

1 November 2017

Mr Andrew Hastie
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
CANBERRA ACT 2600

Dear Mr Hastie

Law Council submission to the review of the 'declared area' provisions

1. The Law Council welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security's (**PJCIS**) regarding its inquiry into the 'declared area' provisions under sections 119.2 and 119.3 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).
2. The Law Council is grateful for the assistance of its National Criminal Law Committee and National Human Rights Committee in the preparation of this submission.
3. Subsection 119.2(1) of the Criminal Code makes it an offence for a person to enter or remain in a declared area. A 'declared area' is one declared as such by the Minister for Foreign Affairs and Trade.¹ A number of 'legitimate purpose' exceptions to subsection 119.2(1) are provided for in subsection 119.2(3).²
4. The Law Council notes that the PJCIS's inquiry follows the release of the recent Independent National Security Legislation Monitor's (**INSLM**) report on *Sections 119.2 and 119.3 of the Criminal Code: Declared Areas*.³ While accepting that the declared area provisions are necessary, proportionate, have the capacity to be effective and should continue for a further five years,⁴ the INSLM has made two principal recommendations to improve the operation of the provisions. Briefly, these are that there should be: a periodic review by the PJCIS of declared areas at its discretion; and a Ministerial pre-authorisation process to enter and remain in a declared area.⁵
5. The Law Council remains concerned that the declared area provisions may not be consistent with Australia's international human rights obligations. Should the declared area offence provisions remain, the Law Council supports the above two recommendations of the INSLM aimed at the improvement of the laws. However, in

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

² *Ibid* s 119.2 (3).

³ Independent National Security Legislation Monitor, *Review of sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (September 2017).

⁴ *Ibid*, pp. 38-39 [9.5]-[9.7].

⁵ *Ibid*, p. 38 [9.2]-[9.4].

light of concerns regarding the practical implementation of a Ministerial pre-authorisation regime, the Law Council considers that there should be an appropriate expansion of the legitimate purposes exception which would not reduce the deterrent effect of the offence. The expansion should include: bona fide, necessary and urgent business to protect the legitimate business interests domiciled in the foreign country; and providing legal advice to an Australian citizen.

6. Additionally, in the event that the INSLM's recommendation regarding a Ministerial pre-authorisation process is not adopted, judicial discretion, guided by appropriate statutory criteria, should be permitted to assist in determining what may be regarded as a 'legitimate purpose'.

General comments

7. The Law Council has previously provided submissions to the PJCIS and the INSLM on the declared areas provisions.⁶ In summary, the Law Council recommended that the offence be repealed, and we continue to make that recommendation. However, if it is maintained, it should be amended to:
 - include as a fault element an intention of entering or remaining in a declared area for an illegitimate purpose, which could be defined as a purpose other than a legitimate purpose that is listed (as is currently done in subsection 119.2(3)) or determined by a court to be legitimate;
 - classify the following conduct as a legitimate purpose for the purposes of the offence: (i) providing legal advice to a client; (ii) making a bona fide visit to a friend, partner or business associate; and (iii) performing bona fide business, teaching and/or research activities; and
 - provide a court with the discretion to determine on a case by case basis whether a person travelled to a declared area for a legitimate purpose. In such a case the power to make regulations under this provision would be removed from the declared area provisions.
8. These recommendations were based on concerns that the declared area offence in section 119.2 of the Criminal Code has the potential to disproportionately impact on Australians' freedom of movement, the right to a fair trial and the presumption of innocence, and that there was much in the argument that the declared area offence was incompatible with the range of human rights considered by the Parliamentary Joint Committee on Human Rights (**PJCHR**).⁷
9. The PJCHR found that the imposition of an evidentiary burden on the defendant to establish that they entered into or remained in a declared area solely for a legitimate purpose interfered with the right to be presumed innocent until proven guilty, and that the Statement of Compatibility in the Bill introducing the offence did not provide sufficient evidence to justify such a reversal.⁸ The Special Rapporteur to the United

⁶ Law Council of Australia, *Stop, search and seizure powers, declared areas, control orders, preventative detention orders and continuing detention orders: Submission to the Independent National Security Legislation Monitor* (12 May 2017); Law Council of Australia, *Counter-terrorism Legislation Amendment (Foreign Fighters) Bill 2014: Submission to the Parliamentary Joint Committee on Intelligence and Security* (3 October 2014).

⁷ Law Council of Australia, *Stop, search and seizure powers, declared areas, control orders, preventative detention orders and continuing detention orders: Submission to the INSLM* (12 May 2017), p. 13, [27]-[28].

⁸ Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014), p. 38.

