

Parliamentary Joint Committee on Intelligence and Security Review of the Declared Area regime.

Submission by Jacinta Carroll, National Security College, Australian National University

Author Background

Jacinta Carroll is Director National Security Policy at the National Security College, Australian National University, a position she has held since August 2017. In this role, Jacinta leads the College's policy-related work and external engagement. Jacinta joined the College from the Australian Strategic Policy Institute, where she established the Counter Terrorism Policy Centre to enhance dialogue on counter-terrorism issues and provide innovative approaches to counter-terrorism policy. Her career experience with the Commonwealth Government includes appointments working on counter-terrorism, strategic policy, border security and international policy, with a particular focus on the Middle East and Afghanistan.

Introduction

1. This submission is made in response to an invitation by the Parliamentary Joint Committee on Intelligence and Security to comment on its review of the operation, effectiveness and implications of sections 119.2 and 119.3 of the *Criminal Code 1995 (Cth)* and any other provision of the *Criminal Code* as far as it relates to those sections, in accordance with Section 29(1)(bb) of the *Intelligence Services Act 2001*. Sections 119.2 and 119.3 make it an offence for a person to enter, or remain in, a 'declared area' in a foreign country.
2. This complements a submission made to the Independent National Security Legislation Monitor's recent review of the same sections. For your reference, a copy of that submission is attached, along with excerpts from the INSLM report referring to that advice.
3. The purpose of this submission is to provide advice on the suitability of this legislation to support Australia's approach to counter-terrorism, including:
 - a. the terrorist threat the Australia
 - b. Australia's approach to counter terrorism
 - c. the foreign terrorist fighter threat
 - d. the international environment, and
 - e. the role of the subject legislation as part of Australia's counter-terrorism approach.

Terrorist threat to Australia

4. The terrorist threat to Australia is real. Australia's National Terrorism Alert Level has been 'Probable: a terrorist attack is likely' since 12 September 2014. This reflects advice from the competent authority in the Australian Government, the Australian Security Intelligence Organisation (ASIO), that individuals and groups maintain the intent and capability to conduct

a terrorist attack in Australia¹. In his most recent National Security Statement, on 13 June 2017, the Prime Minister reiterated the continued appropriateness of this alert level².

5. Australia has featured consistently as a named terrorist target in Islamist terrorist propaganda, and rates between third and fourth place overall in the Islamic State (IS) terrorist group's mentions of target countries. Australians have also been killed in terrorist attacks, including this year in Baghdad, Barcelona and London.

6. From its base in the Middle East, IS has obtained allegiance from supporters in Australia, and has been implicated in providing technical support as well as general inspiration for planned terrorist attacks in Australia. The demise of IS's fortunes in the Middle East has seen a refocus to other regions, including Southeast Asia, where an IS-affiliated group recently captured Marawi in The Philippines; the group, Islamic State East Asia, was proscribed as a terrorist organisation by the Australian Government on 8 September 2017.

7. Since September 2014, Australia's counter-terrorism law enforcement and security agencies have disrupted 13 terrorist plots to conduct complex attacks and inflict mass casualties in Australia. During the same period, Australia experienced five low-level terrorist attacks. In addition to actual and disrupted plots, the Director-General of Security has advised that around 200 people in Australia actively support terrorism and an estimated further 110 Australian foreign fighters are engaged in terrorism overseas and have a right of return^{3 4}. It is also estimated that between 68 to 85 Australians have been killed while with terrorist groups in the Middle East, and around 40 foreign fighters—most of whom were in the region pre-IS—have returned to Australia⁵.

8. In 2016 alone, 30 people were charged and five more convicted of terrorism offences in Australia, and authorities disrupted seven planned attacks, including five major plots. Some of the plots appear to have been directed by terrorist organisations while others were 'inspired' or otherwise broadly directed by these groups. By the end of 2016, as a result of 19 counter-terrorism operations in Australia, 48 people had been charged with terrorism offences, and this number has since increased⁶.

9. But for the actions of Australia's counter-terrorism agencies in disrupting plots, Australia might have experienced 20 or more terrorist attacks in the past three years, instead of five, including potentially more than a dozen mass-casualty events⁷. While law enforcement

¹ Australian Government, *National Terrorism Threat Advisory System*, <https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx>

² The Honourable Malcolm Turnbull MP, Prime Minister of Australia, *National Security Statement*, 13 June 2017, <https://www.pm.gov.au/media/2017-06-13/national-security-statement>

³ Testimony by Duncan Lewis to Legal and Constitutional Affairs Legislation Committee, *Official Committee Hansard, Senate Legal and Constitutional Affairs Legislation Committee Estimates*, 28 February 2017

⁴ Number of foreign fighters advised by Duncan Lewis in testimony to Legal and Constitutional Affairs Legislation Committee, *Official Committee Hansard, Senate Legal and Constitutional Affairs Legislation Committee Estimates*, 24 October 2017. This is a slight increase from the previously advised number of 100, reflecting an enhanced understanding of the circumstances of individuals rather additional recruitment or other factors.

⁵ *Ibid.*

⁶ Jacinta Carroll "Australia: The Year in Review and the Year Ahead", in J. Carroll (ed.) *Counterterrorism Yearbook 2017*, Australian Strategic Policy Institute, 2017 <https://www.aspi.org.au/publications/counterterrorism-yearbook-2017>

⁷ Carroll, *op. cit.*

and intelligence agencies have done well, they have also advised that the number of plots and short turnaround times from planning to action mean that disruption won't always be possible. At least four recent disruptions have occurred within one to three hours before the planned attack⁸.

10. Effective legislation, policy and programs across the spectrum of counter-terrorism and countering violent extremism is essential to continue to prevent and effectively respond to the terrorist threat.

11. Three recent counter-terrorism actions—occurring after the introduction of the legislation that is the subject of this statutory review—indicate the complex and evolving nature of the terrorist threat to Australia. They also indicate the multiplying effect of foreign terrorist fighters on the domestic terrorism environment.

- a. **Young, February 2017.** On 28 February a man in Young, NSW, was arrested and charged with foreign incursion offences for providing technical assistance to IS. Authorities allege the man's contact with IS was facilitated through his relatives, who had left Australia to join IS and were assisting the group with arms trafficking in the Middle East and Eastern Europe. This case indicates the increasingly diverse forms of terrorism affecting Australia, including links to international organised crime and arms trafficking⁹.
- b. **Sydney, July 2017.** On 29 July 2017 a Sydney group was arrested in relation to plans to explode a device on an airplane departing Sydney, and to detonate an improvised explosive device in a crowded place. Authorities allege that planning assistance and technical support was provided by IS associates in the Middle East, with contact made through an Australian foreign terrorist fighter who was related to members of the Sydney group. The NSW Joint Counter Terrorism Team (JCTT) became aware of this plot only a few days prior to its disruption, indicating that authorities consider planning was well advanced and that prompt disruption was necessary to prevent an attack.
- c. **Melbourne, October 2017.** On 24 October 2017, a man was arrested in Melbourne and charged with providing funds and services to an American foreign terrorist fighter in Syria. The Victorian JCTT allege the man supported IS and ran a website that promoted IS and sought funding to support IS.

