Law Council
OF AUSTRALIA

Review of 'declared areas' provisions of the *Criminal Code Act 1995* (Cth)

Parliamentary Joint Committee on Intelligence and Security

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

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The Law Council also acknowledges the assistance of its National Criminal Law Committee and National Human Rights Committee in the preparation of this submission.

Executive Summary

1. The Law Council of Australia welcomes the opportunity to contribute to the Parliamentary Joint Committee on Intelligence and Security (**Committee**) statutory review of the 'declared area' provisions in sections 119.2 and 119.3 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).

2. The declared areas regime in Division 119 of the Criminal Code was enacted by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). The key provisions of the regime are:

   - **section 119.2**, which makes it an offence for an Australian person to enter, or remain in, a 'declared area' of a foreign country, which is punishable by a maximum penalty of 10 years' imprisonment; and
   - **section 119.3**, which sets out a process for the Minister for Foreign Affairs to make a disallowable legislative instrument that prescribes part of a foreign country as a 'declared area' for the purpose of the offence in section 119.2.

3. The Law Council acknowledges that the task of developing and implementing legal mechanisms to effectively prevent, deter, disrupt and denounce the activities of so-called 'foreign terrorist fighters' is complex and challenging.

4. The Law Council further recognises that Australia faces an ongoing security threat from individuals who travel to foreign conflict zones to fight with, or provide support to, terrorist organisations which are engaged in hostile activities in those areas. This threat includes the potential return of those persons to Australia, or their travel to other countries, with enhanced skills and motivation to further the violent and extremist objectives of the terrorist organisation.

5. Accordingly, the Law Council does not oppose, in principle, the enactment of laws that place some limitations on the freedom of movement of individual Australians, to prevent people from engaging in terrorism-related activities in foreign countries. However, under Australia's international human rights obligations, such limitations are permissible only if they are necessary to respond to the security threat presented by foreign terrorist fighters, and are proportionate to that objective.

6. The Law Council continues to hold the concerns it raised with the third Independent National Security Legislation Monitor (**INSLM**) and the Committee in 2017 and 2018. That is, the declared areas regime places substantial limitations on the rights to freedom of movement and a fair trial, which do not meet the essential requirements of proportionality.

Key concerns

7. The Law Council considers that the offence in section 119.2, and the threshold for declaring an area under section 119.3, cast the net of criminal liability in excessively broad terms. They operate to criminalise a person's mere presence at a place in a foreign country, which need not be under the occupation or effective control of a terrorist organisation, as a pre-condition of its listing as a 'declared area'. Consequently, the application and enforcement of the offence are substantially dependent on the exercise of broad discretion by law enforcement agencies[1] and

[1] That is, the Australian Federal Police in relation to investigation, arrest and charge; and the Commonwealth Director of Public Prosecutions in recommending the Attorney-General consent to a prosecution (s 119.11).

ministers.[2] This creates an unacceptably high risk of arbitrariness in the operation of the regime.

8. This risk is compounded by the inclusion of a narrow offence-specific exception in subsection 119.2(3) for persons who are present in a declared area for the sole purpose of engaging in one of eight enumerated 'legitimate purposes'.[3] The limited scope of this exception has the potential to have a harsh and oppressive effect on individuals who are present in a declared area for reasons entirely unrelated to terrorism, but those reasons are not legislatively prescribed as 'permitted purposes'.

9. Further, designing an offence provision to inculpate **all instances** of a person's presence in a declared area merely shifts the significant difficulties in collecting evidence from a foreign conflict zone from the prosecution (in proving the elements of an offence) to the defendant (in discharging the evidential burden in relation to an exception, which in any event, only covers limited permitted purposes). The Law Council acknowledges that the task of collecting admissible evidence from a foreign conflict zone is inherently difficult. However, an individual defendant is at a considerably greater disadvantage than law enforcement agencies, which have powers and resources that are unavailable to private individuals.

Key recommendations

10. The Law Council continues to recommend the repeal of the declared areas regime. Instead, law enforcement agencies should continue to utilise their other preventive and investigatory powers to achieve the desired objectives of prevention, disruption and deterrence that underpin the declared areas regime. This would bring Australia into line with the approaches taken by other, like-minded countries to respond to the threat of foreign terrorist fighters, which have not enacted a comparable offence.[4]

11. If there is a desire to retain the declared areas regime, the Law Council makes three alternative recommendations for amendments to sections 119.2 and 119.3 (summarised below). In making these recommendations, the Law Council seeks to ensure that there are legal safeguards against the risk that executive discretion in the application and enforcement of the offence may be exercised arbitrarily.

12. The Law Council's recommended amendments are directed to the following matters:

    - **elements of the offence**—requiring proof of a person's intent to travel to a declared area with an illegitimate purpose (that is, to engage in an activity in the nature of a terrorism or foreign incursions offence);

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[2] That is, the Minister for Foreign Affairs in determining whether to make a declaration of an area under section 119.3 of the Criminal Code that enlivens the offence in section 119.2, and the Attorney-General in determining whether to consent to a prosecution under section 119.11 of the Criminal Code.

[3] These exceptions cover: (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 or a State or Territory; (d) performing an official duty for the government of a foreign country or part of a foreign country (including service in armed forces) where this would not violate an Australian law; (e) performing an official duty for the United Nations or one of its agencies, or the International Committee of the Red Cross; (f) making a news report of events in the area, where the person is working in a professional capacity as a journalist or assistant to a journalist; (g) making a bona fide visit to a family member; or (h) any other purpose prescribed by the regulations. (As at August 2020, no such other purposes had been prescribed.)

[4] See, for example: James Renwick CSC SC, Independent National Security Legislation Monitor, *Report on the review of sections 119.2 and 119.3 of the Criminal Code: declared areas* (September 2017), 29 at [8.7] (**INSLM report).** Dr Renwick noted that no other country in the Five Eyes alliance had enacted comparable offences, and the only other country with a similar regime is Denmark, however, its offence was subject to a Ministerial regime of 'pre-approval' for individual requests to travel to the relevant areas.

- **expansion of the legitimate purpose exception**—making targeted expansions to legitimate purposes recognised in subsection 119.2(3) to cover:
  - bona fide, necessary and urgent business to protect legitimate business interests domiciled in a foreign country; and
  - providing legal advice to an Australian person who is detained in the declared area;
- **prescription of declared areas**—strengthening the statutory criteria and process by which the Minister for Foreign Affairs may prescribe an area as a 'declared area' in section 119.3, and the circumstances in which a declaration must be reviewed by the Minister; and
- **sunset period and further statutory reviews**
  - limiting any extended period of effect of the regime to a maximum of three years (consistent with the period of extension in 2018); and
  - mandating further statutory 'pre-sunsetting reviews' by the INSLM and Committee (consistent with established practice).

