



*Australian Council  
for Civil Liberties*

**JOINT CCLs  
Submission  
PJCIS STATUTORY REVIEW**

**DECLARED AREA PROVISIONS  
(s119.2 and s119.3 of the Criminal Code)**

*A combined submission from:  
NSW Council for Civil Liberties  
Liberty Victoria  
Queensland Council for Civil Liberties  
South Australian Council for Civil Liberties  
Australian Council for Civil Liberties*

**30<sup>th</sup> October 2017**

## PJCIS STATUTORY REVIEW DECLARED AREA PROVISIONS

### INTRODUCTION

1. The councils for civil liberties across Australia<sup>1</sup> (the CCLs) welcome the opportunity to make a submission to the Joint Parliamentary Committee on Intelligence and Security (PJCIS) statutory review of the 'declared area' provisions under sections 119.2 and 119.3 of the *Criminal Code Act 1995* (Cth) (the Criminal Code) that make it an offence for a person to enter, or remain in, a 'declared area' in a foreign country.
2. This review arises from the statutory requirement that the PJCIS review these provisions prior to their lapsing under a sunset clause on 7 September 2018.<sup>2</sup>
3. The Independent National Security Legislation Monitor (INSLM), Dr Renwick SC, has reviewed these provisions as required by the INSLM Act<sup>3</sup>. We were pleased the PJCIS extended the timeframe for submissions until after the tabling of the INSLM report in Parliament.
4. As the INSLM office brings an independent perspective and has access to intelligence and security information not publicly available, it was important to have the opportunity to consider his report to assess whether there are new grounds for amending any of our previously expressed views on these provisions- before providing our submission to the PJCIS.
5. After briefly restating the CCLs previously argued position, this submission will comment on the findings and recommendations of the INSLM.

### THE CONTEXT

6. The terrorist threat in Australia is serious and evolving. It is clearly important that intelligence and security agencies and police have adequate powers and resources to do their job in the context of the heightened threat of terrorist activity.
7. There is no serious debate on this fundamental goal in the Australian community
8. The debate that has been running between many community, legal, civil liberties and human rights groups and governments since 9/11 is about the effectiveness and proportionality of measures taken to achieve the goal - especially in their impact on fundamental rights and liberties.
9. Some of Australia's counter-terrorism laws have been unnecessary in that appropriate laws and powers already existed. A disturbing number of the counter-terrorism measures have been disproportionate and unjustifiably undermine longstanding democratic processes, rights and liberties.<sup>4</sup>

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<sup>1</sup> New South Wales Council for Civil Liberties, Liberty Victoria, Queensland Council for Civil Liberties, South Australia Council for Civil Liberties, Australian Council for Civil Liberties

<sup>2</sup> Section 29 of the Intelligence Services Act 2001 requires review by 7 March 2018

<sup>3</sup> Independent National Security Legislation Monitor: *Sections 119.2 and 119.3 of the Criminal Code: Declared Areas Report*, September 2017 (INSLM report: Declared Areas 2017)

<sup>4</sup> See ALRC list of Commonwealth statutes-many of which are security/counter-terrorism related- which breach traditional freedoms. Although not all are unjustified-this list should be ringing alarm bells for those who are concerned to protect core freedoms as a central element of our democratic way of life. Australian Law Reform Commission: *Interim Report on Traditional Rights and Freedoms – Encroachment by Commonwealth Laws*. (Report 127), July 2015.

10. Cumulatively this stream of counter-terrorism legislation has had a disturbing effect. Laws which seriously breach long held liberties and rights, key principles of the rule of law and basic democratic values are increasingly numerous and increasingly unremarkable. They are no longer confined to counter-terrorism and national security measures. Our fear that this would occur would now seem to be irrefutable fact.