Nations expressed similar concerns.⁹ The PJCHR further noted the offence was incompatible with the right to freedom of movement by deterring and preventing Australians from travelling overseas for a legitimate purpose due to fear of prosecution. It was also incompatible with the right to equality before the law and to equal protection of the law without discrimination because the offence would have a greater effect on certain individuals based on their ethnicity or country of birth.¹⁰

10. For the above reasons, the Law Council maintains that the offence should include a requirement that the prosecution should have to prove an illegitimate intent. If, as the INSLM points out, it is very difficult to imagine a legitimate purpose for going to the two current declared areas, then the case should be easy to prove. The argument that evidence gathering in such areas is difficult is not resolved by placing that burden on a defendant. Further, future declarations may well involve far more fluid circumstances.
11. However, the Law Council notes that the INSLM did not accept the Law Council's above recommendations and that there is a divergence of views between the INSLM, PJCHR and the Special Rapporteur to the United Nations as to whether the declared area provisions are compatible with Australia's international human rights obligations.
12. The INSLM has recommended that the laws be continued for a further period of five years (subject to recommendations regarding reporting requirements) because:
 - Although there have been no prosecutions the laws have capacity to be effective;¹¹
 - The laws are consistent with Australia's human rights, counter-terrorism and international security obligations, and intergovernmental agreements with Australia;¹²
 - The laws are proportionate to the current threats of terrorism and to national security; and¹³
 - The laws are necessary.¹⁴
13. The Law Council considers that this divergence in views between the INSLM, the PJCHR and the Special Rapporteur may be due to a disagreement about how the balance is to be struck between individual freedoms and the need to fight terrorism. As the INSLM has noted, '[f]inding that 'balance' can be difficult, and fair-minded, informed, people may disagree as to how the balance is to be struck'.¹⁵

⁹ Ben Emmerson, Special Rapporteur, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, A/70/371, (13 September 2016), [22], cited in Independent National Security Legislation Monitor, *Review of sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (September 2017), p. 24.

¹⁰ Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament* (28 October 2014) cited in Independent National Security Legislation Monitor, *Review of sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (September 2017), p. 21.

¹¹ Independent National Security Legislation Monitor, *Review of sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (September 2017), p. vii.

¹² *Ibid* p. viii.

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ *Ibid* p. 1.

14. Despite the above findings, the INSLM made two principal recommendations aimed at improving the declared area provisions, namely that:
- these laws be continued, subject to any declaration being reviewable by the PJCIS at their discretion at any time prior to the declaration ceasing to have effect or being revoked by the Minister;¹⁶ and
 - consideration be given (noting, in particular, the potential issues set out in paragraphs 8.18-8.35 of his report) to the making of a regulation under, or an amendment to, these provisions to allow an individual to seek permission from the Foreign Affairs Minister (following advice from the Attorney-General) to enter into and remain in a declared area for such period and on such conditions as the Minister may choose to impose.¹⁷
15. The Law Council considers that, particularly in light of the human rights concerns expressed by the PJCHR and the Special Rapporteur, the INSLM's recommendations should be seen as a minimum standard by which to improve the proportionality of the offences. The Law Council supports in-principle these two recommendations as a means to assist in ensuring that restriction on a person's freedom of movement and human rights is the least intrusive method of achieving a legitimate objective.¹⁸
16. The Law Council provides additional comments by way of response to the INSLM's report.

PJCIS review of declared area

17. The INSLM received submissions expressing concern about the risk of the Minister 'over-declaring' areas in a foreign country¹⁹ or declaring an area where there is 'only a very small amount of 'hostile activity' in a particular area', meaning it cannot necessarily be inferred that a person enters the area with an intent to engage in hostile activities.²⁰ The INSLM report recommended that as an additional safeguard a declaration made by the Minister of a declared area be reviewable by the PJCIS at its discretion or at any time prior to the declaration ceasing to have effect or being revoked by the Minister.
18. The Law Council supports this recommendation for reasons identified in the INSLM's report, and as a means of ensuring greater oversight and accountability over the process of declaring an area.

Intention to travel to a declared area for an 'illegitimate purpose'

19. The INSLM did not accept the Law Council's view that it would be preferable for the declared area offence to specify the intention of travelling to a declared area for an illegitimate purpose or purposes as a fault element of the offence.

¹⁶ Ibid p. 38.

¹⁷ Ibid p. 38.

¹⁸ *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 993 UNTS (entered into force 3 January 1976) (ICCPR), Art 12(1).

¹⁹ *Transcript of Proceedings*, Public Hearing, Canberra, 19 May 2017, p. 36 (Rodger Shanahan) cited in Independent National Security Legislation Monitor, *Review of sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (September 2017), p. 37.