Background to the review

13. The declared areas regime was enacted in 2014, subject to a four-year sunset clause.[5] Its operation was extended for a further three years in 2018, following statutory reviews by the Committee and the third Independent National Security Legislation Monitor (**INSLM**), Dr James Renwick CSC SC, in 2017 and 2018.[6]

14. Those reviews recommended the extension of the declared areas regime for a further period of between three and five years, with some relatively modest amendments, which included:

    - a limited expansion to the humanitarian aid-related exception to the offence;
    - the conferral of a discretionary Ministerial power to revoke, at any time and for any reason, instruments which designate 'declared areas'; and
    - the conferral of an advisory review function on Committee in relation to individual declarations after the statutory disallowance period has expired, in addition to its existing review functions during the disallowance period.[7]

15. The legislation continuing the operation of the regime for a further three years implemented most amendments recommended by the INSLM and Committee.[8]

[5] INSLM report; and Parliamentary Joint Committee on Intelligence and Security, *Report on the review of the 'declared area' provisions: sections 119.2 and 119.3* (February 2018) (**Committee report**).

[6] The INSLM recommended extension of five years: INSLM report, 38 at [9.5]. The Committee recommended extension of three years: Committee report, 25-26 at [2.42]-[2.43] and recommendation 1.

[7] INSLM report, 38 at [9.2]-[9.4-] and 31-35 at [8.18]-[8.35]. See further: Committee report, 37-48 at [2.81]–[2.121] and recommendations 2-5.

[8] Counter-Terrorism Legislation Amendment Act (No 1) 2018 (Cth). See also: Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment Bill (No 1) 2018*, June 2018, recommendation 1.

16. However, the Government did not support a further recommendation of the INSLM for an additional exception to the offence for travel undertaken in accordance with a prior approval from the Minister, under an application-based 'pre-approval' scheme.[9]

17. The declared areas regime is due to sunset on 7 September 2021, unless the Parliament legislatively extends its duration.[10] The Committee's present review, conducted under subparagraph 29(1)(bb)(iii) of the *Intelligence Services Act 2001* (Cth), is an opportunity for the Parliament to determine whether the declared areas regime remains necessary and proportionate to the objective of preventing Australians from participating in, or supporting, the hostile activities of terrorist organisations in foreign countries. The Law Council submits that the declared areas regime falls short of the requirements of necessity and proportionality.

Offence of entering, or remaining in, a declared area (section 119.2)

18. The offence in section 119.2 of entering or remaining in a declared area casts the net of criminal liability in exceptionally broad terms. The Law Council reiterates its previous submissions to the Committee and the INSLM that the scope of the offence is excessive, in that it goes further than is necessary and proportionate to manage the threat presented by Australian 'foreign terrorist fighters'.[11] The key difficulties with this provision, which are detrimental both individually and cumulatively, are outlined below.

Elements of the offence

19. The elements of the offence impose a remarkably low threshold of culpability. They merely require proof of an Australian person's intentional presence in a declared area, and proof that the person was reckless as to the circumstance that the area was the subject of a declaration made under section 119.3.[12] There is no requirement for the prosecution to prove that the person engaged in, or intended or attempted to engage in, terrorism-related activities in the foreign country. Rather, criminality is founded on mere intentional presence in an area.

20. The Law Council acknowledges that a limited degree of assurance may be taken from the requirement for the prosecution to prove, to the criminal standard, that a person was reckless in relation to the **specific fact** that the area was the subject of a declaration made under section 119.3, and not merely that it was the subject of a 'do not travel' advisory warning, or a travel ban made under a different source of legal authority. (That is, the prosecution must prove that the person either knew that area was the subject of section 119.3 declaration; or was aware of a substantial risk that there was such a declaration in force and took the unjustifiable risk of travelling

[9] Australian Government, *Response to statutory reviews of the Parliamentary Joint Committee on Intelligence and Security and Independent National Security Legislation Monitor* (May 2018), 9. The Law Council also expressed concern about the potential security implications of a Ministerial pre-approval based scheme: Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the declared area provisions* (November 2017) (**LCA Committee Submission**), 5-6 at [23]-[28].

[10] Criminal Code, subsection 119.2(6).

[11] Law Council of Australia, LCA Committee submission; Law Council of Australia, *Submission to the Independent National Security Legislation Monitor review of stop, search and seizure powers, declared areas, control orders, preventative detention orders and continuing detention orders* (May 2017), 12-17 (**LCA INSLM submission**); and Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014) at 12-15.

[12] Criminal Code, subsection 119.2(1). See especially, paragraphs (a) and (b).

to, or remaining in, the area. Whether that risk is unjustifiable would be assessed objectively, in the circumstances known to the person at the time.)[13]

21. The threshold of recklessness may ultimately serve to exculpate a person who was wholly inadvertent to the possibility that a declaration had been made under section 119.3 which covered their destination in a foreign country, and travelled to or remained in that area for reasons that were entirely unrelated to terrorism.

22. However, the application of this fault element to the physical element of the area being 'declared' is likely to turn on fine distinctions in, and judgments about, the available evidence. A person's exposure to prosecution will turn on the judgment of prosecutors about that evidence, in deciding whether to seek the Attorney-General's consent to commence a prosecution, or to continue a prosecution where consent has been obtained. It is therefore unlikely to offer strong or certain protection to individuals who have no connection with a terrorist organisation from being subjected to criminal investigation, charge and prosecution in respect of their presence in an area. The breadth of a person's exposure to the ordeal of prosecution (irrespective of the ultimate outcome) is material to the proportionality of the limitation imposed by the offence on the right to freedom of movement.

23. The Law Council notes that the broad elements of the offence could also cover spouses and children over the age of 10 years, who travel to, or remain in, a declared area at the insistence of their partner or parent. Those spouses or children may have no intention to engage in terrorism-related activities (in the foreign country or elsewhere) and no specific desire to be in the declared area, but may acquiesce to requests to travel out of practical necessity (for example, because they are financially or otherwise dependent on their partner or spouse who is travelling).[14]

Offence-specific exception for 'legitimate purposes'

Narrow scope of the exception

24. The exception in subsection 119.2(3) is limited to persons who enter or remain in a declared area solely for one of the eight purposes that are prescribed as 'legitimate purposes' in paragraphs (a) to (h) (see footnote 3 above). While it is important that these matters are recognised as exculpatory factors, they are not exhaustive of the wide array of reasons a person may be present in a declared area, which would otherwise be perfectly lawful. For example, the current exceptions would not:

- extend to a person who entered or remained in a declared area for the purpose of protecting their legitimate business interests domiciled in the area (for example, urgently making arrangements to relocate the business or cease trading and secure its assets after hostilities had broken out);
- extend to a lawyer who entered or remained in a declared area for the purpose of providing legal advice to a client who is detained in that area by the

[13] Ibid, subsection 5.4(1).