## THE DECLARED AREAS LEGISLATION

11. Section 119.2 of the Criminal Code makes it an offence for a person to enter, or remain in, an area in a foreign country if that area has been 'declared' by the Foreign Affairs Minister under s 119.3. The penalty is imprisonment for up to ten years.
12. Sub-sections 119.2(3) and (4) of the Criminal Code provide a list of legitimate purposes<sup>5</sup> for entering or remaining in a declared area which are exceptions to the offence – provided that such a purpose is the sole purpose. Further exceptions can be added by regulation.
13. A defendant bears an evidential burden in relation to these excepted purposes.
14. Section 119.3 of the Criminal Code empowers the Minister for Foreign Affairs to 'declare an area' in a foreign country if satisfied that a listed terrorist organisation is engaging in a hostile activity in that area. Two areas have been declared.<sup>6</sup>
15. The Attorney-General must give written consent for committal proceedings to commence pursuant to s 119.11(2).
16. As stated in the Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) (the Foreign Fighters Bill), the Government's purposes for these provisions was:
  - *to equip relevant 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'; and*
  - *'to deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so'.<sup>7</sup>*

## THE CCLS POSITION ON THE DECLARED AREA PROVISIONS

17. The CCLS expressed their views on the 'Declared Areas' provisions in the context of the PJCIS review of the Foreign Fighters Bill in 2014.<sup>8</sup> We opposed these provisions on a number of grounds and recommended that they should be removed from the Bill.

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<sup>5</sup> Encompassing: providing humanitarian aid, obligation to appear before a court, visiting family members, performing official duties including for a foreign country, working as a professional journalist and serving in the armed forces of a foreign country or other 'declared' organisation.

<sup>6</sup> al-Raqqa province in Syria and Mosul district in Iraq

<sup>7</sup> (INSLM report: Declared Areas 2017) p13.

<sup>8</sup> Submission Of Civil Liberties Councils Across Australia To The Parliamentary Joint Committee On Intelligence And Security Inquiry Into The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill , 3<sup>rd</sup> Oct 2014. Submission number 25 (CCLS PJCIS submission FF Bill 2014) [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/Counter-Terrorism\\_Legislation\\_Amendment\\_Foreign\\_Fighters\\_Bill\\_2014/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Counter-Terrorism_Legislation_Amendment_Foreign_Fighters_Bill_2014/Submissions)

18. A number of positive amendments were made to ameliorate some aspects of the 'declared area' proposals following the PJCS report – including the significant reduction in the length of the sunset clause, the addition of legitimate purposes for travelling to declared areas, and the capacity to add to these by regulation.<sup>9</sup>

19. However, the amendments failed to address the CCLs' central objections to the underlying nature of the offence created in this legislation:

*In our view, the starting presumption in a liberal democracy should be that its residents are free to travel wherever they please. If there is a need to limit freedom of travel in the context of terrorism, **any limitation should require a connection to terrorist activity, as in the case of the incursion offences** ... Criminalising travel per se is an extraordinary departure from Australia's liberal democratic values.<sup>10</sup>*

20. The provisions also breached the presumption of innocence by effectively reversing the burden of proof.

21. Notwithstanding our fundamental opposition to the 'declared area' provisions, the CCLs proposed amendments to lessen the negative elements of the Bill in the event that the 'declared areas' proposals were not withdrawn from the Bill.

22. It was submitted that the fundamental flaw in the framing of the offence could only be remedied by incorporating a requirement that the person entered or remained in a declared area with the intention of engaging in, or engaged in, some form of terrorist related activity. The CCLs recommended:

*If the offence remains, contrary to this recommendation, it should be reframed to include intent to engage in hostile activity as an element of the crime'.<sup>11</sup>*

23. It is difficult to think of harmful terrorist-related activity not already covered by other provisions – notably the broadly defined foreign incursions offence of engaging in 'a hostile activity in a foreign country' set out in s 119.1 and defined in s 117.1 of the Criminal Code.

24. No changes were made to the offence elements in the legislation.

25. The list of legitimate purposes for entering a 'declared area' in the Bill was unacceptably narrow. The CCLs recommended an expanded, non-exhaustive list:

*If the offence remains as currently structured, contrary to these recommendations, the list of innocent purposes in s 119.2(3) should be considerably expanded and expressed as inclusive rather than exhaustive.<sup>12</sup>*

26. There were amendments to this provision. However, the additions made to the list of legitimate purposes and the possibility of further additions by means of regulation were weaker than many proposals and did not address the full range of possible legitimate reasons for travel to a declared area.

