Law Council
OF AUSTRALIA

Office of the President

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Chair, Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

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Dear Mr Khalil

Review of the Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024

1. The Law Council welcomes the opportunity to provide this submission to the Parliamentary Joint Committee on Intelligence and Security as part of the Committee's review of the Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024 (the **Bill**). The Bill would, among other things, extend the declared areas offence, contained in section 119.2 of the *Criminal Code Act 1995* (Cth) (the **Criminal Code**) and related ministerial powers, for a further three years, to 7 September 2027. That offence and the related powers are currently due to sunset on 7 September 2024.

2. The Law Council is grateful for the contribution of the Law Institute of Victoria, the Law Society of New South Wales, and the Law Society of South Australia to this submission. We also acknowledge the assistance of our National Criminal Law Committee and National Human Rights Committee.

Overview

3. The Law Council appreciates 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. A decade after the establishment of the declared area regime under the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), this review is an important opportunity to carefully scrutinise the ongoing necessity of this regime. The continuation of this extraordinary offence should not be assumed and should be re-evaluated in light of changes in the security environment and the practical experience drawn from the operation of Australia's counter-terrorism framework in the last decade.[1]

4. The declared area regime makes it an offence for a person to enter or remain in an area prescribed by the Minister for Foreign Affairs and Trade without legitimate reasons (which are prescribed narrowly in the legislation). The key provisions of the regime within the Criminal Code are:

[1] See further regarding the general trend towards exceptional measures, departing from orthodox rule of law and criminal law principles, being increasingly seen as normal aspects of the criminal justice system: Rebecca Ananian Welsh and George Williams 'The New Terrorists: the Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38 *Melbourne University Law Review* 362-408.

- **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. This is an absolute liability offence, though this is subject to certain limited exceptions in section 119.2(3); 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.

5. The declared area regime seeks to achieve two separable objectives, the first, related to general deterrence, and the second, punishment and disruption. With respect to general deterrence, it is argued that certain areas targeted by these provisions are dangerous locations in which listed terrorist organisations are engaging in hostile activities. The declared area offence is designed to act as a deterrent to prevent people from travelling to declared areas. The Attorney-General's Department has provided evidence that, '[w]here this deterrent effect is realised, it reduces access to training, tools and motivation to carry out terrorism offences in Australia'.[2] With respect to punishment, the Explanatory Memorandum argues that this offence fulfills a 'crucial role' in the disruption and prosecution of returning foreign terrorist fighters and 'allows for the prosecution of suspected terrorists in circumstances where it is challenging to collect evidence relating to the intention elements of more serious terrorism offences, including in conflict zones'.[3]

6. To date there have only been two declarations made—Mosul district, Ninewa province, in Iraq on 2 March 2018; and Al-Raqqa province, in Syria on 4 December 2014—with four Australians charged under the declared area offence.[4] Those declarations have since been repealed.[5] There are no current declarations. The Attorney-General's Department asserts that limited use of these provisions 'is not an indication of a lack of utility' and '[t]he limited number of areas that have been declared, and the limited use of the offence to date are indicative of its exceptional nature and judicious use of this power and associated offence'.[6]

Summary

7. The Law Council has extensively considered the declared area regime in two previous submissions to this Committee.[7] We commend those submissions to the Committee for a full statement of our position. The purpose of this submission is to elaborate on some of the key concerns we have raised previously, in light of recent changes to Australia's security environment and the use of this offence in recent years.

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[2] Attorney-General's Department, Submission no. 6 to Parliamentary Joint Committee on Intelligence and Security, Review of the Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024 (Submission, April 2024), 3 [7] ('***Attorney-General's Department Submission***').
[3] Explanatory Memorandum, 2 [4].
[4] Minister for Foreign Affairs (Cth), Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria (4 December 2014); Minister for Foreign Affairs (Cth), Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2015—Mosul District, Ninewa Province, Iraq (2 March 2015).
[5] Minister for Foreign Affairs (Cth), Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Revocation Instrument 2017 – Al-Raqqa Province, Syria (27 November 2017). Minister for Foreign Affairs (Cth), Criminal Code (Foreign Incursions and Recruitment—Declared Areas) Declaration 2018—Mosul District, Ninewa Province, Iraq (1 March 2018).
[6] Explanatory Memorandum, 3 [10].
[7] See, Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Review of 'declared areas' provisions of the *Criminal Code Act 1995* (Cth) (Submission, 25 August 2020) ('***Law Council's 2020 Submission***') and Law Council of Australia, Supplementary Submission to Parliamentary Joint Committee on Intelligence and Security, 'Declared areas' provisions of ss 119.1 and 119.3 *Criminal Code Act 1995* (Cth) (Submission, 28 September 2020) ('***Law Council 2020 Supplementary Submission***'). See more

8. We do 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.

9. In our view, the declared area regime is not a necessary or proportionate response to the security threat presented by foreign terrorist fighters for the following reasons.

