

28 September 2020

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

By email: pjicis@aph.gov.au

Dear Chair

‘Declared areas’ provisions of ss 119.2 and 119.3 *Criminal Code Act 1995 (Cth)*

Thank you for the opportunity to appear before the Committee’s public hearing into the above inquiry on 22 September 2020.

The Law Council of Australia wishes to provide some supplementary information about two matters, which are as follows:

- the ‘designated area’ regime in the United Kingdom (**UK**) enacted by section 58B and 58C of the *Terrorism Act 2000* (UK) (**UK Terrorism Act**), as enacted by the *Counter-Terrorism and Border Security Act 2019* (UK); and
- a possible defence of ‘reasonable excuse’ modelled on that in subsection 58B(2) in the UK Terrorism Act.

United Kingdom ‘designated areas’ regime

1. In my evidence to the Committee, I noted that the UK regime included a number of safeguards that are not present in the Australian ‘declared areas’ regime in sections 119.2 and 119.3 of the *Criminal Code Act 1995 (Cth)* (**Criminal Code**).
2. These include significantly expanded exceptions to the offence of entering, or remaining in, a designated area;¹ and a ‘grace period’ of one month for people who are present in, or are travelling to, an area at the time it becomes designated.² Key differences in particular exception provisions are detailed in the table below.
3. In addition, I note that the UK regime has additional safeguards in the process for prescribing an area of a foreign country as a ‘designated area’. The UK regime is subject to an express necessity threshold, in that the relevant Secretary of State must be satisfied that making the determination, and therefore restricting the movement of UK citizens and nationals, is necessary for the purpose of protecting members of the public from a risk of terrorism.³

¹ *Terrorism Act 2000* (UK), subsections 58B(2) and (4)-(8).

² *Ibid*, subsection 58B(3).

³ *Ibid*, section 58C.

4. This is in contrast with the Australian regime, under which the only statutory condition in section 119.3 of the Criminal Code is that a listed terrorist organisation is engaging in a hostile activity in the area, without any requirement to consider, and be reasonably satisfied of, the necessity or proportionality of the declaration.
5. Further, the regulations made by the relevant UK Secretary of State prescribing an area as a 'designated area' are subject to a positive Parliamentary approval requirement, meaning that they will cease to have effect unless the Parliament makes a resolution approving them within 40 days of being issued.⁴ This is in contrast to a Parliamentary power of disallowance in Australia, which is exercisable within 15 sitting days of the instrument being tabled in Parliament (which, in turn, must occur within six sitting days of its making).⁵
6. In addition, the UK regime is subject to the human rights framework in force in that country, including review rights under the *Human Rights Act 1998* (UK). A person could seek a declaration of incompatibility and various remedies in respect of the designation of an area under section 58C of the UK Terrorism Act, or the commencement of a prosecution under section 58B of that Act.

Differences in the exceptions in the UK and Australian regimes

UK exceptions (designated areas offence): UK Terrorism Act ss 58B(2)-(6)	Aus exceptions (declared areas offence): Criminal Code, s 119.2(3)
Reasonable excuse defence: s 58B(2).	No equivalent
Exception for a person who is already travelling to, or is already in the area on the day on which it became a designated area, and leaves the area within one month: s 58B(3).	No equivalent The offence applies as soon as the instrument of declaration commences (generally upon its registration: <i>Legislation Act 2003</i> , s 12)
Exception for a person who enters, or remains in, a designated area involuntarily. (For example, this is likely to cover spouses and children who are dependent on the person who decides to and takes their family): s 58B(4)(a).	No equivalent. A person would have to rely on the general defence of duress in s 10.2 of the Criminal Code, which requires specific proof of a threat being made against the defendant unless they commit the offence, and an assessment that committing the offence is a reasonable response to the threat made against them.
Exception for a person who enters, or remains in, a designated area for or in connection with one or more of the prescribed purposes: ss 58B(4)(b) and 58B(5) (see purposes below)	Narrower prescribed legitimate purposes than UK: s 119.2(3) (see below comparison)
<i>Prescribed, legitimate purposes: s 58B(5)</i> Entering or remaining in an area for, or in connection with, one of the following purposes: (a) Providing aid of a humanitarian nature (provided that it is not delivered in contravention of internationally recognised principles and standards applicable to the provision of humanitarian aid)	<i>Prescribed, legitimate purposes: s 119.2(3)</i> Entering the area <u>for the sole purpose of</u> one or more of the following: • Equivalent: s 119.2(3)(a)