⁸ Duncan Lewis, *opening Statement to the Independent National Security Legislation Monitor (INSLM) Review into Terrorism Questioning and Detention Powers Public Hearing*, 19 August 2015. At this time, Mr Lewis advised three of the last 10 disruptions; since this time, the October 2016 Bankstown disruption occurred within minutes of a planned attack. <https://www.asio.gov.au/independent-national-security-legislation-monitor-inslm-review-terrorism-questioning-and-detention.html>

⁹ Jacinta Carroll and Micah Batt, *Operation Marksburg and CT arrest in Young, 28 February 2017*, Australian Strategic Policy Institute, 2017, <https://www.aspi.org.au/publications/operation-marksburg-and-ct-arrest-in-young,-28-february-2017>

Australia's approach to counter-terrorism

12. Counter-terrorism policy is typically described in terms of prevention and response. Australia's approach to counter-terrorism reflects this, with the COAG *Counter-Terrorism Strategy* identifying five elements, the first four of which are preventative in nature:

- a. challenging violent extremist ideologies
- b. stopping people from becoming terrorists
- c. shaping the global environment to counter terrorism
- d. disrupting terrorist activity within Australia, and
- e. having effective responses and recovery should an attack occur.

13. The most visible part of Australia's approach to counter-terrorism is response operations, that is, action after terrorist acts have occurred; major disruptions may also attract some publicity. After a terrorist event, however, public focus typically turns to how the terrorist incident may have been prevented, including warnings and indicators of possible future behaviour, as seen in the ongoing matter of the Lindt Café coronial inquiry.

14. International experience indicates that implementing significant counter-terrorism laws only after a major attack is not the best way to develop appropriate, considered and balanced laws—although lessons learned from attacks can highlight gaps in legislation. Recent experience in Europe and Southeast Asia has demonstrated it is preferable to have considered counter-terrorism legislation in place to effectively manage the known threat rather than after issues of concern have become manifest. Australia's success to date in disrupting planned terrorist attacks is testament to the value of a sustained and considered approach to counter-terrorism legislation and resourcing, and ensuring balance between the security of all and the rights of the individual.

15. A review I led of counter-terrorism approaches around the world in 2016 indicates that those countries that are best placed to counter terrorism, and have demonstrated greatest effectiveness at countering terrorism, are those that have strong political, legal and social institutions that enable a considered array of capabilities, powers and activities to counter terrorism, and actively review the effectiveness and necessity of more restrictive measures¹⁰. Counter-terrorism legislation is best developed in a measured and ongoing manner to anticipate as well as respond to the changing threat environment, and Australia's approach to counter-terrorism does this.

Foreign terrorist fighters: a global security threat

16. The primary and most vital consideration when reviewing Australia's declared areas provisions is the issue it was designed to address: stopping foreign terrorist fighters. This should remain the focus as the Committee proceeds with its work in reviewing the operational effectiveness of the legislation.

¹⁰ J. Carroll "Introduction" in J. Carroll (ed.) *op. cit.*

17. The foreign terrorist fighter phenomenon that drove the development of this legislation is a serious and global threat. While there have been, and continue to be, instances of citizens of one country joining other military or paramilitary forces, as well as joining overseas-based and focussed terrorist organisations, the numbers involved in Islamist-extremist terrorist groups in the Middle East is much higher and wider spread than seen in comparable recent incidents and poses an extraordinary global security threat. This threat is twofold: foreign terrorist fighters have directly and substantially contributed to conflicts in the Middle East, Africa and Asia; they are also directing, supporting and enabling terrorism elsewhere, including in their home countries.

18. The security threat posed by foreign terrorist fighters is considered by states and experts alike as one of the most challenging and concerning aspects of the current Islamist extremist terrorist threat. It is also of urgent and pressing concern, due to the involvement of tens of thousands of foreign fighters in ongoing conflicts in the Middle East and elsewhere. International concern about foreign terrorist fighters came to a head in 2014, with IS declaring its so-called caliphate in Iraq and Syria.

19. Recognising this concern, formal statements condemning foreign terrorist fighters and urging action to counter this threat have been made by international bodies including the United Nations, the European Union, INTERPOL, the Organisation for Security Cooperation in Europe (OSCE), the Association of South East Asian Nations and the African Union.

20. In September 2014 UNSC Resolution 2178 was unanimously endorsed—including by Australia as a Council member—expressing ‘grave concern about [this] acute and growing threat’ and requiring Member States to ‘urgently’ and ‘immediately’ implement a range of measures to address the foreign terrorist fighter threat. UNSCR 2178 builds upon existing counter-terrorism resolutions—notably UNSCR 1373 (2001)—and requires Member States to undertake a range of actions, both within national mechanisms and international arrangements, to stop the travel, financing and other support of foreign terrorist fighters, enhance information sharing, and initiating criminalising foreign fighters and the means to prosecute, consistent with human rights obligations. It also calls for Member States to undertake an array of measures to deny this support, including doing what they can to prevent radicalisation and recruitment to terrorism.

21. The urgency and immediacy of this issue is reflected in the Resolution which,

Stresses the urgent need to implement fully and immediately this resolution with respect to foreign terrorist fighters, underscores the particular and urgent need to implement this resolution with respect to those foreign terrorist fighters who are associated with ISIL, ANF and other cells, affiliates, splinter groups or derivatives of Al-Qaida.¹¹

¹¹ United Nations Security Council, *Resolution 2178 (2014) S/RES/2178 (2014)*, http://www.un.org/en/sc/ctc/docs/2015/SCR%202178_2014_EN.pdf

22. The ongoing severity of this matter has seen the UN's Counter Terrorism Committee's annual report on progress in implementing UNSCR 2178 complemented by the Secretary-General providing four-monthly updates since 2015^{12 13}.

23. While the need to take action against foreign terrorist fighters is known and strongly agreed internationally, putting this into action has proven problematic. For in addition to being a security threat, foreign terrorist fighters also pose challenges for international and national laws. These challenges include:

- a. How to demonstrate intent to travel to become a foreign terrorist fighter.
- b. How to demonstrate that someone is or has been a foreign terrorist fighter. This includes the difference between intelligence assessments of terrorist-related criminal activity, and evidence of such activity that meets prosecutorial standard.
- c. How to gather evidence from the conflict zone to support prosecution. Issues included the absence of recognised government, such as in areas controlled by IS, and the absence of a government whose advice can be relied upon, as in the case of Syria.
- d. How to deal with a citizen who may be behaving as an enemy combatant in a conflict zone. This is an issue for Australia, as the Australian Defence Force is involved in warlike operations in Iraq and Syria, while some Australian citizens are also participating in the conflict as foreign terrorist fighters.