- In light of the evidence of how these powers have operated in the context of Australia's counter-terrorism framework and the security environment, we consider these powers redundant to any legitimate objective. As set out below, Australia is an outlier among like-minded international jurisdictions in *using* these types of broadly defined offences.

- The rule of law requires that offence provisions are not so broad that they capture a wide range of innocuous conduct.[8] We consider the declared area offence to be unjustifiably broad: criminalising a person's mere presence in a declared area—if they are reckless as to whether the area has been *declared*. Unlike the foreign incursion-related offences, the declared area offence does not depend on a person's intended conduct in the area.

- The application and enforcement of the offence is substantially dependent on the exercise of discretion by law enforcement agencies[9] and the Minister:[10] for example, whether the Foreign Minister is satisfied that a listed terrorist organisation is 'engaged in a hostile activity' in that area of the foreign country.[11] This creates an unacceptably high risk of arbitrariness in the operation of the regime. 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).[12] As noted by Mr Richard Wilson SC, co-chair of our National Criminal Law Committee in his evidence before the Committee in 2020:

  - *… in relation to the power in 119.3, the power to make the declaration, it is simply so broad and unfettered. It's unfettered in relation to geography, except that it cannot be an entire country. It can be the whole of Turkey east of the Bosporus, for example. It's not limited in terms of activity, the extent of hostile activity or even the nature of hostile activity.*[13]

- Because of the amorphous definition of hostile activities referred to above, it is unsatisfactory for the Executive to have such a broad discretion, in effect to create criminal offences using that concept. We consider that the need to publicly denounce the activities of terrorist organisations whose security threat may be linked to control over geographic areas, such as the Islamic State in certain parts

generally, Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Review of the 'declared area' provisions, (Submission, 1 November 2017).
[8] Law Council of Australia, Policy Statement—Rule of Law principles (Submission, March 2011), Principle 1(b).
[9] 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).
[10] 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.
[11] See, Criminal Code, s. 117.1 (definition '*engage in a hostile activity*') read alongside s. 119.3(1).
[12] Law Council's 2020 Submission, 11 [32].
[13] Parliamentary Joint Committee on Intelligence and Security, Official Committee Hansard, Review of Declared Area provisions (22 September 2020, Richard Wilson SC), 5.

of Iraq and Syria between 2014 and 2019, is the legitimate province of Parliament and should be subject to democratic debate. In respect of many areas of the world, individual Australians are divided as to whether they support an arguably repressive regime (from which they may have fled) or the 'terrorist organisation' resisting that regime.[14] This ambiguity is further complicated by section 119.2(3)(d) of the Criminal Code which would absolve any Australian fighter 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.[15] There is evidence that some politically motivated 'Neo Nazi' violent extremists have sought to travel to Ukraine to fight with far right units associated with the Ukrainian armed forces.[16] This is another area where the Minister's unguided decision to declare a listed terrorist organisation as 'engaged in a hostile activity' may involve contentious judgments of policy that should be subject to democratic debate.

- We remain concerned about the limited scope of the 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' (or other purpose prescribed by the regulations).[17] This 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.[18] 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. 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

[14] For example, it is likely that members of the Australian community may hold divergent views in relation to the long-running civil war in Sri Lanka between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (which concluded in 2009 with the defeat of the separatist organisation). Prior to 2009, separatist forces had varying levels of control over parts of Northern and Northeastern Sri Lanka. In that context, human rights groups have argued that both the Sri Lankan military, and paramilitary organisations allied with it, and the Liberation Tigers of Tamil Eelam have engaged in 'widespread human rights abuses, including abduction, conscription and the use of child soldiers': Jayshree Bajoria, Council on Foreign Relations Backgrounder: The Sri Lankan Conflict, (Online, 18 May 2009). Indeed, the Office of the United Nations High Commissioner for Human Rights on Sri Lanka found 'that there are reasonable grounds to believe that gross violations of international human rights law, serious violations of international humanitarian law and international crimes were committed by all parties during the period under review': United Nations Human Rights Council, Comprehensive report of the Office of the United Nations High Commissioner for Human Rights on Sri Lanka, UN Doc A/HRC/30/61, 30th session, Agenda Item 2 (28 September 2015). In particular, in the period before 2009, when the Tamil Tigers controlled large parts of northern Sri Lanka, Tamil Sri Lankan Australians may have had significant family reasons (for example, care of terminally ill parents) to visit areas controlled by the Tamil Tigers.

