22 September 2017

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Canberra ACT 2600

Dear Committee Secretary

Review of the 'declared area' provisions

Thank you for the opportunity to make a submission to this review of the declared area offences in sections 119.2 and 119.3 of the *Criminal Code Act 1995* (Cth) (Criminal Code). We make this submission in our personal capacity, and are solely responsible for the views and content contained therein.

We note that this submission is in the same terms as that which we made to the Independent National Security Legislation Monitor (Monitor), Dr James Renwick SC, on 27 April 2017. The Monitor is required to provide his report on the declared area offences to the Prime Minister by 7 September 2017. That report must then be tabled in the House of Representatives within 15 sitting days, that is, by the end of November 2017. We would appreciate an opportunity to make a further written submission to this inquiry once we have been able to consider the recommendations made by the Monitor.

Section 119.2 of the Criminal Code makes it an offence punishable by 10 years' imprisonment to enter or remain in a declared area.[1] The Minister for Foreign Affairs may declare an area of

1 *Criminal Code Act 1995* (Cth) s 119.2(1).

a foreign country as a 'declared area' if they are satisfied that a listed terrorist organisation is engaging in hostile activity in that area.[2] It is a defence to the declared area offence for the defendant to show that they entered or remained in the area *solely* for a legitimate purpose.[3] The legislation provides a list of legitimate purposes, including bona fide family visits, making news reports and providing humanitarian aid.[4]

We have consistently opposed this offence. It imposes a significant burden upon the freedom of movement by preventing individuals from travelling to areas designated by the Minister for Foreign Affairs as 'no-go zones'. Such a burden might be justified if there was evidence that restricting the freedom of movement was a necessary and proportionate response to the threat posed by foreign fighters. There are, however, several reasons why the current offence is not sufficiently targeted to the threat of terrorism.

First, the offence does not technically reverse the onus of proof and nor is it an offence of strict or absolute liability. However, it has essentially the same effect; criminal liability will be prima facie established wherever a person enters or remains in a declared area. No other physical elements are required in order for the offence to be made out. The prosecution need not establish, for example, that the person travelled to the area for the purpose of engaging in terrorism.[5] This is problematic because it is that malicious purpose – rather than the mere fact of travel – which renders the conduct an appropriate subject for criminalisation.

Secondly, the available defences do not capture the wide range of legitimate reasons for which a person might travel to a foreign country in a state of conflict – such as undertaking a religious pilgrimage, conducting business or commercial transactions, or visiting friends. The legislation provides that additional legitimate purposes may be specified in the regulations.[6] However, it would be impossible as a matter of practicality to prospectively specify *every* legitimate reason for travel.

The third – and related reason – concerns the burden of proof which is placed on defendants to establish that their travel was for one of the specified legitimate purposes. In order to displace

2 *Criminal Code Act 1995* (Cth) s 119.3(1).
3 *Criminal Code Act 1995* (Cth) s 119.2(3).
4 *Criminal Code Act 1995* (Cth) sub-ss 119.2(3)(a),(f),(g).
5 As in the offence of entering a foreign country with intention to engage in hostile activities: *Criminal Code Act 1995* (Cth) s 119.1.
6 *Criminal Code Act 1995* (Cth) s 119.2(3)(h).

the required evidentiary burden, it would be necessary for the defendant to demonstrate a reasonable possibility that they travelled to the declared area *solely* for a legitimate purpose. It is not clear how this would be interpreted by a court, but it could very well mean that defendants are placed in the very difficult position of needing to prove a negative. That is, a defendant may be required to adduce evidence not only that they travelled to the area for one of the enumerated purposes but also that this was the *only* purpose for travel. This would require the defendant to provide factual evidence that they did *not* travel to the area with the intention of engaging in a terrorism-related purpose. It is not clear what evidence a defendant would be able to adduce to establish the absence of such an intent. A similar point can be made in relation to the defence of *bona fide* family visits. How would a defendant adduce evidence that they were visiting their family for 'genuine' reasons, as opposed to visiting them in order to, for example, provide a cover for engaging in terrorism? Presumably, a defendant would need to demonstrate some evidence that they were *not* intending to become involved in foreign conflict. This would put them in a very difficult position and, indeed, it is difficult to see how such a requirement would work in practice.

For these reasons, we believe that the declared area offence should be allowed to lapse at the end of the sunset period. The only viable alternative would be if the government specified some illegitimate purpose as part of the actus reus of the offence. However, if such an amendment were adopted, the offence would be superfluous as it would overlap very significantly with the foreign incursion offences in the *Criminal Code*. Those offences already have a broad scope and cover the kinds of activities to which the declared area offence is directed – namely, to prevent individuals from participating in hostilities overseas.

We made the above arguments in submissions to both the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in 2014 and the Australian Law Reform Commission in 2015. However, the evidence in support of our position today is even stronger. Although the lack of use of a legislative provision is not determinative, the fact that the declared area offence has never been used goes a long way to demonstrating that it is neither necessary nor effective as a response to the threat posed by foreign fighters. Since late 2014, more than 50 people have been charged with terrorism and/or foreign incursions offences in Australia. In not one instance has the declared area offence been relied upon. What this clearly demonstrates is that – in contrast to the claim made in the Second Reading Speech – the declared area offence is not required in order for 'law enforcement agencies to bring to justice those Australians who have

committed serious offences, including associating with, and fighting for, terrorist organisations overseas'.[7]

Yours Sincerely

Dr Nicola McGarrity
Senior Lecturer, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales

Professor George Williams AO
Dean and Anthony Mason Professor, Faculty of Law, University of New South Wales

7 Commonwealth, *Parliamentary Debates*, 24 September 2014, 7001 (George Brandis).