²⁰ Australian Human Rights Commission, Submission No 7 to the PJCIS, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, 2 October 2014, Recommendation 5.

20. The INSLM noted, that if the legitimate purposes exception were to be replaced with an element of the offence that the defendant travel to the declared area for a stated 'illegitimate purpose' or otherwise to engage in hostile activities, this would 'result in substantial overlap between the declared area offence and other foreign incursion offences in div 119 of the Criminal Code'.²¹ It would also have the potential to render the offence unworkable and undermine the unique purpose that the offence serves.²²
21. The Law Council accepts that there would be an overlap as the foreign incursion offences are very broad and include, for example, the preparation to enter, or for another person to enter, a foreign country with an intention to engage in a hostile activity.²³ However, notwithstanding this circumstance (which is a matter of concern in itself), the Law Council regards the reversal of the onus of proof, as in the present form of the offence, as making the offence disproportionate. If the present structure is to be retained, absence of an intention to travel to a declared area for an illegitimate purpose, the need to ensure that a complete array of possible legitimate purposes is prescribed or authorised becomes even more acute.
22. The problematic nature of this offence may be likely to be expanded over time. Military policy may expand the state of war to an increasing number of localities in the world. This may create increasing problems of refugees, other displaced peoples and more areas which the Australian Government determines to be a source of terrorist influences. In turn, this may restrict persons' rights to visit localities for reasons and purposes they consider legitimate.

Ministerial pre-authorisation

23. As an alternative to 'replacing' the element of the offence, the INSLM recommended that consideration be given to making a regulation under, or amendment to section 119.2 to allow an individual to seek permission from the Foreign Affairs Minister (following advice from the Attorney-General) to enter into and remain in a declared area for such period and on such conditions as the Minister may choose to impose.²⁴ A similar pre-authorisation approach exists in Denmark's equivalent declared area offence, and the Migration Regulations 1994 also employ a pre-authorisation mechanism to allow certain protection visa holders to travel outside Australia.²⁵
24. Should the Minister's pre-authorisation measure be implemented, the Law Council recommends that it be done through appropriate legislative amendment rather than reliance on the ability to make a regulation under paragraph 119.2(3)(h) of the Criminal Code, which permits that regulations may be made to permit other legitimate purposes for entering or remaining in a declared area.²⁶ Legislative amendment may avoid any possible Constitutional concern about sub-delegation of legislative power

²¹ Independent National Security Legislation Monitor, *Review of sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (September 2017), p. 33.

²² *Ibid* p. 34.

²³ *Criminal Code Act 1995* (Cth), ss 119.1 and 119.4.

²⁴ Independent National Security Legislation Monitor, *Review of sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (September 2017), p. 38.

²⁵ *Ibid* p. 34.

²⁶ *Criminal Code 1995* (Cth), s 119.2(3)(h).

(as noted by the INSLM) and would allow for the authorisation framework to be clearly prescribed in law.²⁷

25. However, the Law Council is concerned that the INSLM's Ministerial pre-authorisation recommendation may not be workable from a security perspective and that the Minister cannot be assured of the individual's safety or that the individual would not conduct an act related to terrorism where the Minister has declared an area. A question may also arise as to Commonwealth liability in circumstances where an authorised person is injured or injures others in a declared area.
26. The liability issue may potentially be addressed through the provision of an undertaking to the Minister to pay any damages which a court may decide another party may suffer as a result of the person's actions while entering and remaining in a declared area. However, the security and safety risks do not appear to be easily ameliorated.
27. The INSLM report refers to the Migration Regulations 1994 as an example of a legislative regime that uses a Ministerial pre-authorisation mechanism pursuant to conditions imposed on certain protection visa holders for travel outside of Australia.²⁸ However, those Regulations do not specifically contemplate entry into an area which the Minister has declared that a terrorist organisation is engaging in hostile activities. The reference to the Migration Regulations 1994 may therefore not be pertinent.
28. In addition, on a practical level, the time taken to obtain such an authorisation may well defeat the purpose for the travel. This may be compounded if the applicant is already overseas.

Measures to be adopted in the absence of Ministerial pre-authorisation

29. The difficulties identified above regarding a Ministerial pre-authorisation regime raise a concern that this recommendation of the INSLM may not be implemented. Should this occur, the Law Council recommends that there be an expansion of the legitimate purposes in the provisions and that a court should have a discretion to determine additional legitimate purposes.

²⁷ This is consistent with the Law Council of Australia's Rule of Law Principles, that the law must be readily known and available, and certain and clear: Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), available online at: <https://www.lawcouncil.asn.au/resources/policies-and-guidelines>, p. 2.