[15] For example, press reports confirm that Australians are fighting with the Ukrainian and Israeli armed forces and Australians may also be fighting in the armed forces of, or paramilitary organisations aligned with, Russia: Andrew Greene, ABC News 'Former Australian soldier Joel Stremski killed while serving with foreign unit of Ukraine's Armed Forces, (Online, 21 November 2023); Nino Bucci, ABC News 'Five Australians free to return after fighting in Ukraine far-right 'finishing school' alongside Russian nationalist militia' (Online, 23 April 2019). Some governments, arguably, could be described as meeting the ordinary meaning of "terrorist" in their actions. Again, our view is that the creation of criminal offences for one's mere presence in a particular region should not be the province of a government minister.

[16] For example, media reports of some Australian 'Neo-Nazis' who have sought to fight in Ukraine for the Azov Regiment: Nick McKenzie and Anthony Galloway, The Sydney Morning Herald, 'Senior neo-Nazi slips out of Australia hoping to fight Russian army' (Online, 23 March 2023); Nick McKenzie and Joel Tozer, The Sydney Morning Herald, 'Fears of neo-Nazis in military ranks after ex-soldiers passport cancelled,' (Online, 22 August 2021). The Azov Regiment is a controversial armed group which since 2014 has operated as part of the Ukrainian National Guard. A recent report published in West Point's leading counter-terrorism journal Sentinel argued that 'the regiment and movement typify some of the concerns extremism researchers have about the war and its potential aftereffects. This is due to Azov's history, its far-right nationalist orientation, the symbology it has used, its associations, and the role it has played as a dangerous key player of the transnational extreme-right:' Don Rassler, External Impacts and the Extremism Question in the War in Ukraine: Considerations for Practitioners, *Counter Terrorism Centre: Sentinel* (June 2022) 15(6).

17 Criminal Code, s. 119.2(3)(h).

[18] See further, Law Council's 2020 Submission, 9-10 [24] – [26].

the area was covered by the matters prescribed as 'legitimate purposes'.[19] The exception is therefore unavailable to a person who was present in an area for multiple reasons, none of which was connected with terrorism-related activity, but not all of which were covered by the current statutory list of 'legitimate purposes'.[20]

- Related to the above, the limited scope of the exceptions 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).[21]

Recommendations

10. Accordingly, our primary **recommendation** is that both sections 119.2 and 119.3 be allowed to sunset on 7 September 2024 and not be extended.

11. If our primary recommendation is not accepted, we support recommendations, to improve the proportionality of the scheme, which we have set out in our previous submission. Those **recommendations** are summarised below.[22]

    - **Elements of the offence**—We support 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 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).

    - **Expansion of the legitimate purpose exception**—In the first instance, we recommend replicating a wider 'reasonable excuse' defence modelled on section 58B(2) of the *Terrorism Act 2000* (UK).[23] Specifically, we also consider that matters currently prescribed as 'legitimate purposes' in subsection 119.2(3) should be expanded to include:

        - 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**—We reiterate support for legislative amendments directed to 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. We have previously set out in detail our proposed improvements.[24]

Necessity

12. The declared area regime was introduced by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) to respond to the specific and

[19] Criminal Code, s. s. 119.2(3).
[20] For example, we have previously cited the example of 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. Or, the example of a person who is a dual-citizen of a foreign country where the declared area was located who travels for the dual purpose of visiting family and also has a business in the proscribed area: Law Council's 2020 Submission, 10 [25] – [26].
[21] See further, Law Council's 2020 Submission, 10-11 [27] –[28].
[22] For the detailed form of those recommendations, see: Law Council's 2020 Submission, 21-23 Recommendation 2 and Recommendation 3.
[23] We consider this extensively in Law Council's 2020 Supplementary Submission.
[24] Law Council's 2020 Submission, 23 Recommendation 3.

unparalleled threat posed by returning foreign fighters around 2014 because of the specific link between the Islamic State and control over certain geographic areas (that is, its erroneous claim to have established a caliphate).[25] At the time, there was understandable uncertainty about the adequacy of tools required to combat these threats. That specific threat has now substantially diminished, and there is a range of more proportionate counter-terrorism tools that can be used to regulate future risks posed by returning foreign fighters. Even if the declared offence was considered necessary in 2014, there is compelling evidence, set out below, that it is no longer necessary.

13. In September 2014, in his second reading speech, then Attorney-General Senator Brandis referred to the risk posed by returning foreign fighters as 'one of the most significant threats to Australia's national security in recent years' and observed:[26]

> *While this is not the first time Australians have been involved in overseas conflicts, the scale and scope of the conflicts in Syria and Iraq, and the number of Australians presently involved, is unparalleled and demands specific and targeted measures to mitigate this threat.*

14. We recognise that, even after the downgrading of the National Terror Threat Level to 'POSSIBLE, Australia may face an ongoing security threat from individuals who travel to foreign conflict zones to fight with, or provide support to, terrorist organisations that are engaged in hostile activities in those areas.[27] 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. However, we submit that there is a range of existing counter terrorism tools better tailored to combat this risk. These tools are outlined below.