[14] In these circumstances, it appears possible that the fault element of intention in relation to their conduct in travelling to, or remaining in, the declared area could be met. Subsection 5.2(1) of the Criminal Code provides that a person has intention with respect to conduct if they mean to engage in that conduct (for example, if a person means to board a flight or a vehicle or vessel to take them to a destination that is a declared area). Subsection 10.2(1) of the Criminal Code provides that a person is not criminally responsible for an offence if they carry out the relevant conduct under duress. However, subsection 10.2(2) sets a high threshold. It requires proof that the person was threatened unless they committed an offence, and there was no reasonable way the threat could be rendered in effective, and their conduct was a reasonable response to the threat.

government of the foreign country, or a non-state actor that is exercising effective governmental control over the area; or

- allow for the exercise of judicial discretion, in the prosecution of an individual for the offence in section 119.2, to determine whether a particular, non-enumerated purpose was, in fact, a legitimate one (in that it had no connection with a listed terrorist organisation operating in the area, and would not otherwise have violated any other applicable Australian law).

25. This difficulty is amplified by the fact that the exception is limited expressly to circumstances in which the **sole purpose** of a person's presence in the area was covered by the matters prescribed as 'legitimate purposes'. The exception is therefore unavailable to a person who was present in an area for multiple reasons, none of which were connected with terrorism-related activity, but not all were covered by the current statutory list of 'legitimate purposes'.

26. For example, the sole purpose requirement in subsection 119.2(3) would exclude the following people from the exception:

- an Australian journalist who is in the area for the dual purpose of making news reports of the activities, as well as writing a book or conducting academic research (noting that it is not uncommon for professional journalists to also hold appointments at academic institutions or policy organisations; or to publish monographs recording detailed information and analysis about issues they have encountered in their professional journalistic work); and
- a person who was a permanent resident of Australia and a citizen of the foreign country in which the declared area was located, who travelled the area because they had family, friends and a business in that place, and wished to help their family and community members to evacuate to a safer place, while also relocating, winding up or otherwise securing their business.

Allocation of the evidential burden

27. Framing the 'sole legitimate purpose' provisions in subsection 119.2(3) as an offence-specific exception, rather than making the absence of a legitimate purpose an element of the offence, means that the defendant bears the evidential burden in relation to the purpose of their presence in the declared area.[15]

28. The task of adducing evidence suggesting a reasonable possibility that the person's sole motive for being present in a declared area was one of the prescribed 'permitted purposes' is difficult because:

- it is possible that no tangible evidence of the defendant's motive may exist, and a defendant may only be able to make a bare statement of their subjective intent, which might not discharge an evidential burden;[16]
- there are significant challenges in obtaining admissible evidence from a foreign conflict zone. As noted above, while Law Council acknowledges that these challenges exist for both the prosecution and the defendant,

[15] Criminal Code, subsection 13.3(3).

[16] Although, as the INSLM recognised, to discharge an evidential burden, a defendant is only required to adduce 'slender evidence' that 'may be taken at its most favourable to the accused', the Law Council's concern is that the narrow framing of the exception and the circumstances in which it will operate (requiring a defendant to 'prove a negative' in the context of their presence in a foreign conflict zone) may make it impossible for a defendant to meet that threshold. (See further: INSLM report, 10 at [3.13]-[3.14] referring to *The Queen v Khazaal* (2012) 246 CLR 601, 624 per Gummow, Crennan and Bell JJ.)

the challenges faced by a defendant, as a private individual, may conceivably be greater than the prosecution and investigating police, which have the resources and powers of the State at their disposal; and

- as noted above, a defendant may have had multiple purposes for entering or remaining in the declared area, none of which were in any way connected with terrorism, but only some of which were recognised in the 'legitimate purposes' prescribed in subsection 119.2(3). This would exclude the defendant from the offence-specific exception.

Sentencing implications

29. The arbitrary nature of the declared area offence in section 119.2 is compounded by the sentencing consequences for persons found guilty of the offence. Section 19AG of the *Crimes Act 1914* (Cth) (**Crimes Act**) applies to mandate a non-parole period of at least three quarters of the full sentence of imprisonment imposed for a 'terrorism offence'. The latter term is defined in section 3 of the Crimes Act to include the offences in Part 5.5 of the Criminal Code (which covers section 119.2). Consequently, if a person is sentenced to imprisonment for the offence in section 119.2, they will be required to serve at least three quarters of that custodial sentence.

Threshold and process for prescribing a 'declared area' (section 119.3)

30. The enlivenment of the offence in section 119.2 is subject to the exercise of a further discretionary executive power. This is the discretionary power of the Minister for Foreign Affairs under section 119.3 to prescribe a 'declared area'.

31. As the Committee acknowledged in its 2018 report, the declaration-making power in section 119.3 is subject to a very low threshold.[17] The Minister need only be satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of a foreign country.[18] The Law Council is concerned that there are inadequate statutory criteria to guide and limit the exercise of discretion, and therefore ensure that the offence in section 119.2 is only available where it is necessary and proportionate to manage identified security risks presented by prospective Australian 'foreign terrorist fighters' in relation to a particular terrorist organisation operating in a particular area of a foreign country.

32. In particular, there are no statutory criteria prescribing the threshold or degree of hostile activity being carried out by the terrorist organisation in the relevant area (such as a requirement that the area is under the effective control of a listed terrorist organisation, or such an organisation is engaging in hostile activity to a significant degree, having regard to the continuity of its presence and the nature and effects of its activities). Nor is the Minister required to consider the likely consequences of making the declaration (that is, the exposure of Australians to criminal liability on the basis of their mere presence in the area) and be satisfied that they are reasonable necessary to manage the security risk, and are proportionate to that objective.

33. Further, there is no statutory process to ensure (rather than merely recommend) the timely revocation of a declaration, in line with potentially rapid changes to the

[17] Committee report, 45-46 at [2.110]-[2.111].
[18] Criminal Code, subsection 119.3(1).

international security and geopolitical environment.[19] In contrast to the provisions of Division 102 of the Criminal Code governing the listing and de-listing of terrorist organisations by the Minister for Home Affairs, there is no statutory application-based review process in relation to declarations made under section 119.3, which would require the Minister for Foreign Affairs to review an extant declaration on the application of any person, and decide whether it should be revoked or varied.[20]

34. The absence of statutory limitations on the power to prescribe a declared area, and the absence of statutory requirements for the mandatory review of declarations while they are in force, exacerbates the risks outlined above arising from the breadth of the elements of the offence in section 119.2 and the narrow scope of the exception. That is, there is no legal limitation on the power of the Minister for Foreign Affairs to declare an area on the basis of isolated or low-impact hostile activities of a terrorist organisation, or to otherwise make a declaration at a very early stage of an outbreak of conflict in a region. If the declaration power was exercised in this way, it is readily conceivable that many Australian persons will have numerous non-terrorism related reasons for being present in the area and will therefore be exposed to criminal liability under section 119.2.

35. This risk is not ameliorated by the fact that declarations made under section 119.3 are disallowable legislative instruments[21] that are the subject of advisory review by the Committee.[22] Nor is it ameliorated by the current practice of the Minister to consider various non-statutory criteria, which have been developed by the Australian Security Intelligence Organisation (**ASIO**).[23]

36. All of these measures are reliant on the exercise of executive, parliamentary and political discretion. They are not legal limitations on the declaration-making power itself, which is the essential characteristic of a safeguard. That is, a safeguard removes the risk that a power could be exercised in a harsh and oppressive manner, by placing legal limits on its scope.