⁴ Ibid, paragraph 123(6ZA)(b).

⁵ *Legislation Act 2003* (Cth), section 42.

UK exceptions (designated areas offence): UK Terrorism Act ss 58B(2)-(6)	Aus exceptions (declared areas offence): Criminal Code, s 119.2(3)
<p>(b) Satisfying an obligation to appear before a court or other body exercising judicial power.</p> <p>(c) Carrying out work for a government of a country other than the United Kingdom (including service in or with the country's armed forces) (provided that it does not constitute an offence against a law of the UK, if done in the UK)</p> <p>See also: s 58B(12): the offence does not apply to persons acting on behalf of, or holding office under, the Crown.</p> <p>(d) Carrying out work for the United Nations or an agency of the United Nations (provided it would not constitute an offence against UK law, if done in the UK)</p> <p>(e) Carrying out work as a journalist (provided that it would not constitute an offence against UK law, if done in the UK)</p> <p>(f) Attending the funeral of a relative or visiting relative who is terminally ill</p> <p>(g) Providing care for a relative who is unable to care for themselves</p> <ul style="list-style-type: none"> • Other purposes prescribed by regulations: s 58B(7) 	<ul style="list-style-type: none"> • Equivalent: s 119.2(3)(b) • Equivalent: <ul style="list-style-type: none"> ○ s 119.2(3)(c) (Australian government) ○ s 119.2(3)(d) (foreign government) ○ s 119.2(4) (armed forces of foreign government) • Equivalent: s 119.2(3)(e). Also covers the International Committee of the Red Cross. • Narrower: 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: s 119.2(3)(f). • Potentially covered by the exception of making a bona fide visit to a family member: s 119.2(3)(g) • Potentially covered by the exception of making a bona fide visit to a family member: s 119.2(3)(g) • Equivalent: s 119.2(3)(h).
<p><i>Combined purposes of presence in a designated area – prescribed and non-prescribed: s 58B(6)</i></p> <p>It is an exception if a person travels for multiple purposes, some of which are prescribed in s 58B(5) and others are not.</p> <p>This is provided that the other, non-prescribed purposes fall within the 'reasonable excuse' defence in s 58B(2).</p>	<p>No equivalent</p> <p>The exception in subsection 119.2(3) is limited to the sole legitimate purpose of a person's presence in the declared area.</p>

Reasonable excuse defence

7. The Law Council understands from evidence of the Commonwealth Attorney-General's Department (**AGD**) at the Committee's public hearing on 22 September 2020 that there may be some reluctance to adopt a 'reasonable excuse' exception to the offence of entering or remaining in a declared area in section 119.2 of the Criminal Code.
8. The Law Council understands that this view is based on the following policy statement in the *Australian Government Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*:

Principle

*An offence-specific defence of 'reasonable excuse' should not be applied to an offence, **unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences** [emphasis added].*

Discussion

The defence of reasonable excuse is too open-ended. It is difficult to rely on because it is unclear what needs to be established. Equally, it may be difficult for the prosecution to respond to the defence, if raised.