- Under the *Australian Passports Act 2005* (Cth), the Minister may cancel or suspend an Australian travel document.[28]
  - **Cancellation**—officers may make a refusal/cancellation request in relation to a person if they suspect, on reasonable grounds, that, if an Australian travel document was issued to a person, the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country.[29]
  - **Suspension**—the Director General of Security may request the Minister to suspend (for 28 days) all Australian travel documents issued to a person if the Director-General suspects on reasonable grounds that, for example, the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country.[30]
- Under the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) the Minister has a broad power to make a temporary exclusion order in certain circumstances. These include where, for example, the Minister suspects, on reasonable grounds, that making the order would substantially assist in, for

[25] See generally, Zachary Laub, Backgrounder—The Islamic State, Council on Foreign Relations (Online, 10 August 2016).
[26] Commonwealth of Australia, *Parliamentary Debates*, Senate, 24 September 2014, 6999 (George Brandis, Attorney-General).
[27] See further, Mike Burgess, Director General of Security, Australian Security Intelligence Organisation Annual Threat Assessment 2024 (Speech, 28 February 2024).
[28] *Australian Passports Act 2005* (Cth), s. 18(1) and (2) (competent authority may refuse to issue an Australian travel document to a person or cancel an Australian travel document that has been issued to a person).
[29] Ibid, s. 14(1)(a)(i)
[30] Ibid, s. 22A (1) and (2). For context, these powers were inserted by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) which also introduced the declared area offence.

example, preventing training from being provided to, received from or participated in with a listed terrorist organisation.[31] In its recent review of these powers, this Committee cited evidence that, since commencement in 2019, eight temporary exclusion orders have been made and five return permits have been issued.[32] These orders were described by security agencies as an 'offshore-focused tool that allows the management of a foreign fighter's return to Australia in circumstances where they may pose a security threat'.[33]

- Under Division 104 of the Criminal Code, a range of sometimes punitive restrictions may be placed on a person under a Control Order in order to protect the public from a terrorist act or to prevent the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.[34] These orders may be obtained on satisfying the civil standard of proof where there is insufficient evidence for a criminal prosecution.[35] This scheme was recently significantly expanded, for example, to align the conditions available under Control Orders with the conditions that may be imposed under an Extended Supervision Order (with the effect that there is no longer any limit on the conditions that the issuing court may impose on a person).[36] The rationale for this expansion was to ensure the control orders can be better tailored to address the risk profile of the individual concerned.[37] These changes to the Control Order regime were informed by evidence from security agencies to this Committee's 2021 AFP powers review.[38] That evidence identified, among other features of the security environment, 'the demise of ISIL territorial caliphate' and 'the need to prepare for … the possible return of foreign fighters'.[39]

- The range of existing criminal offences targeting a broad range of preparatory and ancillary conduct, for example, associating with a terrorist organisation or training involving a terrorist organisation:[40]

    - In particular, the foreign incursion, and related preparatory, offences in the Criminal Code provide a more proportionate alternative to the declared area offence. For example, it is an offence contrary to section 119.1(1) of the Criminal Code if a person enters foreign countries with the intention of

[31] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth), s. 10(2)(a)(ii). See further, Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Statutory review of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) (Submission, 29 November 2021).
[32] Parliamentary Joint Committee on Intelligence and Security, *Review of the Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Report, April 2023), citing Australian Security Intelligence Organisation evidence, 14-15 [1.56].
[33] Ibid, citing Australian Security Intelligence Organisation evidence, 19 [2.9].
[34] Division 104, Criminal Code (see in particulate, object listed at s. 104.1(c))
[35] Criminal Code, s. 104.4(1)(c) (the court must be satisfied on the balance of probabilities).
[36] Reflecting the views expressed by this Committee: Parliamentary Joint Committee on Intelligence and Security, Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime (Report, October 2021), [3.76] Recommendation 10. ('***AFP Powers Report***')
[37] *Counter-Terrorism and Other Legislation Amendment Act 2023* (Cth). The Law Council provided extensive comment on these changes: Law Council of Australia, Submission to Parliamentary Joint Committee on Intelligence and Security, Counter-Terrorism and Other Legislation Amendment Bill 2023 (Submission, 13 October 2023).
[38] AFP Powers Report, 51 [3.73] – [3.75].
[39] AFP Powers Report, 9 [1.34].
[40] Criminal Code, ss. 101.2-101.6 (offences for preparatory and ancillary acts in relation to a terrorist act); s. 102.2 (directing the activities of a terrorist organisation); s. 102.3 (membership of a terrorist organisation); s. 102.4 (recruiting for a terrorist organisation); s. 102.5 (training involving a terrorist organisation); s. 102.6 (getting funds to, from, or for a terrorist organisation); s. 102.7 (providing support to a terrorist organisation); s. 102.8 (associating with terrorist organisation); ss. 103.1 and 103.2 (terrorism financing offences); and ss. 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).

engaging in hostile activities. It is also an offence contrary to section 119.4(1) to engage in conduct (whether within or outside Australia) where the conduct is preparatory to foreign incursion conduct proscribed in section 119.1. The general principles of ancillary liability apply.

