

Tuesday, 22 September 2020

## Opening Statement: Parliamentary Joint Committee on Intelligence and Security (PJCIS) review into the ‘declared area’ provisions

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As the national body representing the Australian legal profession, the Law Council is grateful to appear before the Committee as part of its second statutory inquiry into the ‘declared areas’ regime in sections 119.2 and 119.3 of the *Criminal Code Act 1995* (Cth).

The Law Council recognises that the task of developing and implementing mechanisms to prevent, deter and disrupt the activities of those deemed ‘foreign terrorist fighters’ is difficult.

We acknowledge the ongoing security threat that is presented by Australians who travel to foreign conflict zones, such as Syria, to fight with or support terrorist organisations, such as Islamic State, that are engaged in hostilities.

The Law Council does not oppose, in principle, the enactment of laws that place some limitations on the freedom of movement of individual Australians, to prevent people from engaging in terrorism-related activities in foreign countries. Rather, our longstanding concern is that the declared areas regime does not meet the basic requirements of proportionality.

### Key concerns in the declared areas regime

In particular, the offence in s 119.2 for entering or remaining in a ‘declared area’ – together with the low threshold for the Minister declaring an area under section 119.3 – cast the net of criminal liability in excessively and inappropriately broad terms.

The offence criminalises a person’s mere presence at a place in a foreign country, which need not be under the effective control of a listed terrorist organisation, as a pre-condition to its listing as a ‘declared area’. Consequently, the application and enforcement of the offence are substantially dependent on the exercise of broad discretion by law enforcement agencies and ministers. This creates an unacceptably high risk of arbitrary operation.

This risk is compounded by the inclusion of a narrow offence-specific exception in subsection 119.2(3) for persons who are present in a declared area for the sole purpose of engaging in one of eight enumerated ‘legitimate purposes’. The limited scope of this exception has the potential to have a harsh and oppressive effect on individuals who are present in a declared area for reasons entirely unrelated to terrorism, but those reasons are not legislatively prescribed as ‘permitted purposes’. The imposition of an evidential burden on a defendant to establish their sole purpose of their travel may also be insurmountable.

## Recommendations

For these reasons, our primary recommendation is that the declared areas regime should be repealed. Reliance should instead be placed on enforcing the wide range of preparatory and ancillary offences in Chapter 5 of the Criminal Code. This includes in combination with the extensions of criminal liability in Chapter 2, such as the offences of attempt and conspiracy.

If the Committee is minded to recommend the continuation of the regime, however, we have made alternative recommendations for amendments to the elements of, and exceptions to, the offence in s 119.2. We also recommend strengthening the statutory criteria in s 119.3 that the Minister for Foreign Affairs must apply in order to prescribe a 'declared area'.

## Clarification

Finally, I wish to clarify a factual issue at paragraphs 10 and 71 of the Law Council's submission. We indicated that the repeal of the declared areas regime would bring Australia into line with like-minded countries that do not have a comparable regime.

I should clarify that this does not include the United Kingdom, as the UK enacted a 'designated areas' regime, via amendments to the *Terrorism Act 2000* (UK), in late 2019. However, the UK regime has several safeguards that the Australian regime does not, which avoid some of the problems the Law Council has identified regarding the narrow scope of exceptions.

This includes a defence of reasonable excuse; broader 'legitimate purpose' exceptions, especially for journalists and those who enter or remain in a designated area involuntarily; and a higher threshold for the designation of an area. In addition, the UK regime is subject to the requirements of the Human Rights Act 1998 (UK), including review rights.

Thank you, Chair, and Committee Members. We are happy to answer your questions.

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