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<sup>9</sup> The sunset clause was reduced from 10 years to 2 years after next federal election (ie. 7<sup>th</sup> September 2018) in line with recommendation 20. Parliamentary Joint Committee on Intelligence and Security: Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Oct 2014

<sup>10</sup> (CCLs PJCS submission FF Bill 2014) p13

<sup>11</sup> Ibid

<sup>12</sup> (CCLs PJCS submission FF Bill 2014) p

27. Consequently, despite the amendments, the CCLs maintained their opposition to the declared areas provisions as finally legislated because they:
- criminalised travel without requiring any element of intention/participation in terrorist related activities;
  - effectively reversed the onus of proof onto the defendant;
  - incorporated an inadequate list of legitimate purposes; and
  - were not necessary for the achievement of the specified purposes of the legislation.

### **Lack of operational experience**

28. There have been no prosecutions relating to this offence since it came into operation on 1 December 2014. While 50 people have been charged with terrorism and/or foreign incursions offences in Australia since late 2014, none of these have related to the 'declared area' offence.
29. This statistic provides support for the argument of the CCLs and others who have consistently argued the offence is not necessary.<sup>13</sup>
30. The INSLM review process has provided some more recent information as to use of these provisions. The AFP has indicated that a number of arrest warrants have been issued and that investigations are ongoing.<sup>14</sup> The Attorney General's Department has indicated that the consent of the AG to proceed to prosecution has been requested once in relation to this offence. The INSLM also notes a warrant was issued in 2015 for the arrest of Tareq Kamleh and another in 2016 for the arrest of Neil Christopher Prakash in relation to a 'declared area' offence.<sup>15</sup>
31. As it stands, however, there is no detailed empirical information from operational experience against which the CCLs can further assess the effectiveness or the necessity of the declared area provisions in delivering on either of the stated purposes for the legislation.

## **THE INSLM FINDINGS AND RECOMMENDATIONS**

32. The INSLM reviewed the 'declared areas' provisions in terms of:
- their 'effectiveness: in deterring and responding to security/terrorist-related activity
  - their 'appropriateness' in terms of: consistency with international human rights, counter-terrorism and security obligations; their safeguards for protecting rights of individuals and their proportionality to any threat of terrorism or threat to national security or both
  - whether they 'remain necessary – derived from the above questions.<sup>16</sup>
33. His key conclusions and recommendations are:
- *I recommend that these laws be continued, subject to any declaration being reviewable by the PJCS at their discretion at any time prior to the declaration ceasing to have effect or being revoked by the Minister. (9.2)*

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<sup>13</sup> Evidence given by 'Academic Group submission to INSLM review 3 quoted in (INSLM report: Declared Areas 2017) p25

<sup>14</sup> INSLM report: Declared Areas 2017) p31

<sup>15</sup> (INSLM report: Declared Areas 2017) p31

<sup>16</sup> The INSLM is agreeing with the first INSLM's interpretation of the INSLM Act provisions: INSLM Annual Report (16 December 2011) p4.

- *I also recommend that consideration be given (noting in particular the potential issues set out in paragraphs 8.18–8.35 of this report) to making a regulation under, or an amendment to, these provisions to allow 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. (9.4)*
- *Provided the review provision is amended as recommended above, I recommend that the laws be continued for a further period of five years. (9.5)*
- *In making the findings and recommendations set out in this report, I have considered the matters in s 6(1)(a) of the INSLM Act and I conclude that the laws have the capacity to be effective (noting that no prosecution of the declared area offence has occurred). (9.6)*
- *As to the matters in s 6(1)(b) of the INSLM Act, I have considered Australia's human rights, counter-terrorism and international security obligations, and intergovernmental agreements within Australia, and I conclude that the laws are:*
  - a. consistent with the obligations referred to above and contain appropriate safeguards for protecting the rights of individuals;*
  - b. proportionate to the current threats of terrorism and to national security; and*
  - c. necessary. (9.7)<sup>17</sup>*

### **The necessity of the declared areas offence**

34. The INSLM has determined that the declared area legislation is necessary for the declared purposes.
35. In support of this determination, the INSLM cites the arguments of the Government agencies and some individual security experts that the expectation of a significant increase in the numbers of returning foreign fighters from these areas necessitates the retention of this offence because of the difficulty of gathering usable evidence in conflict areas.
36. It is argued that this is so, notwithstanding that other foreign incursion offences were introduced precisely to address the recognised difficulties of gathering information and evidence in conflict zones where ordinary processes are unsustainable:

*Several of the submissions I received highlighted that, despite the operation of other foreign incursion offences in div 119 of the Criminal Code, the declared areas offence remains necessary as it serves a unique purpose. Submissions noted that declared areas reflect an environment within which the ordinary processes and procedures for the collection and transfer of evidence are unlikely to be sustainable.<sup>18</sup>*

*[N]otwithstanding the 2014 changes to the Foreign Evidence Act 1994 which simplified processes for adducing foreign evidence in terrorism-related cases, obtaining foreign evidence remains a challenge. This is particularly the case where the evidence is being sought from a conflict zone which may not have fully operational government in place.<sup>19</sup>*

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<sup>17</sup> INSLM report: Declared Areas 2017 pp38-39

<sup>18</sup> (INSLM report: Declared Areas 2017) p 29

<sup>19</sup> AFP, Submission to the INSLM, *Statutory Deadline Reviews*, 2 May 2017, [20]. Quoted in *ibid* p30

37. It is understandable that the security and intelligence and police agencies will argue for as many 'tools' as they think might be useful. But when there are significant consequences for the rule of law and basic rights of individuals, it is very important that such arguments are supported by solid evidence.
38. The arguments referenced by the INSLM in support of the provisions' necessity do not provide specific examples as to how the existing simplified processes have been inadequate in enabling the arrest, charging and prosecution of returning foreign fighters suspected of having engaged in any kind of terrorist related activity.<sup>20</sup>
39. Without compelling specific examples providing solid evidence the arguments are essentially expressions of opinion. The CCLs note (as does the INSLM) that were strong views disputing the necessity of the offence and arguing for it to be allowed to lapse in 2018 under the current sunset clause. These are also essentially expressions of opinion. In both cases most of these opinions are from expert perspectives. The necessity has not been established.
40. The 'unique' dimension of this offence is that it does not require proof of intention to engage in a hostile activity for a person to be charged, prosecuted and found guilty of a serious criminal offence.
41. **The CCLs maintain their view that the declared area offence is neither a proportionate nor necessary law to achieve the stated objectives.**
42. The INSLM does not address the argument that the offence should include the intention to engage in some hostile activity as an element. We note that this was seen as a major problem by groups other than the CCLs.
43. **If the provisions are not repealed or allowed to lapse in 2018, the CCLs consider the intention to engage in, or engagement in hostile activity should be included as an element of the offence.**

#### **The right to freedom of movement**

44. Freedom of movement is not an absolute right and can be restricted if necessary for national security purposes. The INSLM accepts that the declared area legislation is necessary for national security and therefore does not consider it unnecessarily restricts the right to freedom of movement:

*Prohibiting a person from travelling to a declared area clearly involves a restriction of that person's rights, most notably the right to freedom of movement. That, however, is only the first part of the analysis. As noted above (para 5.16), this right is not absolute. Given that the prohibition is provided for in law, an assessment of whether it complies with the right to freedom of movement – and is therefore consistent with Australia's international obligation to respect that right – **ultimately depends on whether the prohibition is necessary to protect national security, and the risk of the prohibition being applied arbitrarily.** In each case, proportionality between the nature and scope of the prohibition and the national security interests sought to be protected will be an important factor.<sup>21</sup>*

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<sup>20</sup> See 8.9ff (INSLM report: Declared Areas 2017) pp29-31