- The foreign incursion offences are regularly successfully investigated and prosecuted.[41] In sentencing, Courts have well-developed principles for sentencing offenders in respect of these offences, as distinct from terrorism offence under part 5.3 of the Criminal Code, including having regard to the extent of an offender's radicalisation at the time of the offending conduct.[42]

15. As explained in our previous submissions, since the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) was enacted, a significant number of new or expanded preventive and surveillance powers have been conferred on law enforcement and intelligence agencies.[43] These tools have significantly enhanced the ability of security agencies to investigate terrorism and foreign incursions-related offences, to disrupt and deter the activities of prospective 'foreign terrorist fighters', and prevent the return of such persons to Australia.[44]

16. Notably, many of the powers described above were introduced after the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), and could not have been taken into account in the assessment of the necessity of declared area offences.

17. Australia is an outlier among like-minded international jurisdictions in retaining and using the declared area offence. The Attorney-General's Department provided evidence in 2020 that there are no similar offence provisions in the United States, Canada or New Zealand—and that the United Kingdom is the only five-eyes jurisdiction to criminalise mere presence in a designated area.[45]

18. Notably, in the United Kingdom, the designated area offence contained in section 38B *Terrorism Act 2000* (UK) has not been enlivened. The Independent Counter-Terrorism Reviewer, Jonathan Hall KC, referred to certain key features specific to the Islamic State in explaining the fact that no designation has been made since the introduction of designated area offences in the UK in 2019:[46]

> *As I have previously reported, designating the territory of another country as a no-go area, and criminalising those who travel there, is a delicate business.*
>
> - *The law was passed to counteract the pull of another 'Caliphate' (Islamic State/ Da'esh's former area of control in Syria and Iraq), if it ever came along.*

[41] See for example, contrary to sections 119.1 and 119.4 of the Criminal Code: *R v Betka* [2020] NSWSC 77 and *R v EB* [2018] NSWSC 201. In addition, the predecessor incursion offences in section 7(1)(e) of the *Crimes (Foreign Incursion and Recruitment) Act 1978* (Cth): *Director of Public Prosecutions (Cth) v El Sabsabi* [2017] VSCA 160.
[42] See, *Elmir v R* [2021] NSWCCA 19, [48] (McCallum JA, Garling and Wright JJ).
[43] 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). See also, *Telecommunications Legislation Amendment (International Production Orders) Act 2021* (Cth); and *Australian Security Intelligence Organisation Amendment Act 2020* (Cth) (Schedule 1—amendments relating to compulsory questioning powers).
[44] Law Council's 2020 Submission, 14-15 [45] – [48].
[45] Attorney-General's Department, Joint Submission no. 6 to Parliamentary Joint Committee on Intelligence and Security, Review of Declared Area Provisions (Submission, August 2020), 16.
[46] Jonathan Hall KC, Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006, and the Terrorism Prevention and Investigation Measures Act 2011, The Terrorism Acts in 2021 (Report, March 2023), 92 [7.10].

- *This perhaps reflects a truth about terrorist offending, that just as terrorist groups come and go (such as Italy's Red Brigade or Germany's Red Army Faction), so modes of terrorist conduct also wane and wax.*

19. Furthermore, in the United Kingdom other civil powers have been used to regulate the risk of returning foreign fighters: for example, removal of passport facilities, exclusion from the United Kingdom, deprivation of citizenship and Terrorism Prevention and Investigation Measures (substantially analogous to Control Orders in Australia).[47]

20. We understand that Denmark is one of the only examples of a liberal democratic state that has taken a similar approach to Australia's in designating presence in a proscribed area as a criminal offence.[48] In a recent European Court of Human Rights case, the Court upheld the compatibility of the applicant's conviction, under Danish law, of breaching the prohibition on entry into and stay in a conflict zone in order to participate in armed hostilities with Article 7 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.[49] However, that case highlights the inherent difficulty of criminalising mere presence in a proscribed area as the applicant was fighting against the Islamic State for the Kurdish People's Defence Units movement (a NATO ally in the fight against the Islamic State).[50]

Limited impact on sentencing disposition

21. We consider it significant that, among the infrequent cases in which individuals have been charged with this offence in Australia, in some cases, it has been possible to obtain a conviction in relation to the more proportionately-framed offences: for example, engaging in hostile activity in a foreign country (contrary to section 119.1(2) of the Criminal Code).[51] In these cases, a conviction for the declared area offence has not made a significant difference in the sentencing disposition.

