s response that these provisions remain an important measure to combat threats.
- 2.47 Therefore, the Committee would welcome the government providing a briefing to the Committee within 18 months of the tabling of this report on the proportionality and necessity of provisions 119.2 and 119.3 of the *Criminal Code Act 1995*.

Recommendation 3

- 2.48 **The Committee recommends that, within 18 months of tabling this report, the Parliamentary Joint Committee on Intelligence and Security receive a briefing, from relevant government agencies on the use, proportionality and effectiveness of provisions 119.2 and 119.3 of the *Criminal Code Act 1995*.**

Permits to travel to a declared area

- 2.49 Following recommendations in the INSLM’s 2017 Report, the Committee believes there is merit in implementing a regulation under the provisions allowing Australian Citizens to apply to the Minister for Foreign Affairs for permission to travel to a declared area in special circumstances.

- 2.50 These exemptions could be applied for reasons that are otherwise legitimate under Australian law, but are not prescribed exceptions under section 119.2, for example, assisting an elderly family member to relocate out of a conflict zone.
- 2.51 This may remove the need to extend the exceptions, and allow the government to consider applications based on merit and a relevant security threat assessment, allowing more oversight of Australians overseas in potentially dangerous situations than for which the legislation currently provides.
- 2.52 In the cross-agency submission, the Government Agencies noted that declared areas are also ‘do not travel’ zones, and permitting travel in this way would be contrary to the Governments own policy.³³ Further, the agencies noted that there would be significant practical difficulty in monitoring compliance.
- 2.53 The Committee considers providing an avenue for people, with legitimate reasons to travel, to request an exemption upon which the Minister for Foreign Affairs could decide to impose conditions (for example, regular contact with the closest embassy), would likely be significantly easier to manage than people traveling to a declared area under a current exception. If an applicant with an approval permit does not comply with the terms of their exemption, they could also be charged under section 119.2 or other relevant offence provision.
- 2.54 Further, the Minister for Foreign Affairs, on advice from the Attorney-General and the Minister for Home Affairs, would have the ability to reject an application based on the reason or security situation in the area where travel is intended.
- 2.55 The Committee considers this method of providing individual exceptions to travel would be less burdensome than trying to list every possible reason a person may legitimately need to travel to a declared area. The Committee believes regular applications would be unlikely, as there are no current declared areas, and unlikely to be any in the near future, given COVID-19 restrictions on travel.

³³ DFAT et al, *Submission 6*, pp. 11-12.

Recommendation 4

- 2.56** The Committee recommends that the *Criminal Code Act 1995* be amended to allow Australian citizens to request an exemption from the Minister for Foreign Affairs to travel to a declared area for reasons not listed in section 119.2, but which are not otherwise illegitimate under Australian Law.

The Committee recommends that the Minister for Foreign Affairs' decision is not subject to merit review.

Senator James Paterson

Chair

18 February 2021

A. List of Submissions

- 1 Dr Nicola McGarrity, Professor George Williams AO
- 2 Law Council of Australia
 - 2.1 Supplementary to submission 2
- 3 Australian Human Rights Commission
- 4 Australian Federal Police
- 5 International Commission of Jurists (Victoria)
- 6 AGD, AFP, DFAT, ASIO, Department of Home Affairs, CDP
- 7 Attorney-General's Department
- 8 Department of Home Affairs
 - 8.1 Supplementary to submission 8
- 9 Australian Federal Police
- 10 Australian Security Intelligence Organisation (Classified)

B. List of Witnesses at Public Hearings

Tuesday, 22 September 2020

Committee Room 2R1

Parliament House

Canberra

Law Council of Australia

- Ms Pauline Wright, President
- Mr Richard Wilson SC, Co-Chair, National Criminal Law Committee
- Dr Natasha Molt, Director of Policy, Policy Division

Australian Human Rights Commission

- Mr Edward Santow, Human Rights Commissioner
- Mr John Howell, Director, Human Rights Scrutiny

Australian Federal Police

- Deputy Commissioner Ian McCartney, Investigations
- Assistant Commissioner Scott Lee, Counter Terrorism and Special Investigations

Australian Security Intelligence Organisation

- Ms Heather Cook, Deputy Director-General, Intelligence Service Delivery

Commonwealth Director of Public Prosecutions

- Mr Scott Bruckard, Deputy Director (Via Teleconference)

Attorney-General's Department

- Mr Andrew Walter, First Assistant Secretary, Integrity and Security
- Ms Ayesha Nawaz, Assistant Secretary, Security Law and Policy
- Mr Tom Sharp, Director, Counter-Terrorism Legislation Section

Department of Foreign Affairs and Trade

- Ms Suzanne McCourt, Assistant Secretary, Sanctions Crime and Sea Law Branch, Legal Division
- Mr Paul Foley, Ambassador for Counter-Terrorism
- Mr Peter Scott, Director, Counter-Terrorism Strategy
- Ms Lindsay Buckingham, Director, Transnational Crime Section, Sanctions, Crime and Sea Law Branch, Legal Division

Department of Home Affairs

- Mr Richard Feakes, Deputy Counter-Terrorism Coordinator
- Ms Alexandra Fong, Director, Counter-Terrorism Legal Policy