²⁸ Independent National Security Legislation Monitor, *Review of sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (September 2017), p. 34 [8.28].

*Expanding the list of legitimate purposes*²⁹

30. The INSLM has concluded that the 'circumstances in which an adult person would wish to travel to either of the current declared areas other than to provide support to the terrorist organisation engaged in hostile activities in the area are extremely narrow'.³⁰ He also noted that this is 'reflected by the current drafting of the legitimate purpose exception in subsection 119.2(3) which acknowledges some reasons may exist'.³¹ He also noted that 'while difficulty in conceiving reasons to travel is not sufficient grounds alone to criminalise that travel, I am satisfied that the operation and content of the legitimate purpose exception renders the declared area offence a sufficiently proportionate response'.³²
31. However, the Law Council considers that there is still value in allowing for certain conduct to also be classed as a legitimate purpose under the offence. In particular, the Law Council considers that the legitimate purposes exception should permit:
- bona fide, necessary and urgent business to protect the legitimate business interests domiciled in the foreign country – for example, it would appear disproportionate to criminalise for three years a person who travels to a certain area to address matters relating to his or her livelihood or expose the person to potential conflicts with fiduciary duties purely because a listed terrorist organisation had commenced operating in an area. This issue may be more likely to arise where a declaration is first in force and a person is required to address urgent financial affairs in light of the danger in the area;
 - providing legal advice to an Australian citizen. For example, if parts of Egypt had been a declared area, Peter Grete's lawyer would not be able to visit him for the purposes of providing legal advice under this offence, unless the lawyer was specifically satisfying an obligation to appear before a court or other body exercising judicial power. The current exception regarding satisfying an obligation to appear before a court appears inconsistent with not permitting a legal practitioner to advise a client prior to the appearance.
32. The Law Council notes that the declared area provisions do not require an area to be fully under the control of a terrorist organisation to be declared but only that a listed

²⁹ Legitimate purpose exceptions to subsection 119.2(1) of the Criminal Code are provided for in subsection 119.2(3). These are where a person enters or remains in a declared area solely for one or more of the following 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 the United Nations or an agency of the United Nations;
- (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; and
- (h) any other purpose prescribed by the regulations.

³⁰ Independent National Security Legislation Monitor, *Review of sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (September 2017), p. 34 [8.30].

³¹ *Ibid.*

³² *Ibid.*, p. 24 [8.30]-[8.31].

terrorist organisation is engaging in hostile activity in that area. This means that a person may still have legitimate business or legal interests that may be dealt with under local law.

33. The INSLM did not address, with any specificity, allowing such exceptions as the above but noted that 'the deterrent effect of the offence may be reduced by opening up the list of legitimate purposes in s 119.2(3)'.³³ Nonetheless, he made the Ministerial pre-authorisation recommendation which would in effect open up the circumstances for a person to enter into and remain in a declared area. He made this recommendation as it had some 'appeal as it would allow for individual circumstances to be addressed if warranted'.³⁴
34. The Law Council does not consider that providing for appropriate legitimate purpose exceptions reduces any deterrent effect of the offence. Individuals at large are unlikely to travel to a declared area unless they fall within an appropriately defined exception which may include the urgent need to attend to business or the provision of legal advice before the effective downfall of an area.

Judicial discretion

35. The Law Council considers that a general term could be inserted in subsection 119.2(3) to provide 'without limiting this subsection', to allow a court the discretion to determine on a case-by-case basis whether a person travelled to a declared area for a legitimate purpose. The Law Council notes that the INSLM does not appear to have addressed the appropriateness of allowing a court to determine what may constitute a legitimate purpose,³⁵ although the pre-authorisation Ministerial authorisation would effectively permit the Minister a discretion in this area.
36. In either scenario, individual circumstances may be addressed if warranted. While the Ministerial pre-authorisation would, potentially, obviate the need for a criminal trial, the difficulties identified above raise concerns that this recommendation may not be implemented or may not be effective even if implemented. In such a case, the Law Council considers that judicial discretion should be permitted to determine what constitutes a legitimate purpose. Appropriate criteria could also be developed to guide this discretion, including the need for deterrence of individuals to a declared area.

³³ *Ibid*, p. 24 [8.29].

³⁴ *Ibid* p. 35 [8.33].

³⁵ The Independent National Security Legislation Monitor does however cite the Law Council's previous submission on this point: Independent National Security Legislation Monitor, *Review of sections 119.2 and 119.3 of the Criminal Code: Declared Areas* (September 2017), p. 32 [8.19].

Thank you for the opportunity to provide these comments.

The Law Council would be pleased to elaborate on the above issues, if required.

Please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division
in the first instance should you require further
information or clarification.

Yours sincerely

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President