22. For example, in the sentencing of one offender convicted of engaging in hostile activity in a foreign country, pursuant to section16BA of the *Crimes Act 1914* (Cth), the Court passing this sentence took into account the offender's admission of guilt with respect to a single offence of entering/remaining in declared area contrary to s119.2(1) of the Criminal Code.[52] Crucially, the sentencing court did not significantly increase the sentence, in respect of the declared area admission, because it would involve double counting.

23. If the existing suite of powers noted above (which in many cases afford broad discretion to intelligence and law enforcement agencies to undertake their investigations) are insufficient or underutilised, we consider that the Government should provide an explanation as to their shortcomings with respect to prevention, disruption and deterrence.[53]

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[47] See further, Ibid, 126 [8.2]. For a controversial illustration of the application of citizenship deprivation powers in order to regulate the risk posed by foreign fighters and their associates see: *Begum v Home Secretary* [2021] UKSC 7.
[48] Article 114j of the Penal Code (Denmark), read with Executive Order no. 1200 Prohibiting the Entry into or Stay in Certain Conflict Zones (28 September 2016, Denmark).
[49] See further, *Mørck Jensen v. Denmark* (European Court of Human Rights, Second Section, Application no. 60785/19, 18 October 2022).
[50] Ibid, [2].
[51] See further, Law Council's 2020 Submission, 16 [53] – [54].
[52] *R v Betka* [2020] NSWSC 77, [80] – [81] (Harrison J).
[53] For example, it is noted that there will be cases where suspects will voluntarily agree to the use of the additional preventive measures, such as control orders. In 2019, 36 women and children detained in camps in Syria offered to be put under control orders, while agreeing to be subject to any further criminal investigations, to assist with their return home. This offer was not accepted by the Australian government. See The Guardian, 'Australian families trapped in Isis camps offer to be put under control orders if they can return' (26 October 2019).

Human rights concerns

24. As a general point, we endorse the position articulated by Michelle Bachelet, United Nations High Commissioner for Human Rights, in an open letter to the Office of the Attorney General of Australia dated 8 October 2021 calling on the Commonwealth Government to review its counter-terrorism laws, policies, and practices to bring them in line with Australia's international human rights obligations.[54] This letter also urged the Australian Government to ensure that any limitations of human rights for national security purposes are confined to those that are necessary, proportionate, and subject to appropriate safeguards.

25. We recognise that, as a result of successive resolutions of the United Nations Security Council, Australia is required to take effective action to, in accordance with international law, among other things, develop and implement prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters.[55] However, in crafting and adopting such measures, Governments are required to respect, uphold, and protect fundamental human rights.

26. For reasons detailed in our previous submission, we remain concerned that extension of the declared area regime raises four human rights related concerns.[56] For brevity, we have only listed limitations on rights enshrined under the *International Covenant on Civil and Political Rights* (**ICCPR**).[57]

- **First**, we have previously argued that the structure of the offence in section 119.2, combining a very broad offence with only a narrow 'sole legitimate purpose' exception (section 119.2(3)), is a disproportionate (and thus impermissible) limitation on the right to freedom of movement under Article 12 of the ICCPR.
- **Secondly**, that the offence 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 (Articles 2, 16 and 26 of the ICCPR).
- **Thirdly**, the design of the offence, in inculpating mere presence in a declared area, with only a narrow 'sole legitimate purpose' exception (subject to an evidential onus of proof), conflicts with the presumption of innocence (Article 14(2) of the ICCPR) and fair hearing rights provided for in Article 14 of the ICCPR. For example, 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.
- **Fourthly,** given that the offence in section 119.2 is punishable by a maximum sentence of 10 years' imprisonment and conviction and detention of an individual for being in a declared area does not require evidence of intent—the offence may be incompatible with right to liberty and prohibition against arbitrary detention (Article 9 of the ICCPR).

27. We endorse the conclusion of the Parliamentary Joint Committee on Human Rights which stated:[58]

[54] UN Human Rights Office of the High Commissioner, letter from Michelle Bachelet, UN High Commissioner for Human Rights to the Attorney General's Department Australia (8 October 2021).
[55] See for example, Security Council Resolution 2178, UN Doc S/Res/2178 (24 September 2024), [4] and [5].
[56] See further, Law Council's 2020 Submission, 17-19.
[57] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976, entered into force in Australia 13 November 1980).
[58] Parliamentary Joint Committee on Human Rights, Human rights scrutiny report—Report 3 of 2024 (17 April 2024) 15 [1.17].