24. One of the most complex matters in dealing with foreign terrorist fighters, therefore, is developing legislation and law enforcement mechanisms to not only criminalise foreign fighter activity, but to be able to put these legislative tools to effect. This presents an extraordinary and pressing issue for countries like Australia that are committed to rule of law, including human rights. This dilemma is visible in the wording of the various UNSCRs relating to terrorism, which seek urgent and innovative action to counter terrorism, while maintaining consistency with international obligations, including specifically international humanitarian law, the UN Charter, and international refugee law. The Organisation for Security Cooperation in Europe noted this dilemma in 2015, with its parliamentary assembly issuing the Helsinki Declaration calling for innovative approaches to dealing with the many challenges of foreign terrorist fighters, emphasising that its members 'must prepare themselves to face a huge legal challenge'.¹⁴

25. The latest UN report on implementation of UNSCR 2178 found that most countries have not made effective and timely progress specifically in countering foreign terrorist fighters; Australia is highlighted as one of only a handful of countries to have complied with the

¹² United Nations Security Council Counter-Terrorism Committee Executive Directorate (CTED), *Implementation of Security Council resolution 2178 (2014) by States affected by foreign terrorist fighters*, 2016, https://www.un.org/sc/ctc/wp-content/uploads/2016/09/FTF-Report-1-3_English.pdf

¹³ United Nations Security Council, *Resolution 2253 (2015) S/RES/2253 (2015)*, [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2253\(2015\)&referer=/english/&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/2253(2015)&referer=/english/&Lang=E)

¹⁴ Resolution on a Comprehensive Legislative Reform on Foreign Terrorist Fighters from the OSCE Area <https://www.oscepa.org/meetings/annual-sessions/2015-helsinki-annual-session/2015-helsinki-final-declaration/2286-11>

resolution by enacting legislation specifically aimed to counter foreign fighters.¹⁵ Other countries that have made effective progress in legislation and law enforcement activities to counter foreign terrorist fighters include the USA and Canada. The report notes that Australia, the USA and Canada are well-placed to progress a balanced and effective approach to the foreign fighter phenomenon¹⁶,

Since [they]...embrace ethnic diversity as part of their national identity, [and are therefore] well equipped at the policy level to introduce decisive measures that are sensitive to the needs and concerns of minority groups.¹⁷

26. As strong liberal democracies, Australia, Canada and the USA also have legislative and judicial oversight arrangements, supported by active civil society, to ensure a balanced approach to issues of security and human rights. Australia is well-placed both in its existing range of counter-terrorism legislation and in the established process in place for legislative review through the office of the INSLM and other measures, policy-focussed review through the Council of Australian Governments (COAG) supported by the Australia and New Zealand Counter-Terrorism Committee (ANZCTC), and consideration of any proposed bills through your Committee's legislative review process, whose recent reviews of proposed legislation also typically include public inquiry.

Declared area offence

27. The revisions to sections 119.2 and 119.3 were introduced into the *Criminal Code 1995* (Cth) through the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). These removed the requirement for an entire country to be declared, instead enabling particular regions to be declared, and allowed a single declaration to cover areas in more than one country if the Foreign Minister is satisfied that one or more declared terrorist organisations are engaging in hostile acts in each. S119.2 details the offence of entering, or remaining, in declared areas—including exceptions—while s119.3 describes the process of declaring an area for the purposes of s119.2¹⁸.

28. The concept of declared areas enables Australia to bring together a range of relevant factors in relation to the foreign terrorist fighter threat to make a reasonable judgement about the intention and actions of individuals. These including intelligence assessments, evidence and the declared terrorist organisation regime. This means that any prosecution in relation to the declared area offence brings together:

- a. information from investigations relating to such things as an individual's intentions, movements and allegiance to a terrorist organisation
- b. operating in conjunction with the current—and regularly updated—list of declared terrorist organisations

¹⁵ United Nations Security Council CTED, *op. cit.*, 2016, p67

¹⁶ The group examined in the report is terms Oceania/Americas, and comprises Australia, Canada, New Zealand, Trinidad and Tobago, and the United States of America. While the overall comments about the strength of civil society applied to all five nations, New Zealand and Trinidad and Tobago had a lower overall terrorist threat level than the other three countries, with a related level of counter-terrorism activity. United Nations Security Council CTED, *op. cit.*, 2016

¹⁷ United Nations Security Council CTED, *op. cit.*, 2016

¹⁸ Commonwealth of Australia, *Commonwealth Criminal Code Act 1995*

- c. assessments by appropriate authorities of regions that are effectively controlled by that organisation, and
- d. consideration of whether it would be reasonable for any Australian to be travelling to this area for any purpose other than those designated as exempt from the provision.

29. The amendments to sections 119.2 and 119.3 provided increased specificity to the areas being declared, thus ensuring that the declarations remained relevant and current, and not inadvertently affect individuals who have legitimate reason to be in a declared country but in regions not affected by terrorism.

30. The amendments to the declared area offences regime have provided flexibility in accurately identifying the areas where terrorist groups such as IS are concentrated and active—including across borders—including through the Foreign Minister declaring particular regions of Iraq and Syria, where the terrorist group has been centred. Declared areas are notified on the Department of Foreign Affairs and Trade's 'Smartraveller' website, which assists public awareness and enables legitimate travellers to easily access this information. The specificity of regions also provides a clear link between the terrorist threat environment and an individual's travel, thus clarifying whether or not an individual should be a person of interest to authorities for investigation purposes, and also to assist prosecution.

31. There has been some criticism of this approach in relation to human rights and the justice afforded individuals that may be subject to this legislation. This is understandable as this is a complex matter that does not fit neatly into existing legal regimes. As the tension in the various UNSCRs on terrorism, and their accompanying update reports demonstrate, countering terrorism and its related atrocities often necessitates unconventional approaches to balancing between security and the rights of the individual.

32. A key principle of international human rights law is that most human rights are not absolute and that reasonable limits may be placed on these¹⁹. But where limits are placed, they must be balanced with other considerations such as context, proportionality, and ensuring complementary safeguard measures are in place.

33. A strength of the declared areas provisions in particular, and Australia's approach to counter-terrorism legislation more broadly, is that this balance is assisted through an array of safeguards, of which this very inquiry is one. The recent INSLM statutory inquiry provides another element of oversight and review.

34. The power to designate an area as a terrorist conflict zone is an effective legal tool to approach the complex issue of foreign terrorist fighters. This provides an offence in support of UNSCR 2178 to enable prosecution of foreign fighters and their supporters, while acknowledging the difficulties of collecting evidence in conflict environments to support other criminal charges.

¹⁹ Australian Government, Attorney-General's Department, *Public Sector Guidance Sheet: Absolute Rights*, <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Absoluterights.aspx>

35. It also guards against indiscriminate use by specifying limited legitimate reasons for being in a declared zone, as well as clarifying areas of the same country where it is not an offence to travel. For example, despite IS, al-Qaeda and the other 24 organisations listed as terrorist groups controlling territory and engaging in conflict in regions across Africa, the Middle East and South Asia, including Somalia, Mali, Tunisia, Yemen, Pakistan and Afghanistan, to date only the cities of Raqqa in Syria and Mosul in Iraq have been declared areas under s119.2²⁰.

36. The declared area powers also provide an important deterrence effect, in support of UNSCR 2178's exhortation for Member States to prevent people becoming foreign terrorist fighters, clarifying to Australians that being engaged with a terrorist group in these areas is a criminal offence, and that they may face prosecution. This was a key intention of the laws when proposed, as stated in the explanatory memorandum,

*The legitimate objective of the new offence is to deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so.*²¹

While the direct impact of the deterrence element of this legislation cannot be easily quantified, it is generally accepted that law has some preventative effect on behaviour²².

Issues with the Declared Areas Provisions

37. The threat from foreign terrorist fighters and the challenges with bringing them to justice provide the clear and compelling argument that has necessitated these laws. And much of the subsequent debate, including discussion through inquiries and reviews of the laws, has focussed on legal and ethical principles surrounding these laws. But refocussing on the practical effectiveness of the declared areas offences, as this inquiry is charged to do, it appears that there are practical issues in using the laws.