37. In addition, it should be noted that a declaration of a declared area made under section 119.3 could be in force (and individuals exposed to criminal liability under section 119.2) for a protracted period of time before the Parliament has an opportunity to exercise its power of disallowance under section 42 of the *Legislation Act 2003* (Cth). This is because the legislative instrument prescribing an area as a 'declared area' will generally commence the day after its registration on

[19] While there is an obligation on the Foreign Minister to revoke a declaration if they believe that the grounds a are no longer met, and a three-year sunset period for declarations, there is no obligation on the Minister to conduct periodic reviews within the period of operation. Further, while the Committee can review declarations at any time during its period of effect, the power of review is discretionary and the Committee's recommendations are merely advisory to the Minister: Criminal Code, subsections 119.3(4), (5) and (8).

[20] Cf Criminal Code subsection 102.1(17) which requires the Minister for Home Affairs to consider an application brought by any person for the 'de-listing' of a terrorist organisation that is listed under Division 102.

[21] Criminal Code, subsection 119.3(1) and *Legislation Act 2003* (Cth) section 42.

[22] Criminal Code, subsections 119.3(7) and (8).

[23] Committee report, 46 at [2.112]. Non legislative factors identified by ASIO in its evidence to the Committee included: links to Australia and Australians; threats to Australian interests; the enduring nature of the terrorist organisation's hostile activity in the area; international relations; and the operational utility of declaring the area. While the Committee considered that these factors would help to ensure 'a more judicious application of the declared area provisions' and considered them to be 'crucial factors' in determining whether an area should be declared, and whether a declaration should remain in force, its report did not address the question of whether they should be enumerated as statutory issuing criteria. Rather, the committee recommended that the public statements of reasons accompanying each declaration should address these matters.

the Federal Register of Legislation (rather than being deferred to the expiry of the disallowance period).[24]

38. If the Parliament is adjourned for a prolonged period (such as the current adjournments due to the COVID-19 pandemic, or the routine December-January sitting break) a considerable amount of time may elapse between the commencement of the instrument (the day after registration) and the expiry of the 15-sitting-day disallowance period (which runs from the Parliamentary tabling of the instrument, which in turn, must occur within six sitting days of registration).[25] An individual will therefore be exposed to criminal liability in this potentially lengthy intervening period, without Parliamentary limitation or control.

General comments on necessity and proportionality

Overreliance on executive discretion

39. In raising the above concerns about specific aspects of the declared areas regime, the Law Council acknowledges and supports the need for law enforcement agencies to have appropriate and proportionate legislative tools to prevent, disrupt and deter prospective foreign terrorist fighters, who present a significant and ongoing security threat to national and international security. However, the Law Council's concern is that the criminalisation of a person's mere presence in an area in a foreign country is a disproportionately blunt instrument through which to achieve the objectives of prevention, disruption and deterrence.

40. As noted above, the effect of the declared areas regime is to shift the difficulties of obtaining admissible evidence about a person's intent and activities in a foreign conflict zone from the prosecution to the defendant. This means that the liability, or otherwise, of a person who travels to or remains in a declared area for non-terrorism related purposes is dependent on the exercise of discretion by law enforcement agencies, and the Attorney-General in determining whether to consent to a prosecution.[26]

41. Reliance on unguided executive discretion cannot rationally be characterised as a safeguard against arbitrariness or oppression. The defining characteristic of a safeguard, and a fundamental tenet of the rule of law, is that the discretionary exercise of power is subject to defined legal limits, which are clear and certain.

42. As the third INSLM observed in his final report, public trust and confidence are essential to the credibility and legitimacy of Australia's security agencies, including law enforcement agencies, in performing their vital functions.[27] However, that trust and confidence is not gained merely through those agencies and Ministers conducting themselves with integrity, propriety and fairness in exercising broad discretionary powers,[28] including in making decisions about the enforcement of

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[24] *Legislation Act 2003* (Cth), paragraph 12(1)(a).

[25] Ibid, sections 38 and 42.

[26] As explained below, the scope of the offence in section 119.2 is also subject to the exercise of discretion by the Minister for Foreign Affairs under section 119.3, about whether to prescribe an area as a declared offence, and whether to revoke such a declaration, with very limited statutory guidance on, and limited Parliamentary control of, the exercise of that discretion.

[27] James Renwick CSC SC, Independent National Security Legislation Monitor, *Trust but verify: report concerning the Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018 and related matters*, (June 2020), 23 and 34 at [1.50].

[28] Ibid.

offences that are equally capable of covering terrorism-related activities and wholly unrelated activities.

43. Rather, the Law Council concurs with the views of the third INSLM in his final report that there must also be robust legal safeguards to prevent any misuse or oppressive use of power (whether deliberate or inadvertent). In the case of the declared areas offence, these safeguards should take the form of statutory limitations on the scope of criminal liability, so that individuals who are not engaged in any terrorism-related activities are not exposed to prosecution and up to 10 years' imprisonment.[29]

Expansion of other preventive and disruptive powers since the enactment of the declared areas regime in 2014

44. Since the declared areas regime was enacted in 2014, a significant number of new or expanded preventive and surveillance powers have been conferred on law enforcement and intelligence agencies.

45. These tools have significantly enhanced the ability of security agencies to investigate terrorism and foreign incursions-related offences, and, consequently, to disrupt and deter the activities of prospective 'foreign terrorist fighters' and prevent the return of such persons to Australia. New powers include:

- temporary exclusion orders;[30]
- a citizenship cessation regime;[31]
- significant expansions of agencies' electronic surveillance powers;[32]
- the expansion of the grounds on which control orders may be issued to include foreign incursions-related activities, and the extension of surveillance powers to monitor a person's compliance with a control order;[33] and
- the enactment of a compulsory industry assistance scheme, under which law enforcement and intelligence agencies may compel communications providers to assist them in accessing electronic data relevant to their investigations.[34]

46. Further, the Committee is presently reviewing proposals for additional expansions of law enforcement and intelligence agencies' investigatory powers, which are relevant to the investigation of terrorism and foreign incursions-related offences in the context of Australian 'foreign terrorist fighters'.[35]

47. In addition, on 6 August 2020, the Government announced, as part of the *2020 Cybersecurity Strategy*, its intention to introduce legislation expanding the powers of

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[29] These are examples, in a criminal law context, of the core features of the legislative framework for national security and counter-terrorism legislation, which are necessary to build public trust and confidence in security agencies, which were identified by the third INSLM in his report on the TOLA amendments. The third INSLM quoted the (then) Independent Reviewer of Terrorism Laws for the UK, David Anderson QC, who emphasised 'the importance of clear law, fair procedures, rights compliance and transparency': ibid, 23.

[30] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth).

[31] *Australian Citizenship Act 2007* (Cth), sections 35, 35AAA and 35AA.

[32] See, for example, *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) (**TOLA Act**), Schedules 2-5 (law enforcement computer access warrants, and expanded mandatory assistance orders to make intelligible data collected under a warrant).

