

Review of the operation, effectiveness and implications of sections 119.2 and 119.3 of the *Criminal Code* – the ‘declared area’ provisions

Questions to the Attorney-General’s Department

- 1. The Australian Human Rights Commission has recommended that the Foreign Affairs Minister should only be able to declare an area if she is satisfied that a listed terrorist organisation is engaging in hostile activity *to a significant degree* in that area. Do you have any concerns about how this recommendation, if implemented, would operate in practice?**

Noting that the Australian Human Rights Commission’s recommendation has not been the subject of detailed consideration by Government, the department provides the following preliminary observations.

‘Engage in hostile activity’ is defined in section 117.1 of the Code to mean engaging in conduct in a country with the intention of achieving one or more of the objectives listed in that section, whether or not the objective is achieved. Those objectives include the overthrow of the government of that country, intimidating the public or a section of the public of a country and causing the death of a head of state of a foreign country.

Introducing a subjective element to the nature of the hostile activity that underpins the declaration could undermine the operation of the declared area offences by creating greater opportunity for the basis of the declaration to be challenged.

- 2. The INSLM has recommended that consideration be given to allowing ‘an individual to seek permission from the Foreign Affairs Minister (following advice from the Attorney-General) to enter into and remain in a declared area for such period and on such conditions as the Minister may choose to impose’.**

- a. Can you foresee any practical difficulties in implementing such a scheme?**

In the department’s preliminary view, it would only be appropriate to introduce an authorisation regime if it is capable of being effectively implemented and monitored, which would be difficult.

Firstly, there may be practical difficulties in establishing a regime for assessing an application to travel to a declared area to determine that the applicant is travelling for a bone fide reason. There may be little information at the Government’s disposal, other than that provided by the applicants themselves, to determine whether their proposed travel is for a legitimate purpose. Significant security and intelligence resources would need to be diverted from other priorities to assess risk of applicants engaging in or supporting hostile activities.

As the INSLM has noted, there are also significant practical difficulties in monitoring compliance with any conditions imposed on an authorisation for travel to conflict zones.

Further, it is likely that any declared area will also be a ‘do not travel’ destination on smartraveller.gov.au, the Government’s official travel advisory service. Allowing an

individual to travel to a declared area would be contrary to the Australian Government's travel advice.

b. What limitations, if any, would need to be put in place to ensure the mechanism is not open to misuse?

Noting the answer to question 2a, the department has not given detailed consideration to the design of a scheme of the kind proposed.

3. The Law Council of Australia, citing concerns about the practical implementation of a pre-authorisation regime, has proposed an alternative recommendation that a court, guided by appropriate criteria, have discretion to determine what constitutes a legitimate purpose.

a. Do you have any concerns about how this recommendation, if implemented, would operate in practice?

In the department's preliminary view, the function of determining what constitutes a legitimate purpose is appropriately exercised by the parliament.

Listing the legitimate purposes provide clear guidance to individuals about the acceptable reasons for entering or remaining in a declared area. The exercise of broader judicial discretion on what is a 'legitimate purpose' would undermine the certainty these listings provide.

b. Are you confident that appropriate criteria could be developed to guide a court's determination?

Please refer to the response to question 3a.

4. A number of submitters to this review and to previous reviews have called for the list of 'legitimate purposes' in section 119.3 should be expanded to include purposes such as visiting friends, transacting business, and retrieving property.

a. What practical impact would a broad expansion of the list of legitimate purposes have on the operation of the provisions?

The offence is designed to discourage persons travelling to extremely dangerous areas in foreign countries where listed terrorist organisations are engaged in hostile activity. The list of legitimate purposes is, appropriately, limited because entry into a declared area will be at considerable risk to the person's safety. Experts who gave evidence to the INSLM during his review also questioned the credibility of persons travelling to conflict zones controlled by terrorist organisations for conducting any kind of business activity. The INSLM's report concluded that the circumstances in which a person would wish to travel to a declared area other than to provide support to the terrorist organisation engaging in hostile activities in the area are extremely narrow.

Without expressing a concluded view, the department's preliminary position is that expanding the list of 'legitimate purposes' in section 119.2 would be counter to the Government's aim of discouraging persons from travelling to these extremely dangerous areas.

- b. Do you agree with the Law Council of Australia that a more limited expansion of the defence to include 'bone fide, necessary and urgent business to protect the legitimate business interests domiciles in a foreign county' and 'providing legal advice to an Australian citizen' would not affect the offence's deterrent value?**

Please refer to the response to question 4a.

- c. Similarly, would you hold any concerns about amending the existing legitimate purpose of 'providing aid of a humanitarian nature' to make clear that it includes persons engaged in humanitarian work other than direct aid, such as the delivery of training on the laws of armed conflict (as recommended by Australia Lawyers for Human Rights)?**

This option remains under consideration by Government, noting that providing humanitarian aid is already a legitimate purpose and the activities of many aid agencies would fit within this category.

- 5. As part of the advice provided to the Attorney-General in consideration of the listing of terrorist organisations under the *Criminal Code*, ASIO has regard to a range of 'non-legislative criteria'. Are there any specific non-legislative criteria that ASIO has regard to in support of the possible declaration of areas under section 119.3 of the *Criminal Code*? If so, what are the criteria?**

To guide and prioritise the selection of areas in foreign countries for consideration, the National Threat Assessment Centre may also have regard to a range of other non-legislative factors. Key non-legislative factors are:

- links to Australia and Australians
- threats to Australian interests including the role of a particular area in the radicalisation of Australians and likely repercussions in Australia
- the enduring nature of the listed terrorist organisation's hostile activity in the area
- the operational impact/utility 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 listed terrorist organisation's ideology
- links to other terrorist groups, and
- engagement in peace or mediation processes.

Information on the 'declared areas' offence including these non-legislative factors is publicly available on the Government's National Security website: www.nationalsecurity.gov.au.