

Parliamentary Joint Committee on Intelligence and Security

REVIEW OF DECLARED AREAS PROVISIONS

Attorney-General's Department

Hearing date: 22 September 2020

Hansard page: 31

Question type: Spoken

Mark Dreyfus asked the following question:

Mr DREYFUS: Of course. Should a person who goes to a declared area or is in an area at the time it is declared be charged with an offence if he or she is in the area for bona fide, necessary and urgent business to protect legitimate business interests?

Mr Walter: Thank you, I got the question that time. Obviously I understand that has been an issue that has been raised in submissions, and clearly it's something that we can give further thought to. It's probably worth making a couple of observations, though. As has been pointed out by the outgoing INSLM, the Independent National Security Legislation Monitor, in the past one of the challenges with these kinds of offences or this particular offence is that, if you start adding in a wide number of difficult-to-define defences, you potentially create substantial holes in the provision. A general 'I'm there for legitimate business reasons' defence is a little bit difficult to frame, I suspect, and to determine when something is a legitimate business reason to be in a location or not. To paraphrase the INSLM—I won't verbal him—he's indicated in the past there are going to be very limited circumstances where people would have good reason to go to these places. The circumstances in which they're declared are very limited. We do have those exceptions there for bona fide family reasons and a range of other reasons. Going into one of these zones for urgent business reasons, I think we'd have to be really precise about what we're talking about.

...

Mr DREYFUS: Can I give you another possibility? Should a person who goes to a declared area or is in an area at the time it is declared be charged with an offence if he or she is in the area to provide legal advice to an Australian who's detained in the area?

Mr Walter: I guess we can think through that one as well. Obviously, there is the exception in there if somebody is—for the other side, so the person who is required to be there because of the need to appear before a judicial authority of some sort. But I suspect you're contemplating an example where perhaps an Australian lawyer has travelled there to provide advice to someone who is wanting to return to Australia or some scenario, such as that. Let me take that one on notice. I can try to think through it. I can't immediately think of an objection to it, but let me put a bit of thought into that example.

The response to the Member's question is as follows:

The purpose of the declared areas offence is to protect Australians from the threat posed by individuals returning from very specific conflict zones which have been declared by the Minister for Foreign Affairs. The offence seeks to deter Australians from travelling to these areas – to protect them, to limit hostile activity in foreign countries, and ultimately to protect the Australian community from those who would seek to join foreign conflicts and then return to Australia.

Declared areas are extremely dangerous areas where a listed terrorist organisation is engaging in hostile activity. There are very few legitimate reasons why a person should be in such an area. This is reflected in the limited list of exceptions in subsection 119.2(3) of the *Criminal Code* which provide a complete defence to the offence.

In considering possible additions to the list of exceptions, the Government would need to give careful consideration to ensure that those exceptions did not risk undermining the objective of the offence. This would involve ensuring that any possible further exception was framed in a way that did not detract from the purpose of the offence of deterring travel unless absolutely necessary, and that any exception is based on a legitimate and identifiable need to travel to a declared area.

The Law Council has proposed two additional exceptions: where a person travels to, or remains in, a declared area for the purposes of bona fide, necessary and urgent business to protect legitimate business interests; and for providing legal advice to an Australian detained in a declared area.

The Attorney-General's Department's (the department) view is that there would be difficulties incorporating these two proposed exceptions in an appropriately limited way to ensure that the offence continues to achieve its intended effect, while ensuring clarity as to its operation for potential travelers and the courts.

In providing this response, the department has consulted the Department of Foreign Affairs and Trade, Department of Home Affairs, Australian Federal Police, Australian Security Intelligence Organisation and the Office of the Commonwealth Director of Public Prosecutions.

Providing legal advice

In relation to the proposed exception of providing legal advice to an Australian detained in a declared area, it is not clear whether it is necessary or desirable to create such an exception. The Australian Government appreciates the right of those in detention to appropriate legal advice. However it is difficult to conceive of a situation in which such a person would need legal advice from an Australian lawyer, to the extent that the lawyer would need to travel to a declared area.

In contrast with the existing exception of providing humanitarian aid, there is the possibility that legal advice could be provided remotely rather than requiring a person to travel into a declared area. While this may be difficult in conflict zones, public reporting indicates that Australians detained in Internally Displaced Persons Camps (IDPCs), in regions similar to former declared areas, are able to contact persons outside the IDPCs, such as family and friends.

Legitimate business interest

In relation to the proposed exception for an urgent business interest, possible issues include the breadth of what could constitute a business interest and the difficulty in appropriately and clearly limiting any exception to business reasons for which it would be appropriate to provide an exception.

A possible implication of an exception for an urgent business interest is that, in some circumstances, it may result in a person engaging in conduct which breaches Australian law. Where the declared area is controlled by a listed terrorist organisation (such as the two declared areas to date), a person conducting business in such an area may be at risk of committing an offence under terrorism financing provisions in the Criminal Code (such as sections 102.6, 102.7, 102.8 and 103.1) and targeted financial sanctions offences in the *Charter of the United Nations Act 1945* (section 27).

Previous consideration of further exceptions

The department notes that both the Committee and the Independent National Security Legislation Monitor have previously considered expanding exceptions, including to proposed exceptions for business and legal advice, and ultimately did not make a recommendation to extend the list of exceptions at those earlier times.

Neither the department nor other relevant agencies are aware of any circumstances where an Australian has sought to travel to a declared area, but has been prevented or dissuaded from travelling because their travel purpose does not meet a listed exception.

The department and other agencies will continue to keep these provisions under consideration, and will consider the need for additional exceptions at such a time when it becomes apparent that there are further legitimate reasons for travel to a declared area that are not addressed by the existing exceptions.