[33] *Counter-Terrorism Legislation Amendment Act (No. 1) 2014* (Cth), Schedule 1; and *Counter-Terrorism Legislation Amendment Act (No. 1) 2016* (Cth), Schedules 1-10.

[34] TOLA Act, Schedule 1, inserting Part 15 of the *Telecommunications Act 1997* (Cth).

[35] Telecommunications Legislation Amendment (International Production Orders) Bill 2020; and Australian Security Intelligence Organisation Amendment Bill 2020.

the Australian Federal Police and Australian Criminal Intelligence Commission to access data from the 'dark web' and to deploy an offensive capability to disable online networks being used to engage in serious offences, including terrorism.[36]

48. The Law Council submits that these expanded powers—when combined with the availability of terrorism and foreign incursions offences that specifically target preparatory and ancillary acts[37]—suggest that the declared areas regime is neither necessary nor proportionate.

Limited evidence of enforcement

49. As at August 2020, publicly available information suggests that there has only been extremely limited use of the declared areas regime.

Prosecution

50. The Law Council is only aware of one prosecution for an offence against subsection 119.2(1), as at August 2020. Mr Belal Betka was charged in December 2017 with one count of an offence against subsection 119.2(1) (entering a declared area), and one count of an offence against subsection 119.1(2) (engaging in a hostile activity in a foreign country).

51. The offences concerned his travel to Al-Raqqa, Syria, in 2015, which was then a declared area under section 119.3, to provide support to the listed terrorist organisation ISIS. This included receiving training in clerical duties, becoming part of a group under the command of an ISIS official, engaging in a conflict where his group was attacked with drones, distributing firearms rounds, discharging firearms, and destroying property.[38]

52. Mr Betka pleaded guilty to the charge in relation to subsection 119.1(2) (namely, engaging in a hostile activity in a foreign country). In sentencing Mr Betka for the 'hostile activity' offence in subsection 119.1(2) in February 2020, the New South Wales Supreme Court took into account the charge in relation to the declared areas offence under subsection 119.2(1). This was pursuant to a sentencing provision in section 16BA of the Crimes Act. This enables a sentencing court to take into account the fact that a person has admitted guilt to another offence in certain circumstances, including the agreement of the person being sentenced.[39] Mr Betka

[36] Australian Government, *2020 Cybersecurity Strategy*, 6 August 2020, [6]. See also: the Hon Scott Morrison MP, Prime Minister of Australia, and the Hon Peter Dutton MP, Minister for Home Affairs, *Transcript of Press Conference: Australian Parliament House, Thursday 6 August 2020*, Media release, 6 August 2020, 8.

[37] Criminal Code, sections 101.2-101.6 (offences for preparatory and ancillary acts in relation to a terrorist act), sections 102.2-102.8 (terrorist organisation offences), sections 103.1 and 103.2 (terrorism financing offences), and sections 119.4-119.6 (offences for preparatory and ancillary acts in relation to foreign incursions). All of these offences are also subject to the extensions of criminal responsibility in Chapter 2 of the Criminal Code (such as attempt, conspiracy and aiding and abetting).

[38] *R v Betka* [2020] NSWSC 77 (20 February 2020, Harrison J). See especially the summary of the defendant's activities in Syria at [17].

[39] Section 16BA of the Crimes Act provides that a sentencing court may take into account the fact that a person admits guilt to another offence (known as the 'scheduled offence' which, in this case, is the declared areas offence in section 119.2(1) of the Criminal Code) for the purpose of sentencing them for another federal offence (known as the 'principal offence', which in this case is the hostile activity offence in subsection 119.1(2) of the Criminal Code). The prosecution must file a document with the court for the purpose of section 16BA, which identifies the 'scheduled offence/s' which the person is believed to have committed. The court may, with the consent of the prosecution, ask the person whether they admit guilt to the scheduled offence or offences, and if so, whether they wish to have them taken into account on sentencing for the principal offence. If the person admits guilt to the scheduled offence or offences, and states that they wish to have the scheduled offence or offences taken into account in passing sentence for the principal offence, then the court

was sentenced to imprisonment for three years and eight months for the 'hostile activity' offence in subsection 119.1(2).

53. The court's sentencing remarks highlight the overlap between the offences in sections 119.1 and 119.2. The sentencing judge, Harrison J, did not accept the prosecution's submission that the sentence for the primary, 'hostile activity' offence in subsection 119.1(2) should be increased because of the subsection 119.2(1) 'declared area' offence, which was submitted to be 'independently serious'.[40] In rejecting that submission, his Honour stated:

> *I do not consider that Mr Betka's sentence for the principal offence* [the 'hostile activity' offence in subsection 119.1(2)] *should be significantly increased for doing something* [namely, travelling to Al-Raqqa, Syria] *that is contemplated by the principal offence. The scheduled offence* [the 'declared area' offence in subsection 119.2(1)] *is necessarily geographically contemplated by the principal offence. The Crown's submission, if accepted, would lead to double counting.*[41]

54. Other than this matter, the Law Council is not aware of any further prosecutions for offences against section 119.2. The Law Council notes that the Committee's 2018 report on its previous review indicated that, at 19 December 2017, there were six outstanding arrest warrants issued for Australian persons who were overseas, and that one person (presumably Mr Betka) had been arrested and charged in Sydney.[42] There does not appear to be information on the public record about the status of these or any subsequent matters, including any reasons for any discontinuation of enforcement action.

Proceeds of crime matter

55. The only other publicly available evidence of enforcement action relevant to the offence in section 119.2 that the Law Council has identified is the case of *Re Commissioner of Australian Federal Police (No. 3).*[43]

56. This case concerned an application for a consent order for the forfeiture of assets under the *Proceeds of Crime Act 2002* (Cth). The relevant property (namely, certain bank accounts and travel debit cards) was suspected of being proceeds of the offence of entering or remaining in a declared area (namely, the Al Raqqa province in Syria, which was then the subject of declaration made under section 119.3). The respondent was not charged with the offence in section 119.2, but rather held an interest in one of the bank accounts.

Comment on low utilisation of the offence

57. While the limited use of an offence is not conclusive of a lack of necessity, the Law Council submits that it is a relevant and highly persuasive consideration that should be given considerable weight. The declared areas offence only appears to have been applied in sentencing an offender who was convicted of a different offence,

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may do so. Further, section 16BA provides that the person cannot then be prosecuted for the 'scheduled offence' to which they have admitted guilt for the purpose of sentencing for the principal offence under section 16BA of the Crimes Act. Their admission of guilt to the 'scheduled offence' is not admissible in evidence in proceedings against them in relation to that offence.

[40] *R v Betka* [2020] NSWSC 77 (20 February 2020, Harrison J) at [38].

[41] Ibid, [40].

[42] Committee report, 21 at [2.26]-[2.27].

[43] [2016] NSWSC 759 (10 June 2016, Button J).

whose conduct was held to be at the 'lower end of the range of objective seriousness',[44] and to support a civil application for asset forfeiture.[45] At the very least, this casts doubt on its necessity.

