



Australian
Human Rights
Commission

Review of the 'declared areas' provisions

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION
TO THE PARLIAMENTARY JOINT COMMITTEE ON
INTELLIGENCE AND SECURITY**

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Table of Contents

***Australian Human Rights Commission Submission to the PARLIAMENTARY
JOINT COMMITTEE ON INTELLIGENCE AND SECURITY.....***

| | | |
|----------|------------------------------|----------|
| 1 | Introduction..... | 3 |
| 2 | Recommendations | 5 |

1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its review of the 'declared areas' provisions contained in Division 119 of the *Criminal Code* (Cth).
2. The 'declared areas' provisions were last subject to a legislatively mandated review by the PJCIS in 2017. The Commission made a submission to that inquiry in October 2017. The Commission also made a supplementary submission in November 2017, to address several matters arising from the relevant report of the Independent National Security Legislation Monitor (INSLM) dated 7 September 2017 and released to the public on 16 October 2017.
3. In those submissions the Commission undertook a detailed human rights analysis of the declared areas provisions, as they appeared at the time. While recognising the legitimacy, and importance, of Australia having robust national security legislation, the Commission expressed strong concerns about these provisions, and proposed several amendments to strengthen the law's human rights protections.
4. Since the last review, minor changes have been made to these provisions. The Commission welcomes these, most notably the creation of an exception to the declared areas offence for individuals performing an official duty for the International Committee of the Red Cross and enhanced oversight of the PJCIS to monitor and review the basis of the Minister's declaration of a prescribed security zone.
5. However, in the absence of any other substantive legislative amendments, the Commission remains of the view that the limitations on human rights resulting from these provisions are neither necessary nor proportionate to achieving an identified legitimate objective.
6. Consequently, the Commission draws the Committee's attention to its previous submissions to the PJCIS. With some minor changes, the Commission reiterates the substance of the recommendations it made in its last submission to the PJCIS and to the INSLM. They are annexed to this submission for reference.
7. In summary, the Commission's continuing concerns include the following:
 - The provisions criminalise conduct that is not in itself wrongful or 'inherently criminal' in nature. Despite that fact, the offence attracts a very high penalty.
 - In making a declaration about an area, the Foreign Minister is not required to form a view about the extent of hostile activity that is occurring in a particular area.
 - The list of 'legitimate' purposes for travel to a declared area is very short. There are therefore likely to be many innocent reasons a person might

wish to enter or remain in a declared area which do not fall within a recognised exception.

- The exception applies only if travel is ‘solely’ for a legitimate purpose specified in s 119.2(3) or the relevant Regulations. That requirement has the effect that a person who enters a declared area primarily for a purpose falling within a recognised exception (such as visiting a parent) but also with a secondary innocent purpose (such as attending a friend’s wedding), will commit an offence.
- The Explanatory Memorandum prepared in relation to the Bill did not identify an adequate justification for the provisions. It stated that division 119 was designed to

equip law enforcement and prosecutorial agencies with the tools to arrest, charge and prosecute those Australians who have committed serious offences, including associating with, fighting, or providing other support for terrorist organisations overseas.¹

- The Commission considers that this explanation does not justify criminalising entry into an area without having committed any other offence or intending to perform any wrongful conduct.
- The exception in s 119.2(3) places an evidential burden on an accused. Once a person is accused of entering or remaining in a declared area (or attempting to do so), it is necessary for them to adduce evidence that they were in a declared area solely for one or more specified legitimate purposes.
- The Commission considers that it is likely to be difficult, if not impossible, to formulate in advance a comprehensive list of legitimate reasons for travel to a declared area. This will render persons who do not intend to undertake any inherently wrongful conduct liable to prosecution. While the Commission acknowledges that the Attorney-General may choose to withhold consent to the commencement of a particular prosecution, and similarly the Director of Public Prosecutions may exercise a discretion not to prosecute, this is a weak protection against the prosecution of conduct that is not inherently wrongful.² It does not conform with the foundational principle of the rule of law that such a protection would rely on the exercise of a personal discretion by a senior government official.
- By potentially capturing a wide range of innocent conduct, and making that conduct subject to a severe criminal penalty, in the absence of a demonstrated compelling need, the declared area provisions are likely to infringe impermissibly the freedom of movement (protected by article 12 of the International Covenant on Civil and Political Rights) and other human rights, such as the right to family life (protected by article 23)³.
- Finally, the Commission considers it important to acknowledge the implication of Covid-19 on the operation of this legislation. The declared areas provisions in particular will alter in their practical effect due to the steps that have been taken by governments in response to the pandemic,

such as the closing of Australia's borders, and this should be a factor taken into account in the present review.

2 Recommendations

8. The Commission considers that the declared areas provisions place significant restrictions on the human rights of persons affected by them. To date, no compelling evidence has been provided to demonstrate that they are necessary and proportionate to achieving the objectives as stated in the Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (which introduced the provisions).
9. The Commission therefore repeats the substance of its recommendations made in its INSLM Submission and its supplementary submission to the PJCIS in its last review.

Recommendation 1

The declared areas provisions should be repealed as they are not justified as necessary and proportionate to achieving a legitimate end.

Recommendation 2

In the event that recommendation 1 is not accepted, s 119.3 of the Criminal Code should be amended so that the Foreign Affairs Minister may declare an area only if the Minister is satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area.

Recommendation 3

In the event that the PJCIS is satisfied that the declared areas provisions are necessary and proportionate and should not be repealed, the exception contained in s 119.2(3) of the Criminal Code should be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.

Recommendation 4

In the event that recommendation 3 is not accepted:

- a) Detailed consideration be given to expanding the list of legitimate reasons for travel to declared areas in s 119.2(3) of the Criminal Code to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. The list should be made as comprehensive as possible; and
- b) Section 119.2 of the Criminal Code be amended so that it is a defence to a charge of entering or remaining in a declared area if a person establishes they were in a country for a purpose other than engaging in a hostile activity.

Australian Human Rights Commission

Declared areas – 28 August 2020

¹ Explanatory Memorandum to the Foreign Fighters Bill 2014 (Cth), p 139 [827].

² Parliamentary Joint Committee on Intelligence and Security, Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (October 2014), 104 [2.384]. At http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CounterTerrorism_Legislation_Amendment_Foreign_Fighters_Bill_2014/Report1 (viewed 17 August 2020).

³ International Covenant on Civil and Political Rights (ICCPR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).