38. For, although the declared area provisions have been in law since 2014, they have not yet been used to charge an individual²³. This is despite the Government advising that around 110 Australians are assessed to be foreign terrorist fighters in Iraq/Syria—with a further 68-85 having been killed—and that their membership of IS makes it likely they have been in the declared areas²⁴. There are a variety of reasons why the offence has not been used, including the difficulty of obtaining evidence to a prosecution standard in a conflict environment; that the offence doesn't apply retrospectively; and that perpetrators may still be with terrorist organisations overseas and unable to have charges laid.

²⁰ Australian Government, *Listed Terrorist Organisations*, <https://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/default.aspx>

²¹ Parliament of the Commonwealth of Australia, *Counter-terrorism legislation amendment (foreign fighters) bill 2014 Replacement Explanatory Memorandum*, paragraph 230

²² See for example, Lawrence J. Sherman, 'Defiance, deterrence and irrelevance: A theory of the criminal sanction', in *Journal of Research in Crime and Delinquency*, Vol 30, No. 4, November 1993 pp445-473.

²³ To date, three people have been charged with offences in relation to foreign fighters, but none in relation to declared areas.

²⁴ Around 40 Australians have also returned from fighting in the Middle East, although it is likely these fought with various other groups, with the majority having returned prior to IS's declaration of a 'caliphate' in 2014.

39. A key matter that the Committee may wish to be advised by relevant Government agencies, therefore, is how practical this legislation is, and whether it needs to be amended in order for it to be used. It would be particularly useful to understand whether agencies consider there are limitations and obstacles in using the declared area provisions, which appear on paper to be an effective and valuable contribution to countering this global terrorist threat.

40. As cases of foreign terrorist fighters play out through the judicial process, the laws might be used. An example is Neil Prakash, who is an Australian alleged to be a member of IS who had been in both Raqqa and Mosul and is the subject of an Australian arrest warrant, but currently facing court in Turkey on a range of criminal offences. While the arrest warrant relates to his alleged involvement in planning terrorist attacks in Australia, the declared area provision allows the possibility for Prakash to face justice for his involvement as a foreign fighter with IS in Syria and Iraq.

41. Overall, Australia's declared area offence legislation is a novel but effective approach to the complex challenge of foreign fighters. It both criminalises foreign fighters and provides an effective deterrent to prevent would-be foreign terrorist fighters, in support of international efforts to address this threat. While the specific provisions of these laws are yet to be used, they are nonetheless needed.

Conclusion

42. The declared areas laws are part of a broad suite of legislation that has been developed to provide appropriate powers to prevent and deal with terrorist-related crime. Together with other elements of Australia's national security legislative architecture, these laws serve Australia's counterterrorism efforts well through:

- a. Supporting Australia's international commitments to not export terrorism and to not unlawfully threaten the security of other states, and to support the application of justice to any Australian citizens who have done so.
- b. Providing counter-terrorism with the tools they need to address security issues as they arise and prevent possible terrorist acts.
- c. Effective accountability and oversight measures to balance public security with the rights of the individual, including compliance with Australia's international obligations as recognised in Section 3 of the *Human Rights Act 2011*.

43. The power to designate an area as a terrorist conflict zone is an effective tool to approach the complex issue of foreign terrorist fighters. Overall, this law directly and practically puts effect to Australia's international commitments to not export terrorism and to not unlawfully threaten the security of other states, and to support the application of justice to any Australian citizens who have done so. The declared areas provisions provide an offence in support of UNSCR 1373 (2001) to ensure terrorists are brought to justice, and UNSCR 2178 (2014) regarding foreign terrorist fighters, including specific undertakings to prevent travel of potential foreign terrorist fighters and to prosecute those who engage in or support foreign terrorist fighters. This is a pragmatic response to the difficulties of collecting evidence in conflict environments to support other criminal charges, and is balanced with provisions specifically identifies limited legitimate reasons for being in a declared zone.

44. The declared areas laws also provide an important deterrence effect, clarifying to Australians that being engaged with a terrorist group in these areas is a criminal offence, and that they may face prosecution.

45. In the three years since UNSCR 2178 was endorsed to meet the urgent and serious threat of foreign terrorist fighters with immediate action, along with other international calls to deal with foreign fighters, Australia is one of only a few countries that have been able to do this, through the declared area offence provision and other complementary initiatives.

46. The unusual nature of the declaration provisions demands a considered and balanced approach to their use, which is provided through the considered process of assessment, specificity and differentiation to localise the area of concern, sunset clauses for declaration and ongoing reviews.

47. The overall effectiveness of any law is its ability to be used to deal with the matter it was intended to address. In this, it appears that the declared area offence may need to be reviewed in terms of its operational effectiveness and ability to be used by counter-terrorism authorities.

Jacinta Carroll
30 October 2017

Attachments:

- A. Excerpts from Dr James Renwick SC, *Independent National Security Monitor Review of section 119.2 and 119.3 of the Criminal Code: Declared Areas*, 7 September 2017, showing references to submission by Carroll.
- B. Submission by Jacinta Carroll to INSLM Statutory Deadline Review of certain counter-terrorism elements of the Crimes Act 1914 and the Criminal Code Act 1995: stop, search and seizure, declared areas, control orders and preventative detention, and high risk terrorist offenders, dated 18 May 2017.

Attachment A to PJCIS Submission: Carroll, dated 30 October 2017

Excerpts from Dr James Renwick SC, *Independent National Security Monitor Review of section 119.2 and 119.3 of the Criminal Code: Declared Areas, 7 September 2017, showing references to submission by Carroll*

Note: the below extracts refer to the chapter numbers of the INSLM report. The report refers to the submission as the ASPI submission.

5.30. In the context of the present review, I have received a number of submissions relating to the human rights impact of the declared area offence. For instance...

e. Conversely, ASPI submitted that the areas of legislation that are the subject of the present statutory review provide '[e]ffective accountability and oversight measures to balance public security with the rights of the individual, including compliance with Australia's international obligations'.

5.34. In its submission to the present review, ASPI noted that the declared areas offence supports Security Council Resolution 2178 (2014) 'to enable prosecution of foreign fighters and their supporters, while acknowledging the difficulties of collecting evidence in conflict environments to support other criminal charges'.

8.10. Several of the submissions I received highlighted that, despite the operation of other foreign incursion offences in div 119 of the Criminal Code, the declared areas offence remains necessary as it serves a unique purpose. Submissions noted that declared areas reflect an environment within which the ordinary processes and procedures for the collection and transfer of evidence are unlikely to be sustainable. The AFP submitted that s 119.2 provides an 'additional tool in the toolbox' that addresses the difficulties of obtaining foreign evidence from a declared area that is needed to prosecute the other offences in div 119:

[N]otwithstanding the 2014 changes to the Foreign Evidence Act 1994 which simplified processes for adducing foreign evidence in terrorism-related cases, obtaining foreign evidence remains a challenge. This is particularly the case where the evidence is being sought from a conflict zone which may not have fully operational government in place.

A similar view was expressed by ASPI, which noted that the offence provision 'enable[s] prosecution of foreign fighters and their supporters, while acknowledging the difficulties of collecting evidence in conflict environments to support other criminal charges'.