58. The fact that the sole case to have been prosecuted also involved a charge (and ultimately a conviction) for the 'hostile activity' offence in subsection 119.1(2) further tends to suggest that other offences provide an adequate basis on which to denounce, punish and deter the activities of so-called 'foreign terrorist fighters'. More generally, the lack of other prosecutions for the declared areas offence in section 119.2 also suggests that other terrorism offences (and associated investigatory and preventive powers) offer adequate preventive, disruptive and deterrent mechanisms.

59. One possible explanation for the extremely limited enforcement of the offence in section 119.2 is that it has failed to mitigate the difficulties experienced by law enforcement agencies in obtaining admissible evidence from a foreign conflict zone. For example, it may nonetheless be extremely difficult for the Australian Federal Police to obtain admissible evidence which establishes, to the criminal standard of proof, that a person entered or remained in the precise geographical area that was the subject of a declaration made under section 119.3. In this event, it would be highly undesirable to extend the duration of an offence that has neither achieved its stated deterrent objectives because it is practically unenforceable, nor provided adequate protections to individuals against arbitrary exposure to criminal liability.

60. On the matter of low utilisation of the declared areas regime as a whole, it is also material that there are currently no active declared areas, which has been the case since December 2019.[46] Further, as the Committee commented in its 2018 report, the length of time taken to revoke the two declarations made to date after the cessation of hostilities is a matter of concern.[47]

International human rights concerns

61. For all of the reasons outlined above, the Law Council continues to share the concerns raised by the Parliamentary Joint Committee on Human Rights (**PJCHR**) in its 2014 review of the originating Bill.[48]

62. In particular, the Law Council remains concerned that the breadth of the offence and the narrow scope of the above exception is a disproportionate (and thus impermissible) limitation on the right to freedom of movement under Article 12 of the *International Covenant on Civil and Political Rights* **(ICCPR**).[49]

63. As the PJCHR observed, there are significant numbers of Australians (citizens, permanent residents and protection visa holders) with connections to countries that could be subject to a declaration under section 119.3. These individuals may have legitimate and innocent reasons to travel (particularly if a declaration was made at

[44] *R v Betka* [2020] NSWSC 77 (20 February 2020, Harrison J) at [54].

[45] *Re Commissioner of Australian Federal Police (No. 3)* [2016] NSWSC 759 (10 June 2016, Button J).

[46] Two areas were formally declared, namely the Mosul District in the Ninewa Province in Iraq (from 2 March 2015 to 19 December 2019) and the Al Raqqa province in Syria (from 4 December 2014 to 30 November 2017). See: *Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Revocation Instrument 2019—Mosul District, Ninewa Province, Iraq*; and *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Revocation Instrument 2017 – Al-Raqqa Province, Syria*.

[47] Committee report, 46 at [2.113].

[48] PJCHR, *Report 14 of 2014*, (October 2014) at 35-44.

[49] *International Covenant on Civil and Political Rights*, [1980] ATS 23 (done at New York, 16 December 1966).

the early stages of the outbreak of hostilities). They would be exposed to criminal liability for such activities as transacting urgent matters of business domiciled in the area, securing or retrieving personal property, and attending to their financial or other personal affairs, in anticipation of being unable to return to the country for a prolonged period due to the instability.[50] As discussed below at paragraph [68], it is no answer that the law has not yet operated in this manner.

64. The Law Council also continues to share the concern raised by the PJCHR in 2014 that the offence in section 119.2 has the potential to impact on the rights to equality and non-discrimination, on the basis that criminalising access to certain areas within a foreign country may have a greater effect on certain individuals based on their ethnicity or place of birth.[51]

65. The Law Council is further concerned that the design of the offence, in inculpating mere presence in a declared area, with only a narrow 'sole legitimate purpose' exception, conflicts with the presumption of innocence provided for in Article 14(2) of the ICCPR as part of the right to a fair trial. As explained above, it places a potentially insurmountable evidential burden on the defendant to 'prove a negative' in the context of an extremely limited exception that attaches to a person's activities in a foreign conflict zone.[52] If a defendant is unable to discharge the evidential burden in subsection 119.2(3) because of these practical impossibilities, the prosecution will not be required to discharge any legal burden in relation to the purpose of the person's presence in the declared area,[53] and the person is liable to conviction on the basis of their mere presence in that area.

66. The Law Council acknowledges that the third INSLM concluded in 2017 that the declared areas regime was a proportionate limitation on human rights, including the rights to freedom of movement and a fair trial (including the presumption of innocence). This was based principally on his views that:

- 'the circumstances in which an adult person would wish to travel to either of the current declared areas are extremely narrow'.[54] (These were areas which were under the effective control of the terrorist organisation Daesh / ISIS, being the Mosul District in the Ninewa Province in Iraq, and the Al Raqqa province in Syria. Both declarations have since been revoked);[55] and
- 'the legitimate purpose exception renders the declared areas offence a sufficiently proportionate response to concerns of protecting the personal

[50] PJCHR, *Report 14 of 2014*, (October 2014), 39-42.

[51] Ibid, 42-44.

[52] Ibid, 34-38.

[53] That is, an exception which casts an evidential burden on the defendant in relation to a matter has the effect of deferring the legal burden on the prosecution to negate the matter. The legal burden on the prosecution to negate the exception will not arise if the defendant fails to discharge their evidential burden in relation that matter. See: Criminal Code, section 13.3. Hence, in the case of the declared area offence in section 119.2, if the question of a person's purpose for being present in a declared area is framed only as an exception and not an element of the offence, and the defendant fails to discharge the evidentiary burden for that exception, then the prosecution will not be required to discharge a legal burden to negate the reasonable possibility that the defendant was present in the area for one of the prescribed 'legitimate purposes'.

[54] INSLM report, 34 at [8.30].

[55] The declaration of the Mosul District in Iraq was in force from 2 March 2015 to 19 December 2019. The declaration of the Al Raqqa province in Syria was in force from 4 December 2014 to 30 November 2017. See: *Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Revocation Instrument 2019—Mosul District, Ninewa Province, Iraq*; and *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Revocation Instrument 2017 – Al-Raqqa Province, Syria*.

safety of Australians, and of preventing the support (directly or indirectly) of terrorist organisations in control of those areas'.[56]

67. However, the Law Council is concerned that these conclusions appear to be premised on an assumption that the wide Ministerial discretion in section 119.3 will invariably be exercised in the manner that occurred in the previous two instances. That is, these areas were effectively under the control of a terrorist organisation, and were made at a reasonably advanced stage of the conflict, such that it would be reasonable to conclude that the legitimate purposes prescribed in subsection 119.2(3) would be the only reasonable circumstances in which a person would enter or remain in those areas. The Law Council cautions against making such an assumption in the absence of any statutory limitation on the declaration-making power in section 119.3 to these circumstances.

68. In fact, there are no meaningful legal safeguards in sections 119.2 or 119.3 that would protect a person from exposure to criminal liability if the discretionary Ministerial power to declare an area was exercised in factual circumstances outside those contemplated by the INSLM (as summarised above).