> *In light of the limited use of the provisions and the changed threat environment, as well as the availability of other counter-terrorism powers, the committee considers that questions remain as to whether the measure is necessary and addresses a current pressing and substantial concern. Additionally, noting the committee's previous conclusion that these provisions do not contain sufficient safeguards or flexibility to constitute a proportionate limit on rights, concerns remain as to the proportionality of the measure. As such, the committee considers that it has not been demonstrated that the extension of these provisions is compatible with human rights.*

28. The Law Council also agrees with concerns raised by the Australian Human Rights Commission in its 2020 submission to this Committee. Principally, we agree with the conclusion that section 119.2 of the Act imposes undue limitations that are neither necessary nor proportionate to the legitimate objective of preventing terrorism, and which are likely to infringe on rights enshrined under the ICCPR (primarily the right to freedom of movement and to family life).[59]

Impact on women and children

29. We have previously remarked that 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.[60] We consider that a safeguard removes the risk that a power could be exercised in a harsh and oppressive manner, by placing legal limits on its scope.

30. In 2020, we noted the possibility 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.[61] 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).[62]

31. We hold grave concern that declared area offence may adversely impact those persons who have been coerced or trafficked into declared zones, in particular women and girls.[63] In the context of the Syrian crisis, for example, a 2021 report by Reprieve documented the experiences of British victims of trafficking in North East Syria, finding that ISIS recruited hundreds of women and girls who were forced into 'marriage, sexual slavery, domestic servitude and other forms of exploitation'.[64]

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[59] Australian Human Rights Commission, Submission no. 4 Attachment 1 to the Parliamentary Joint Committee on Intelligence and Security, Review of the 'declared areas' provisions (Submission, 28 August 2020), 4.
[60] Law Council's 2020 Submission, 19 [69].
[61] Law Council's 2020 Submission, 9 [23].
[62] 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.
[63] This is particularly relevant in the context of recent report indicating upwards of 70,000 people, primarily women and children, detained in north-eastern Syrian Arab Republic following the conflict with Da'esh. More than half of those detained are foreign nationals, including Australian nationals. See United Nations General Assembly Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Saul A/HRC/55/48 (17 January 2024), para 22.
[64] Reprieve, 'Trafficked to ISIS, British families detained in Syria after being trafficked to Islamic State' (30 April 2021).

32. We note with concern the evidence provided by the Law Institute of Victoria that it is aware of circumstances where vulnerable persons, primarily women and children, may have entered or remained in a declared area involuntarily or owing to matters beyond their control, in circumstances which include: (1) dependency on a person who decides to relocate their family; (2) coercion or manipulation by persons with ties to that area; and/or (3) through being subjected to grooming.[65]

33. We note with concern that this risk has been raised by the UN Special Rapporteur on counterterrorism and human rights, by way of amicus curiae in the matter of *H.F. and others v. France*[66] before the European Court of Human Rights.[67] These matters have also been raised directly with the Australian Government in communications from UN special mandate holders.[68]

34. Since the Law Council's last submission to the Committee, there has been a further case of an Australian woman who pleaded guilty to offences under section 119.2 of the Criminal Code.[69] We do not comment on the individual merits of this matter, as the disposition of sentencing remains before the Court. However, we note that it is possible that further Australians will be charged under these offences, particularly those who have been repatriated from Syria or who may be repatriated in the future. While in some cases the evidence will demonstrate that persons went willingly to declared areas, there is a risk of these prosecutions criminalising persons who were subject to coercion and trafficking, in particular women and children. The legislation requires the consent of the Attorney-General for prosecutions, but does not provide any other safeguards for this category of vulnerable individuals.

35. The Law Council considers that these human rights concerns regarding the disproportionate impact on women and children highlight the importance of our recommendations directed to replicating a wider 'reasonable excuse' defence modelled on section 58B(2) of the *Terrorism Act 2000* (UK). It also underlines our recommendations regarding strengthening the statutory criteria for the making of declarations.

Specific requirement for further review by the Committee

36. Item 3 of Schedule 1 to the Bill would repeal paragraph 29(1)(bbaa) of the *Intelligence Services Act 2001.* That provision provides that the PJCIS may, should it resolve to do so, review the operation, effectiveness and proportionality of sections 119.2 and 119.3 of the Criminal Code prior to 7 January 2024.

37. The Explanatory Memorandum argues that—because the Intelligence Services Legislation Amendment Bill 2023 (Cth), currently before the Parliament, would allow this Committee a general function to review any counter-terrorism legislation prior to its

[65] That is an offence contrary to Section 272.15, Criminal Code.
[66] (European Court of Human Rights, Grand Chamber, Applications nos. 24384/19 and 44234/20, 14 September 2022).
[67] Ibid, [10] – [25], [179] – [181], [232] – [233].
[68] See, for example, Joint Urgent Appeal including Fionnuala Ni Aolain, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Communication UA AUS 4/2022 (26 September 2022); Joint Urgent Appeal also including Fionnuala Ni Aolain, AUS 2/2022 (16 February 2022); Joint letter of allegation, AL AUS 1/2022 (1 February 2022). For example, in UA AUS 2/2022, it was stated: 'We understand that some of the women may have been coerced or trafficked into Syria. We urge your Excellency's government to be conscious of the gender-specific traumas experienced by women and girls, as well as the various human rights violations that they are subjected to in the context of their arbitrary detention and the impact of those conditions on their mental and physical health. It is imperative that State responses do not perpetrate or contribute further harm to those who have already experienced profound violence and trauma'.
[69] NSW Police, 'NSW woman charged for allegedly entering Syria when occupied by Islamic State' (Media Release, 5 January 2023). See also, Conor Burke, ABC News 'Returned ISIS wife Mariam Raad pleads guilty to entering terrorist-controlled region' (Online, 8 May 2024).