8.11. The AFP and AGD also submitted that the offence has the potential to protect the personal safety of individuals by discouraging or deterring them from travelling to areas where terrorist organisations are engaged in hostile activity, a submission that was 'echoed' by ASPI. During the public hearing, AGD stated that the reasoning underpinning the provisions is to:

protec[t] people's personal safety and [...] to discourage them from travelling to areas that are of high, high risk for individuals [...] Our view is that these provisions perhaps have also had an effect of very strongly discouraging people who might otherwise have considered going into the area to [sic] not to go there, that they have a powerful effect beyond just being utilised for prosecution.

Attachment B to PJCIS Submission: Carroll, dated 30 October 2017

Independent National Security Legislation Monitor Statutory Deadline Review of certain counter-terrorism elements of the *Crimes Act 1914* and the *Criminal Code Act 1995*: stop, search and seizure, declared areas, control orders and preventative detention, and high risk terrorist offenders.

Submission by Jacinta Carroll, Australian Strategic Policy Institute

Author Background

Jacinta Carroll joined ASPI in August 2015 as the inaugural Head of the ASPI Counter Terrorism Policy Centre. The focus of the Counter-Terrorism Policy Centre is to enhance dialogue on counter-terrorism issues and provide innovative approaches to counter-terrorism policy. Jacinta joined ASPI from the Commonwealth Government, having worked in the Department of Defence and the Attorney-General's Department. Her career experience includes appointments working on counter-terrorism, strategic policy, border security and international policy, with a particular focus on the Middle East and Afghanistan.

Summary

1. The legislative schemes under review comprise part of Australia's national security legislative architecture; two of the three elements under review were introduced into law in 2005, with the other legislated almost a decade later, in 2014. A more recent piece of legislation, the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* is also related to the legislation under review, as its accompanying parliamentary and public inquiry process led to the requirement for statutory review of the 2016 amendments to the operation of control orders and preventative detention orders.
2. Overall, the existence of these laws serves Australia's counterterrorism efforts well. The four pieces of law contribute in their various ways to supporting a range of policies that are generally considered essential to effective counterterrorism:
 - a. Supporting Australia's international commitments to not export terrorism and to not unlawfully threaten the security of other states, and to support the application of justice to any Australian citizens who have done so, including specifically UNSCR 1373 (2001) to ensure terrorists are brought to justice, and UNSCR 2178 (2014) regarding foreign terrorist fighters.
 - b. Enabling justice options other than imprisonment in order to prevent terrorism and provide the opportunity for individuals to avoid imprisonment through disengaging with criminal behaviour.
 - c. Providing law enforcement and security with the tools they need to address security issues as they arise and prevent possible terrorist acts.
 - d. Effective accountability and oversight measures to balance public security with the rights of the individual, including compliance with Australia's international obligations as recognised in Section 3 of the *Human Rights Act 2011*.

3. The laws under review are part of a broad suite of legislation that has been developed to provide appropriate powers to prevent and deal with terrorist-related crime. They have been developed and revised at different times to deal with the changing nature of the threat. In some cases, the laws may not often have been used. This may be for a variety of reasons: the anticipatory nature of the need, difficulty obtaining evidence in a conflict environment or authorities electing to use less intrusive measures where possible. But this does not mean that they are not needed.

4. ASPI review of counter-terrorism approaches around the world in 2016 indicates that those countries that are best placed to counter terrorism, and have demonstrated greatest effectiveness at countering terrorism, are those that have strong political, legal and social institutions that enable a considered array of capabilities, powers and activities to counter terrorism²⁵. Counter-terrorism legislation is best developed in a considered and ongoing manner to anticipate as well as respond to the changing threat environment. International experience indicates that implementing significant counter-terrorism laws only after a major attack is not the best way to develop appropriate, considered and balanced laws. Recent experience in Europe and Southeast Asia has demonstrated it is preferable to have considered counter-terrorism legislation in place to effectively manage the known threat rather than after issues of concern have become manifest. Australia's success to date in disrupting planned terrorist attacks is testament to the value of a sustained and considered approach to counter-terrorism legislation and resourcing, and ensuring balance between the security of all and the rights of the individual.

5. The threat of terrorism for Australia is real. Australia's National Terrorism Alert Level has been 'Probable: a terrorist attack is likely' since 12 September 2014. This reflects advice from the competent authority in the Australian Government, the Australian Security Intelligence Organisation (ASIO), that individuals and groups maintain the intent and capability to conduct a terrorist attack in Australia. Australia has featured consistently as a named terrorist target in Islamist terrorist propaganda, and rates between third and fourth place overall in the so-called Islamic State's (IS) mentions of target countries.

6. Since September 2014, Australia's counter-terrorism authorities have disrupted 17 terrorist plots to conduct complex attacks and inflict mass casualties in Australia. During the same period, Australia experienced four terrorist attacks. Authorities advise they are investigating around 200 people in Australia who actively support terrorism, while a further 100 Australian foreign fighters are engaged in terrorism overseas.

7. The laws currently under statutory review provide appropriate and complementary legal powers to support Australia's approach to counter terrorism. All have evolved to meet the changing terrorist threat environment and should continue to be reviewed and developed in accordance with the threat.

8. **Stop, search and seizure.** Stop, search and seize powers provide police the ability to quickly act in the field where there is concern about terrorism. While this is an intrusive power that is not to be used lightly, it is a necessary element of Australia's laws, due to the short-turnaround times involved in current threats—typically requiring intervention by first

²⁵ J. Carroll (ed.) *Counterterrorism Yearbook 2017*, Australian Strategic Policy Institute, 2017
<https://www.aspi.org.au/publications/counterterrorism-yearbook-2017>

responders rather than investigators— and the reasonable public expectation that authorities act quickly where there is a possible threat and where they encounter persons of concern. These powers have significant value for use in the event of a serious and imminent terrorist threat.

9. **Control orders and preventative detention orders.** Control orders and preventative detention orders provide useful options short of arrest and charge to deal with those involved in terrorism. These have been the subject of occasional amendment to address the evolving terrorism environment, and also the subject of ongoing review both through the legislative amendment process and through dedicated inquiry such as that conducted by your predecessor INSLM in 2016. Overall, the orders regimes provide effective options to prevent terrorist attacks and deter terrorism offences, and are particularly effective in providing the opportunity for would-be offenders—particularly at-risk youth—to remove themselves from violent extremism. Should the subject of a control order wish to continue to engage in terrorist-related acts, the offence of contravening a control order provides an effective tool to protect the public from a potential terrorist act involving the subject.

10. **Declared areas.** The power to designate an area as a terrorist conflict zone is an effective tool to approach the complex issue of foreign terrorist fighters. This provides an offence in support of UNSCR 2178 to enable prosecution of foreign fighters and their supporters, while acknowledging the difficulties of collecting evidence in conflict environments to support other criminal charges. The declared area provision specifically identifies limited legitimate reasons for being in a declared zone. This also provides an important deterrence effect, clarifying to Australians that being engaged with a terrorist group in these areas is a criminal offence, and that they may face prosecution.

11. **International comparison.** Australia's laws are broadly consistent with comparable liberal democracies. The laws under review are comparable with laws in other Common Law countries and other liberal democracies, noting that some are also parties to conventions and regulations such as the European Convention on Human Rights and national bills of rights (such as in Canada), which is not the case in Australia.