69. The very fact that the declared areas regime has the **potential** to apply in a manner that is disproportionate to the limitations it places on human rights makes it difficult to conclude that it is compatible with Australia's international obligations. The human rights compatibility of a law is assessed by reference to the way in which a statutory power is **legally capable** of being exercised; not merely its exercise in practice or the subjective policy intent about its manner of exercise.

Recommendations

70. In view of the above concerns about a lack of demonstrable necessity and proportionality of the offence in section 119.2 (including because of the circumstances in which it may be enlivened under section 119.3) the Law Council's primary recommendation is for the repeal of the declared areas regime in entirety, consistent with its previous submissions to the Committee and the INSLM in 2017.[57]

71. In preference to the problematic approach of criminalising person's mere presence in an area within a foreign country (the designation of which is, itself, subject to an open-ended discretion by the Minister for Foreign Affairs) the Law Council favours placing reliance on other legislative powers to achieve the desired preventive, disruptive and denunciatory objectives underlying the declared areas regime. This would bring Australia into line with the legislative approaches taken by like-minded countries to respond to the threat of foreign terrorist fighters, which have not enacted comparable offences.[58]

72. The alternative statutory tools that are already available to Australian law enforcement and security agencies include the following:

[56] INSLM report, 34 at [8.31].

[57] Law Council of Australia, LCA Committee submission, 2 at [7]; Law Council of Australia, LCA INSLM submission, 16-17 (recommendation) and 13-14 at [27]-[36].

[58] As the INSLM noted, no other country in the Five Eyes alliance has enacted a comparable offence. The only other jurisdiction to have enacted a similar sort of offence is Denmark: INSLM report, 29 at [8.7].

- the exercise of powers to cancel or suspend and confiscate a person's travel documents, including on suspicion of their intention to travel to a foreign country to fight with, or provide other support to, a terrorist organisation;[59]
- the enforcement of terrorism and foreign incursions-related offences in Parts 5.3 and 5.5 of the Criminal Code. In addition to committing a terrorist act or a hostile activity in a foreign country, these offences include:
  - specific offences for engaging in preparatory and ancillary activities (such as preparation and planning, and financing a terrorist act or hostile activity in a foreign country);[60]
  - offences in relation to membership of, recruitment for, participation in and provision of support to, terrorist organisations;[61] and
  - extended liability under Chapter 2 of the Criminal Code (such as attempt, conspiracy and aiding and abetting) for these offences;[62] and
- the exercise of surveillance powers on persons within Australia, by law enforcement agencies in connection with the investigation of the offences noted above,[63] and by ASIO in connection with the collection of intelligence relevant to security (which would cover conduct constituting these offences).[64]
- making applications to the court for the issuing of a control order to restrict a person's movements and activities in the community to manage the security threat they present to the public;[65]
- strengthening investment in community-led prevention and de-radicalisation programs, including secure funding for program delivery and research; and
- obtaining temporary exclusion orders[66] or invoking citizenship cessation provisions[67] to prevent the return to Australia of foreign terrorist fighters.

Recommendation 1—repeal of declared areas regime (preferred option)

- **Sections 119.2 and 119.3 of the Criminal Code should be repealed.**

73. If the declared areas regime is renewed for a further period of time, the Law Council recommends that several amendments are made to sections 119.2 and 119.3.

[59] *Australian Passports Act 2005* (Cth), sections 20-22A; *Foreign Passports Act (Law Enforcement and Security Act) 2005* (Cth), Part 2.

[60] Criminal Code, sections 101.2-101.6 (preparatory and ancillary acts in relation to terrorism acts); 103.1-103.2 (terrorism financing); and sections 119(1), 119.4-119.7 (preparatory and ancillary acts in relation to foreign incursions).

[61] Ibid, sections 102.2-102.8 (offences in relation to terrorist organisations).

[62] Ibid, Part 2.4 (extensions of criminal responsibility).

[63] *Surveillance Devices Act 2004* (Cth); *Telecommunications (Interception and Access) Act 1979* (Cth); and *Telecommunications Act 1997* (Cth), Part 15 (compulsory assistance from private communications providers). See also, *Crimes Act 1914* (Cth), Part 1AB (controlled operations).

[64] *Australian Security Intelligence Organisation Act 1979* (Cth) especially Part III, Division 2 (special powers warrants), Division 3 (questioning warrants) and Division 4 (special intelligence operations); and *Telecommunications (Interception and Access) Act 1979* (Cth).

[65] Criminal Code, Division 104.

[66] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth).

[67] Australian Citizenship Act 2007, sections 35, 35AAA and 35AA.

Recommendation 2—reforms to the offence provision (non-preferred option)

- **If the declared areas regime is renewed for a further period of time, section 119.2 of the Criminal Code should be amended as follows:**

(a) the elements of the offence should require proof that the person intended to travel to, or remain in, a declared area for an illegitimate purpose. That is, the person intended to:

(i) engage in a terrorism or foreign incursions offence under Parts 5.3 and 5.5 of the Criminal Code (or an activity covered by the extensions of criminal responsibility in Part 2.4 of the Criminal Code, in relation to these offences); or

(ii) engage in an activity that was not covered by the permitted purposes that are currently prescribed in subsection 119.2(3);

(b) the matters currently prescribed as 'legitimate purposes' in subsection 119.2(3) should be expanded to include:

(i) bona fide, necessary and urgent business to protect legitimate business interests domiciled in a foreign country; and

(ii) providing legal advice to an Australian person who is detained in the declared area;

(c) consideration should be given to prescribing a further 'legitimate purpose' covering any other activity in the declared area, if the trier of fact is satisfied that the activity:

(i) was unrelated to the activities of a terrorist organisation; and

(ii) did not otherwise constitute an offence under another applicable Australian law;

(d) the offence provision should be subject to:

(i) a sunset date, providing for a further period of effect of no more than three years; and

(ii) statutory reviews by the Independent National Security Legislation Monitor and the Parliamentary Joint Committee on Intelligence and Security prior to the sunset date, to inform Parliamentary decision-making about whether to further extend the period of effect (including with any amendments).

Overlap with the offence in subsection 119.1(1) of the Criminal Code

74. In relation to paragraph (a) of recommendation 2 above, the Law Council acknowledges that its recommended amendment to the elements of the offence in section 119.2 would result in overlap with the existing offence in subsection 119.1(1) of entering a foreign country with the intention of engaging in a hostile activity in that country or another country.

75. The Law Council submits that the existence of this overlap casts further doubt on the necessity of retaining the offence in section 119.2, if it is amended as recommended above. For the reasons explained in this submission, the Law Council is of the view that the only possible way in which a 'declared areas offence' could be made compliant with Australia's human rights obligations is to require proof of a person's nefarious intent in relation to their presence in the area.

76. As such, the resultant overlap with subsection 119.1(1) (and potentially other offences in Parts 5.3 and 5.5 of the Criminal Code) is unavoidable. For this reason, the Law Council's preferred option is to repeal the declared areas regime and place sole reliance on the enforcement of existing offences, including subsection 119.1(1).