sunsetting—this removes 'the requirement for a bespoke mandate to be provided to the PJCIS to review the declared areas provisions ahead of sunsetting in 2027'.[70]

38. We respectfully disagree. We have long argued for giving this Committee a general mandate to review any counter-terrorism or national security legislation prior to its sunsetting. However, that general function is no substitute for a specific legislative prompt to justify the continued necessity and proportionality of this exceptional scheme prior to its next sunsetting date in September 2027. That is because, given the significant demands already placed on this Committee, it is possible that the declared areas regime (which has been rarely used in practice) will not be reviewed prior to the next sunset in September 2027 and will be renewed without scrutiny. In our experience, a specific legislative prompt for review can trigger reassessments of necessity.[71]

39. Accordingly, if our primary recommendation is not accepted, we **recommend** that the Bill amend paragraph 29(1)(bbaa) of the Intelligence Services Act to require this Committee to review the declared area regime prior to its sunset on 7 September 2027.

The need for review by the INSLM

40. On 7 September 2017, the third Independent National Security Legislation Monitor, Dr James Renwick SC, in his review of the declared area regime concluded that the regime had the capacity to be effective and was necessary and proportionate.[72] At the time, the offence provision had not been enforced.

41. For reasons outlined in the Attorney-General's Department's submission, the INSLM's principal submission for increasing the proportionality of the declared area offence—ameliorating the narrow framing of the legitimate purpose exception by establishing a new scheme for Ministerial pre-authorisation for travel to proscribed areas—has been repeatedly rejected by Government.[73] Notably, this Committee, in its 2020 review of declared area provisions, recommended amendments to the Criminal Code to implement a pre-authorisation regime to allow Australian citizens to request an exemption from the Minister for Foreign Affairs to travel to a declared area for reasons not listed in section 119.2, but which are not otherwise illegitimate under Australian Law.[74]

42. The Government contends that 'a pre-authorisation scheme could not be effectively implemented and monitored, and it would be contrary to Government travel advice to issue a pre-authorisation'.[75] Given that the principal recommendation arising from independent review has been rejected—there is a need to review the necessity and proportionality of the scheme afresh.

43. Accordingly, we consider that it is imperative that the declared area scheme be reviewed again by the Independent National Security Legislation Monitor, noting the unique focus of their statutory mandate which requires consideration of, among other factors, whether the legislation contains appropriate safeguards for protecting the rights of individuals and remains proportionate to any threat of terrorism or threat to national security and

[70] Explanatory Memorandum, 14 [10].
[71] See for example, the admission by security agencies that minor questioning warrants are no longer necessary in the context of this committee's ongoing statutory review of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth): Australian Security Intelligence Organisation, Submission no. 1 to the Parliamentary Joint Committee on Intelligence and Security Review of Division 3 of Part III of the ASIO Act (Submission, 2024). The statutory prompt for review is contained in Intelligence Services Act, s. 29(ce).
[72] Third Independent National Security Legislation Monitor, Dr James Renwick SC, Sections 119.2 and 119.3 of the Criminal Code: Declared Areas (Report, September 2017).
[73] Attorney-General's Submission, 5 [25].
[74] Parliamentary Joint Committee on Intelligence and Security, Review of 'Declared Areas' Provisions—Sections 119.2 and 119.3 of the Criminal Code, (Report, February 2021), [2.56] Recommendation 4.
[75] Attorney-General's Submission, 5 [25].

remains necessary.[76] As we have explained above, many of the matters relating to necessity and proportionality have emerged from an assessment of how these powers have been used in practice in the last decade.

44. If our primary recommendation is not accepted, we **recommend** that section 6 of the *Independent National Security Legislation Monitor Act 2010* (Cth) be amended to require that the declared area regime be subject to review by the Independent National Security Legislation Monitor prior to any future renewal in September 2027.

45. The Law Council would be pleased to elaborate on the above issues, if required. If you would like to discuss this matter, please contact [redacted] Senior Policy Lawyer, on [redacted]

Yours sincerely

[redacted]

Greg McIntyre SC
President

[76] See *Independent National Security Legislation Monitor Act 2010* (Cth), s. 6(1)(b)(i)-(iii).