12. The UK *Terrorism Act 2000* provides overarching legislation for many terrorism powers in the UK, and includes powers similar to Australia's stop, search and seizure, control orders and preventative detention and declared areas laws. Since 2014 a number of European countries including France, Belgium, Germany and the Netherlands—all of which currently face a high terrorist threat—have introduced a range of counter-terrorism legislation, facilitated by consideration by the European Parliament.

13. **Checks and balances.** Australia is well-placed both in its existing range of counter-terrorism legislation and in the established process in place for legislative review through the office of the INSLM and other measures, policy-focussed review through the Council of Australian Governments (COAG) supported by the Australia and New Zealand Counter-Terrorism Committee (ANZCTC), and consideration of any proposed bills through the Parliamentary Joint Committee on Intelligence and Security (PJCIS) legislative review process, whose recent reviews of proposed legislation also typically include public inquiry.

Introduction

14. This submission is made in response to an invitation by the Independent National Security Legislation Monitor to comment on his Statutory Deadline Review of:
- a. Division 3A of Part IAA of the Crimes Act 1914 (Cth) introduced by the *Anti-Terrorism Act (No 2) 2005* (stop, search and seizure);
 - b. Sections 119.2 and 119.3 of the *Criminal Code 1995* (Cth) introduced by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth); and
 - c. Divisions 104 and 105 of the *Criminal Code 1995* (Cth) on control orders and preventative detention orders introduced by the *Anti-Terrorism Act (No 2) 2005*, including the interoperability of the control order regime with the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth)
15. The purpose of this submission is to provide advice on the suitability of this legislation to support:
- a. Australia's approach to counter-terrorism, including: the terrorist threat environment
 - b. counter-terrorism policy response options to address this threat; and
 - c. the role of the subject legislation as part of Australia's counter-terrorism approach.

Background

Role of the Independent National Security Legislation Monitor

16. This advice is providing with reference to the statutory role of the INSLM, which is to review the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation in order to assist Ministers in ensuring that it:

- (a) *is effective in deterring and preventing terrorism and terrorism-related activity which threatens Australia's security; and*
- (b) *is effective in responding to terrorism and terrorism-related activity; and*
- (c) *is consistent with Australia's international obligations, including:*
 - (i) *human rights obligations; and*
 - (ii) *counter-terrorism obligations; and*
 - (iii) *international security obligations; and*
- (d) *contains appropriate safeguards for protecting the rights of individuals.*

Terrorist threat to Australia

17. The threat of terrorism for Australia is real. Australia's National Terrorism Alert Level has been 'Probable: a terrorist attack is likely' since 12 September 2014. This reflects advice from the competent authority in the Australian Government, ASIO, that individuals and groups

maintain the intent and capability to conduct a terrorist attack in Australia²⁶. In his most recent National Security Statement, on 23 November 2016, the Prime Minister reiterated the continued appropriateness of this alert level²⁷.

18. Australia has featured consistently as a named terrorist target in Islamist terrorist propaganda, and rates between third and fourth place overall in IS mentions of target countries.

19. Since September 2014, Australia's counter-terrorism authorities have disrupted 17 terrorist plots to conduct complex attacks and inflict mass casualties in Australia. In 2016 alone, 30 people were charged and five people convicted of terrorism offences in Australia, and authorities disrupted seven planned attacks, included five major plots. Reports on these plots to date indicate a mix between attacks directed by terrorist organisations and 'inspired' or broadly directed. By the end of 2016, as a result of 19 counter-terrorism operations in Australia, 48 people had been charged with terrorism offences, and this number has since increased²⁸.

20. Australia has experienced four terrorist attacks since 2014: Endeavour Hills, Martin Place, Parramatta and Minto. All of these were low-level and relatively unsophisticated attacks undertaken by single actors; the simplicity of the attacks including lack of indicators for their planning is assessed to be part of the reason they were not prevented.

21. In addition to actual and disrupted plots, the Director-General of Security has advised that around 200 people in Australia actively support terrorism and a further 100 Australian foreign fighters are engaged in terrorism overseas and have a right of return²⁹. A related complexity regarding future threats is the presence of around 70 children of Australian foreign terrorist fighters in the Middle East conflict area.

22. But for the actions of Australia's counter-terrorism agencies in disrupting plots, Australia might have experienced 20 or more terrorist attacks during this period, instead of four, including potentially more than a dozen mass-casualty events³⁰.

23. Two recent counter-terrorism actions—occurring after the introduction of the legislation that is the subject of this statutory review—indicate the complex and evolving nature of the terrorist threat to Australia. The disrupted plot to attack multiple venues in the Melbourne CBD during Christmas 2017 using improvised explosive devices, knives and firearms was described by Prime Minister Turnbull as being one of the most substantial plots disrupted in recent years³¹. The February arrest and charge of a man in Young, NSW, on

²⁶ 'National Terrorism Threat Advisory System', <https://www.nationalsecurity.gov.au/Securityandyourcommunity/Pages/National-Terrorism-Threat-Advisory-System.aspx> [accessed 11 October 2016]

²⁷ The Honourable Malcolm Turnbull MP, Prime Minister of Australia, *Address to parliament - national security update on counter terrorism*, 23 November 2016, <https://www.pm.gov.au/media/2016-11-23/address-parliament-national-security-update-counter-terrorism>

²⁸ Jacinta Carroll "Australia" *The Year in Review and the Year Ahead*, in J. Carroll (ed.) *op. cit.*

²⁹ Testimony by Duncan Lewis to Legal and Constitutional Affairs Legislation Committee, *Official Committee Hansard, Senate Legal and Constitutional Affairs Legislation Committee Estimates*, 28 February 2017

³⁰ Carroll, *op. cit.*

³¹ The Honourable Malcolm Turnbull MP, Prime Minister of Australia, Joint Press Conference with the Minister for Justice the Hon Michael Keenan MP and the Australian Federal Police Commissioner Andrew Colvin APM OAM. 23 December 2016, <http://www.pm.gov.au/media/2016-12-23/joint-press-conference-minister-justice-hon-michael-keen-an-mp-and-australian>

foreign incursion offences for providing technical assistance to IS indicates the increasingly diverse forms of terrorism, including links to international organised crime and arms trafficking³².

24. In February 2017, the Director General of Security also advised a fall in the age of those involved in Sunni Islamist terrorism in Australia, with around 40% of persons of interest being 15-24 years in 2015³³.

25. While law enforcement and intelligence agencies have done well, they have also advised that the number of plots and short turnaround times from planning to action mean that disruption won't always be possible. At least four recent disruptions have occurred within one to three hours before the planned attack³⁴.

26. It is the responsibility of governments to do what they can to protect their citizens from attack. Through these laws, the Commonwealth Government, supported by the States and Territories, is aligning with international best practice counter-terrorism policy by focussing on preventing terrorism, protecting the public and ensuring those involved in violent extremism are brought to justice. This complements a range of other counter-terrorism activity, including countering violent extremism and counter-terrorism investigations.

27. Those found guilty of crimes such as terrorism also require their rights to be protected, through the application of due process. It is appropriate that the power to impose limits on certain actions, through control orders and declared area offences, as well as direct the ongoing deprivation of liberty through the extraordinary measure of continuing detention, be undertaken through a regime regulated by a range of safeguards and reviews, including the ultimate authority for detention resting with the courts.

Terrorism as a crime

28. Australia's legal system appropriately deals with terrorism as a crime, progressed through the courts including appropriate sentencing regimes for punishment.