77. The practical enforceability of those offences will be assisted by the recent expansions to the investigatory and preventive powers already available to law enforcement agencies (as well as recent expansions to the powers of intelligence agencies, which may share information with law enforcement agencies).

Extension of legitimate purposes

Urgent business interests and legal advice

78. The Law Council acknowledges the concern expressed by the third INSLM that a significant 'opening up' of the prescribed 'legitimate purposes' in subsection 119.2(3) may neutralise the deterrent effect of the offence.[68] However, the Law Council notes that its recommended extensions of the legitimate purposes in paragraph (b) of recommendation 2 above are modest and targeted to very specific circumstances. They do not constitute a wholesale 'opening up' of the legitimate purposes.

Other activities that are wholly unrelated to a terrorist organisation

79. Further, the Law Council considers that its suggestion at paragraph (c) of recommendation 2 above would not undermine the deterrent effect of the offence. (This is a recommendation for the trier of fact to have discretion about whether a particular, non-prescribed purpose was, in fact, legitimate because it had no connection with a terrorist organisation and was not otherwise an offence.)

80. This would only be enlivened at the point of a person's trial. It would not prevent them from being investigated, arrested or charged. Similarly, it would not prevent the exercise of other powers of disruption or prevention before their intended travel, such as the cancellation or suspension of a person's passport, on suspicion that the person is attempting to commit the offence in section 119.2.

81. If the Committee nonetheless remains of the view that the matter in paragraph (c) of recommendation 2 above may potentially reduce the deterrent effect of the offence in section 119.2, then the Law Council would not object to an alternative form of implementation, which would cast this matter as an offence-specific exception. However, this is conditional on making the amendments to the elements of the offence in paragraphs (a) and (b) of recommendation 2. This would place an onus on a prospective traveller whose reasons fell outside the 'legitimate purposes' to ensure that they had sufficient evidence of the purpose of their travel to discharge an evidential burden. Although such an amendment is the Law Council's least preferred option, it may be an option to balance the objective of deterrence with the conferral of discretion on the trier of fact in individual prosecutions.

[68] INSLM report, 34 at [8.32].

Recommendation 3—amendments to the statutory criteria for prescribing declared areas, and the process for reviewing and revoking declarations

- **If the declared areas regime is renewed for a further period of time, section 119.3 of the Criminal Code should be amended as follows:**

(a) the statutory issuing criterion in subsection 119.3(1) should be supplemented with a further requirement that the Minister must not declare an area unless satisfied, on reasonable grounds, that:

(i) a listed terrorist organisation has engaged in a substantial hostile act in the declared area—for example, because:

- **the organisation has seized effective governmental control of the area; or**
- **the area is a major training, recruitment or operational base for the organisation; or**
- **the organisation otherwise has an enduring presence in the area; or**
- **the hostile activity or activities have involved significant and widespread loss of life or damage to property, which have de-stabilised peace and order in the area.**

(ii) making the declaration is necessary to protect Australia's national security, and the safety of individual Australians; and

(iii) the effects of making the declaration are reasonable and proportionate, including having regard to:

- **the extent to which it will potentially expose to criminal liability Australian persons who have no connection with a terrorist organisation;**
- **the availability of other, less restrictive options to protect Australia's national security and the safety of individual Australians than enlivening the offence in section 119.2;**
- **the impacts of the declaration on Australia's foreign relations; and**
- **the operational impact and utility of making the declaration;**

(b) the mandatory grounds of revocation in subsection 119.3(5) should be amended consequentially, to require the Minister to revoke a declaration if they cease to be satisfied that the criteria in paragraph (a) of this recommendation are met; and

(c) section 119.3 should include a provision analogous to subsection 102.1(17) (concerning applications for the de-listing of terrorist organisations by the Minister for Home Affairs) under which:

(i) any person may, at any time, make an application to the Minister for Foreign Affairs to revoke or vary a declaration; and

(ii) the Minister is obliged to consider and make a decision on the application.

The need for additional statutory conditions on the exercise of Ministerial discretion under section 119.3

82. As noted above, the Law Council acknowledges that, in 2018, the Committee took some assurance from the non-legislative factors that ASIO indicated it routinely applied in advising the Minister about the potential declaration of an area under section 119.3. The Committee identified these factors as including the following:

- links of the terrorist organisation to Australia and Australians;
- threats to Australian interests, including the role of a particular area in the radicalisation of Australia and Australians and likely repercussions in Australia;
- the enduring nature of the terrorist organisation's hostile activities in the area;
- the operational benefit of declaring the area;
- factors relevant to Australia's international relations, including bilateral relations with countries including those in which an area may be declared, and engagement with international organisations such as the United Nations;
- the terrorist organisation's ideology;
- links to other terrorist groups; and
- engagement in peace and mediation processes.[69]

83. While these administrative factors are relevant and important considerations, they do not cure the fundamental defect in the declared areas regime—namely, that it is overly reliant on broad executive discretion. The Minister is under no obligation to be reasonably satisfied that these thresholds are met, as a legal precondition to exercising the power in section 119.3 and thereby enlivening the offence in section 119.2. This does not ensure certainty and consistency in the exercise of Ministerial discretion under section 119.3. Moreover, mere administrative policy is vulnerable to unilateral (and potentially unannounced) change by the executive government, and departure in individual instances.

84. In addition, the administrative factors noted above do not mandate an assessment of the necessity and proportionality of the impacts of making the declaration (including consideration of the potential exposure to criminal liability of Australians who have no connection with a terrorist organisation or terrorism-related activities). Rather, they are focused narrowly on the operational utility of the declaration and the interests of national security.

85. Accordingly, the Law Council's recommendation 3 would provide greater clarity, certainty, consistency and fairness in the exercise of the power under section 119.3. It would also provide a clear and consistent benchmark for the Parliament (including the Committee) to review a declaration. This includes reviews undertaken for the purpose of the Parliament deciding whether to disallow an instrument of declaration during the statutory disallowance period (generally 15 sitting days from tabling).[70]

86. In addition, the Law Council's recommendation for further statutory issuing criteria would provide a stronger protection against the risk that a declaration may remain in force for longer than what is necessary and proportionate. It would do so by enlivening the obligation of the Minister under subsection 119.3(5) to revoke a declaration if the Law Council's recommended issuing criteria are no longer met.

[69] Committee report, 46 at [2.112] and 48 at [2.119] (recommendation 3).
[70] *Legislation Act 2003* (Cth), section 42.

87. The Law Council's recommendation for an application-based review mechanism, analogous to that already available for the de-listing of terrorist organisations,[71] would provide a further safeguard to the ongoing advisory review function of the Committee in subsection 119.3(8).

88. It would strengthen the pathways by which relevant information is placed before the Minister, which could enliven their mandatory revocation power in subsection 119.3(5) or may inform a discretionary decision to revoke the instrument of declaration under subsection 119.3(5A). This would complement the ongoing advisory review function of the Committee under subsection 119.3(8).

[71] Criminal Code, subsection 102.1(17).