The conduct intended to be covered by the defence of reasonable excuse may also be covered by the Criminal Code defences of general application in Part 2.3 of the Criminal Code, such as duress, mistake or ignorance of fact, intervening conduct or event, and lawful authority. Generally, reliance should be placed on Criminal Code defences, or (if these are insufficient) offence-specific defences adapted to the particular circumstances should be applied.⁶

9. The Law Council submits that the declared areas offence in section 119.2 is an instance in which it is not possible to rely on the general defences in Chapter 2 of the Criminal Code, or the sole legitimate purpose exception in subsection 119.2(3).
10. As explained in the Law Council's primary submission to the Committee, the declared areas offence casts the net of criminal liability in extraordinarily broad terms, by criminalising a person's mere presence in a declared area, if they are reckless as to whether the area has been declared. It does not depend on a person's conduct, or intended conduct, in the area.
11. This means that the defences in Chapter 2 of the Criminal Code, such as duress, mistake of fact, intervening conduct or lawful authority, will not assist in exculpating a person who is present in a declared area for purely innocent (that is, non-terrorism related) reasons but are not covered by the 'sole legitimate purpose' exception in subsection 119.2(3) of the Criminal Code.
12. As further explained in the Law Council's primary submission, the eight enumerated 'legitimate purposes' in subsection 119.2(3) are not exhaustive of the wide range of innocent reasons a person may be present in a declared area, and indeed, it may be practically impossible to do so.
13. The limitation of the exception in subsection 119.2(3) to a person's **sole purpose** for being present would also exclude people who are present in a declared area for multiple reasons, none of which have any connection with terrorism, but not all of which have been listed in the provision. The UK's defence of reasonable excuse

⁶ Australian Government, *Guide to framing Commonwealth offences, infringement notices and enforcement powers*, (September 2011), 52 at [4.3.3].

provides a way of protecting people in these circumstances, via the 'multiple purpose' exception in subsection 58B(6) of the UK Terrorism Act. As noted in the table above, this exception covers people who are present in a designated area for a combination of 'prescribed legitimate purposes' in subsection 58B(5) and any other purpose provided that it falls within the concept of a 'reasonable excuse' within the meaning of subsection 58B(2).

14. Further, the Law Council notes that 'reasonable excuse' defences exist in many provisions of Commonwealth legislation, including the *Royal Commissions Act 1902* (Cth) and the *Australian Security Intelligence Organisation Act 1979* (Cth).⁷
15. The Law Council also notes that there is Government Bill presently before the Parliament, which was introduced on 27 August 2020 (proposing to establish the position of a National Commissioner for Defence and Veteran Suicide Prevention) that includes a defence of reasonable excuse, in relation to offences for persons who fail to provide information, produce documents, or appear before the Commissioner and answer questions.⁸
16. The Explanatory Memorandum to that Bill states that the inclusion of such defence was considered appropriate because, among other reasons, it would ensure that a person was not penalised due to 'circumstances beyond their control' or 'where there is some other good and acceptable reason'. It emphasised that such claims could be examined on a case-by-case basis.⁹
17. Thank you again for the opportunity to participate in this important inquiry. Please contact [REDACTED] Director of Policy, Law Council Secretariat on [REDACTED] [REDACTED] if the Law Council may be of any further assistance.

Yours sincerely

[REDACTED]
Pauline Wright
President

⁷ These defences are generally in the context of offences for failing to provide information or produce documents. See, for example: *Royal Commissions Act 1902* (Cth), s 3 (defences to the offence of failing to provide information or documents or answer questions before a Commonwealth Royal Commission); *Australian Security Intelligence Organisation Act 1979* (Cth), paragraph 23(5)(a) (defence to the offence of failing to comply with a request from an ASIO official to an aircraft or vessel operator to provide information or documents); and *Taxation Administration Act 1953* (Cth), s 14Z(2A) (defence to the offence of failing to answer questions or produce documents as required by authorised officers).

⁸ National Commissioner for Defence and Veteran Suicide Prevention Bill 2020, subclauses 45(3) and 49(3) (defences of reasonable excuse for the offences of failing to appear before, or give evidence or information to, the Commissioner).

⁹ Explanatory Memorandum, National Commissioner for Defence and Veteran Suicide Prevention Bill 2020, 19 at [9].