29. There are, however, a number of factors that differentiate terrorism from most other forms of crime under Australian law, and may indicate an ongoing intent by an offender to commit extreme harm even after a sentence has been served in punishment for a crime committed.

30. These factors include:

- a. political intent, including link to particular ideologies

³² Jacinta Carroll and Micah Batt, *Operation Marksborg and CT arrest in Young, 28 February 2017*, Australian Strategic Policy Institute, 2017, <https://www.aspi.org.au/publications/operation-marksburg-and-ct-arrest-in-young,-28-february-2017>

³³ Lewis, *op. cit.*

³⁴ Duncan Lewis, *opening Statement to the Independent National Security Legislation Monitor (INSLM) Review into Terrorism Questioning and Detention Powers Public Hearing*, 19 August 2015. At this time, Mr Lewis advised three of the last 10 disruptions; since this time, the October 2016 Bankstown disruption occurred within minutes of a planned attack. <https://www.asio.gov.au/independent-national-security-legislation-monitor-inslm-review-terrorism-questioning-and-detention.html>

- b. advocating use of violence to achieve this political intent
- c. indiscriminate nature of violence
- d. potential for ongoing support of terrorism with intent to inflict extreme harm
- e. radicalisation and incitement of others to commit terrorist acts, and
- f. target selection, which may include symbols of authority such as police, military and government, or the general public.

Australia's approach to counter-terrorism

31. The most visible part of Australia's approach to counter-terrorism is response operations, that is, action after terrorist acts have occurred; major disruptions may also attract some publicity. After a terrorist event, however, public focus typically turns to how the terrorist incident may have been prevented, including warnings and indicators of possible future behaviour, as seen in the ongoing matter of the Lindt Café coronial inquiry.

32. Prevention is also a key feature of Australia's approach to counter-terrorism and, as with other crime types, is generally regarded by policy makers and practitioners as the key to effectively countering terrorism.

33. Counter-terrorism policy is typically described in terms of prevention and response, and Australia's approach to counter-terrorism reflects this, with the COAG *Counter-Terrorism Strategy* identifying five elements, the first four of which are preventative in nature:

- a. challenging violent extremist ideologies
- b. stopping people from becoming terrorists
- c. shaping the global environment to counter terrorism
- d. disrupting terrorist activity within Australia, and
- e. having effective responses and recovery should an attack occur.

CT Legislation: development and review

34. Australia has a mature process in place for developing and monitoring counter-terrorism legislation. Australia is well-placed both in its existing range of counter-terrorism legislation and in the established process in place for legislative review through the office of the INSLM and other measures, policy-focussed review through COAG supported by the ANZCTC, and consideration of any proposed bills through the PJCIS legislative review process, whose recent reviews also typically include public inquiry.

35. The laws under consideration as part of this statutory review have all been subject to one or more of these review procedures.

Crimes Act 1914, Part 1AA, Division 3A: Stop, search and seizure

36. **Background.** Introduced into the *Crimes Act 1914* through the *Anti-Terrorism Act (No. 2) 2005*. This provides police with powers to stop, search and question in relation to certain terrorist acts and prescribed security zones, as well as where there is reasonable suspicion that this power is necessary to prevent a terrorist offence or serious threat to life or safety. The powers are for use where it is not practical to obtain a warrant, and complement existing state powers. This power has been subject to review, including the COAG *Review of Counter-Terrorism Legislation*, 2013.

37. **How this compares internationally.** The power to stop and search in relation to terrorism is a power found in other comparable jurisdictions, such as the UK, and also in other liberal democracies, such as France. The UK powers, under the *Anti-Terrorism Act 2000*, have been reviewed and subject to legal proceedings on occasion since their inception, including with reference to their use and the changing terrorist threat environment, including revision in 2011.

38. **Operation.** The provision of power to undertake a stop, search and seizure meets a reasonable expectation of what police should be able to do in a particular situation to prevent terrorism. The intrusiveness of the power means that it is anticipated to be rarely used, and to date has not been used by the Commonwealth.

39. **Overall assessment.** Stop, search and seize powers provide police the ability to quickly act in the field where there is concern about terrorism. While this is an intrusive power that is not to be used lightly, it is a necessary element of Australia's laws, necessitated by the short-turnaround times involved in current threats—typically requiring intervention by first responders rather than investigators—and the reasonable public expectation that authorities act quickly where there is a possible threat and where they encounter persons of concern. These powers have significant value for use in the event of a serious and imminent terrorist threat.

Declared area offences

40. **Background.** The revisions to sections 119.2 and 119.3 were introduced into the *Criminal Code 1995 (Cth)* through the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth)*. These removed the requirement for an entire country to be declared. Instead enabling particular regions to be declared, and allowed a single declaration to cover areas in more than one country if the Foreign Minister is satisfied that one or more declared terrorist organisations are engaging in hostile acts in each.

41. **Operation.** The amendments to sections 119.2 and 119.3 provided increased specificity to the areas being declared, thus ensuring that the declarations remained relevant and current, and not inadvertently affect individuals who have legitimate reason to be in a declared country but in regions not affected by terrorism. The amendments to the declared area offences regime have provided flexibility in accurately identifying the areas where terrorist groups such as IS are active—including across borders—including the Foreign Minister declaring particular regions of Iraq and Syria, where the terrorist group is active. Declared areas are notified on the Department of Foreign Affairs and Trade's 'Smartraveller' website, which assists public awareness and enables legitimate travellers to easily access this information. The specificity of regions also provides a clear link between the terrorist threat environment and an individual's

travel, thus clarifying whether or not an individual should be a person of interest to authorities for investigation purposes, and also to assist prosecution.

42. **Overall assessment.** The power to designate an area as a terrorist conflict zone has proven to be an effective tool to approach the complex issue of foreign terrorist fighters. This provides an offence in support of UNSCR 2178 to enable prosecution of foreign fighters and their supporters, while acknowledging the difficulties of collecting evidence in conflict environments to support other criminal charges. It also specifies limited legitimate reasons for being in a declared zone, as well as clarifying areas of the same country where it is not an offence to travel. In addition, this provides an important deterrence effect, clarifying to Australians that being engaged with a terrorist group in these areas is a criminal offence, and that they may face prosecution. To date, two people have been charged with offences in relation to foreign fighters, reflecting the challenges in obtaining evidence to prosecution standard, but neither have been charged in relation to declared areas.

Control orders and preventative detention

43. **Background.** Introduced into the *Criminal Code 1995* (Cth) through the *Anti-Terrorism Act (No 2) 2005*. Control orders are court orders imposing restrictions, prohibitions and obligations upon a person for one or more of reasons below:

- (a) protecting the public from a terrorist act;
- (b) preventing the provision of support for or the facilitation of a terrorist act;
- (c) preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.³⁵

44. Preventative detention orders allow a person to be taken in custody for a brief period to:

- (a) prevent an imminent terrorist act occurring which is capable of being carried out and could occur within 14 days; or
- (b) preserve evidence of, or relating to, a recent terrorist act.'

45. The control order and preventative detention regimes have been the subject of occasional amendment to address the evolving terrorism environment, and also the subject of ongoing review both through the legislative amendment process and through dedicated inquiry such as that conducted by your predecessor INSLM in 2016.

46. **How this compares internationally.** The UK *Terrorism Act 2000* includes control order powers, and formed the basis for developing Australia's control order regime in 2005 along with existing provisions in Australian law for preventative action. There are differences between the two regimes, notably that the UK has two forms of control orders, according to whether or not they comply with the European Convention on Human Rights.

47. **Operation.** To date, six people have been subject to control orders, including four since the current terrorist threat period commenced in 2014. Control orders and preventative detention orders provide useful options short of arrest and charging to deal with those involved in terrorism. They are useful preventative options where there is a known or assessed threat but insufficient evidence for prosecution. The control order regime may be used in relation to foreign fighters by recognising the threat they may pose, operating in conjunction with the

³⁵ *Criminal Code* s 104.1.

Foreign Fighters Act; this is a sensible and effective approach to the threat of returning foreign terrorist fighters.

48. **Overall assessment.** Overall, the orders regimes provide effective options to prevent terrorist attacks and deter terrorism offences, and are particularly effective in providing the opportunity for would-be offenders—particularly at-risk youth—to remove themselves from violent extremism. Should the subject of a control order wish to continue to engage in terrorist-related acts, the offence of contravening a control order provides an effective tool to protect the public from a potential terrorist act involving the subject. The control order regime demonstrates the need for options to quickly implement amendments to address real and emerging threats. The 2016 amendment to control order legislation included extending the regime to 14-16 year olds, recognising the changing demographic of terrorist supporters. This was initially proposed in 2015 to urgently address existing cases involving under-16 youths, but took more than a year to be passed; in the interim, there were various terrorism cases involving youth, where a control order could not be considered³⁶.

High risk terrorist offenders.

49. **Background.** The law provided an additional tool into Australia's national security framework in response to the ongoing threat terrorism poses to Australia and its people. *The Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016*, amended Part 5.3 of the *Criminal Code*, as well as consequential amendments to the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*, to establish a scheme for the continuing detention of high risk terrorist offenders who pose an unacceptable risk to the community at the conclusion of their custodial sentence.

50. **Operation.** Continuing detention of convicted terrorists who are assessed to pose an unacceptable risk of reoffending is an appropriate tool as it contemplates future threat of harm, protects the public, and is a mechanism already used in other areas of criminal law. The court will be required to determine whether there is a real risk of reoffending, and will thereby seek professional expertise including research on violent offenders in general and terrorism in Australia in particular in forming its judgement. Those subject to this regime have been determined by the court to be dangerous offenders, who maintain the intent to commit harm and reoffend. One of the great strengths of this law is that it draws upon existing legal mechanisms, notably existing dangerous offender legislation such as the Queensland sex offender legislation's power of continuing detention, which was upheld in the High Court of Australia, in *Fardon v Attorney General (Qld)*³⁷. The provision of an interim detention order sensibly provides for situations where there is a gap between the end of a sentence and a determination by the court on continuing detention. The power has a range of safeguards and balances to ensure it is used appropriately. These include a high threshold for use, the decision being made independently by the court, a limit of one-year's additional detention per judgement (or annual review), and a limit of 10 years in all.

³⁶ See, for example, Ashley Collingburn and Jacinta Carroll, *Counterterrorism action: Bankstown, 12 October 2016*, Australian Strategic Policy Institute, 2017 https://www.aspi.org.au/publications/counterterrorism-action-bankstown,-12-october-2016/ASPI-CT-Quick-Look-4_Bankstown.pdf

³⁷ *Fardon v Attorney-General for the State of Queensland*, High Court of Australia, (2204) 201 CLR <http://www.austlii.edu.au/au/cases/cth/HCA/2004/46> [accessed 11 October 2016]

51. This law was introduced in late 2016 and will commence in June 2017; it has therefore not yet been used. The number of people to whom continuing detention may apply is small, but growing, as existing prison terms are due to expire for some offenders, and an increasing number of offenders are found to be involved in terrorism, and ultimately sentenced to time in prison. As at September 2016, of the 48 people charged with terrorism offences in Australia in the past two years, less than half have been sentenced and imprisoned³⁸. Overall at this time, 15 terrorists were in prison and 37 were before the courts, with increased numbers since. As this tool has not yet been used there is limited relevant data, research and experience in Australia to inform deliberations in cases proposed for continuing detention.

52. ***Overall assessment in relation to control orders and preventative detention.*** The law directly supports the policy objective of disrupting terrorist activity in Australia, by preventing those intent on engaging in terrorism from prison release. Through providing mechanisms that may be used to continue to detain terrorist recruiters, it also indirectly supports another key policy objective of stopping people from becoming terrorists. This law provides a different and complementary power to that of control orders and preventative detention. All are options to address particular cases in the most appropriate manner. Of note, control orders and preventative detention orders may be contemplated to protect the public for a designated temporary period, while control orders in particular allow the subject in question to remain out of custody. Notably in the case of young offenders—highlighted by authorities as a growing area of concern—control orders provide the option for action short of a custodial sentence and the opportunity for the individual to remove themselves from engagement in violent extremism. This is therefore a particularly valuable tool to support efforts to counter violent extremism and assist at-risk youth. In practice, to effectively support counter-terrorism efforts, the management regimes for terrorists in prison serving sentencing or in post-sentence continuing detention should also ensure that these individuals are unable to use interpersonal connections in prison to radicalise and otherwise build up their terrorist network.

Conclusion

53. ASPI review of counter-terrorism approaches around the world in 2016 indicates that those countries that are best placed to counter terrorism, and have demonstrated greatest effectiveness at countering terrorism, are those that have strong political, legal and social institutions that enable a considered array of capabilities, powers and activities to counter terrorism. Counter-terrorism legislation is best developed in a considered and ongoing manner to anticipate as well as respond to the changing threat environment. International experience indicates that implementing significant counter-terrorism laws only after a major attack doesn't lead to the most appropriate, considered and balanced laws. Recent experience in Europe and Southeast Asia has demonstrated it is preferable to have considered counter-terrorism legislation in place to effectively manage the known threat rather than after issues of concern have become manifest. Australia's success to date in disrupting planned terrorist attacks is testament to the value of a sustained and considered approach to counter-terrorism legislation and resourcing, and ensuring balance between the security of all and the rights of the individual.

³⁸ Brandis, Senator George, Second Reading of Counter-Terrorism Legislation Amendment Bill (No. 1) 2016, Criminal Code Amendment (Firearms Trafficking) Bill 2016, Criminal Code Amendment (High Risk Terrorist Offenders) Bill, *Senate Hansard, Thursday, 15 September 2016*, p35

54. The laws currently under statutory review provide appropriate and complementary legal powers to support Australia's approach to counter terrorism. All have evolved to meet the changing terrorist threat environment and should continue to be reviewed and developed in accordance with the threat.

55. The overall aim of Australia's program for terrorism offenders should be for individuals to be rehabilitated and released into the community without reoffending. This is recognised in much of the legislation under review. The control order, preventative detention and continuing detention program should, therefore, be accompanied by programs to facilitate rehabilitation both during and after the period of the relevant order, the initial sentencing period and, for those to whom this applies, as part of the post-sentence period for continuing detention. Knowledge of how to best approach rehabilitation for terrorism offenders remains the subject of ongoing research and trial programs in Australia.

56. The review of these laws should also recognise, as seen overseas and with the broader experience of criminal rehabilitation, that it will not always be possible to persuade an individual against reoffending; that is, they may continue to support terrorism.

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18 May 2017