<sup>21</sup> (INSLM report: Declared Areas 2017) p23

45. With respect, the CCLs are of a different view. The offence has not been established as necessary for national security. The offence does not require any element of a terrorist related threat. The list of permissible purposes for lawful travel remains too narrow.
46. The INSLM notes the Parliamentary Joint Committee on Human Rights (PJCHR) argued *the offence provision will operate in practice to deter and prevent Australians from travelling abroad for legitimate purposes due to fear that they may be prosecuted for an offence*' and determined therefore that it 'unnecessarily restricts freedom of movement'. The Law Council of Australia, the Australian Human Rights Commission and academics argued to the same end.<sup>22</sup>
47. The INSLM cites an alternative perspective:  
*Conversely, ASPI [Australian Strategic Policy Institute] submitted that the areas of legislation that are the subject of the present statutory review provide '[e]ffective accountability and oversight measures to balance public security with the rights of the individual, including compliance with Australia's international obligations'.<sup>23</sup>*
48. However, the INSLM has not directly countered the arguments that the provisions do unjustifiably breach our international obligation in relation to the right to freedom of movement.
49. The Government has also argued that a key purpose of the legislation is to deter Australians from travelling to declared areas for their own safety. It is of course legitimate for Government to deter persons from travelling to dangerous areas. However, if the intent is to safeguard persons from danger, there is no justification for creating a serious criminal offence with a penalty up to 10 years' imprisonment. The existing travel advice provided by Government on its 'Smarttraveller.gov.au' website is designed for this purpose and carries explicit, strong warnings where appropriate.
50. The INSLM notes that Denmark introduced a similar offence in July 2016.<sup>24</sup> However, it appears that this type of offence only exists in two liberal democracies. As noted by the INSLM, the Special Adviser to the UK Independent Reviewer of Terrorism Legislation has expressed the view that a comparable offence 'would not be worthwhile for the UK'.<sup>25</sup>

**51. The CCLs maintain their view that the declared areas offence unwarrantedly impinges on the right to freedom of movement.**

**Reversal of burden of proof**

52. The INSLM has not made any recommendations to address the transfer of the burden of proof to the accused because he does not consider this to be the effect of the legislation:

*Admittedly, no limits may be placed on the right of the accused to be presumed innocent until proven guilty. However, I do not consider that the declared area offence is inconsistent with this right. While the physical elements of the offence cover a broad range of conduct, and intention to engage in some form of illegitimate activity is not a fault element of the*

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<sup>22</sup> Ibid

<sup>23</sup> Ibid p22

<sup>24</sup> (INSLM report: Declared Areas 2017) p29

<sup>25</sup> The adviser notes that 'the main effect of the provision is to catch 'jihadi brides' rather than jihadi fighters, for which counselling rather than imprisonment is needed;' Quoted in ibid.



*offence, s 119.2 does not fundamentally alter the requirement that the prosecution prove the elements of the offence beyond reasonable doubt.*<sup>26</sup>

53. With respect the CCLs disagree with this analysis. Once a person has entered a declared area the burden of proof shifts to the person to demonstrate that their presence in the area falls within the statutory exceptions.
54. The elements of the offence, which the prosecution will be required to establish beyond a reasonable doubt, are only that the area has been declared by the Foreign Affairs Minister under s 119.3 and that the accused has either entered into the declared area after the declaration by the Minister, or has remained in that area after the declaration.
55. It is not an element of the offence that the accused entered or remained in the declared area for any untoward purpose, with the result that this need not be established by the prosecution for the offence to be made out. In other words, if the prosecution can establish that the accused entered or remained in a declared area after the declaration, the accused will be guilty of the offence unless he or she can demonstrate that a defence applies.
56. In this way, it is the accused who will bear the burden of demonstrating an innocent intent, rather than the prosecution being required to demonstrate a unlawful intent (or the absence of an innocent intent).
57. The INSLM does refer to a number of submissions that point out this effective reversal of the presumption of innocence - but does not offer any specific arguments in response beyond the statement above.<sup>27</sup>
58. The CCLs consider the position they previously argued on this aspect of the legislation remains valid.<sup>28</sup> Such a situation is contrary to the fundamental values of the Australian criminal justice system and to the right to a fair trial.
59. **The CCLs consider this legislation should be repealed or allowed to lapse in 2018 because it effectively reverses the burden of proof, and is contrary to the presumption of innocence and the right to a fair trial.**

#### **Legitimate purpose exception**

60. The CCLs, like many other commentators, argued the list of legitimate purposes was unacceptably narrow, and the requirement that the designated purpose be the sole purpose was unfair to a defendant.
61. The INSLM noted this was a particularly contentious aspect of the legislation and that many of the submissions put forward options for addressing this major problem including:
  - inclusion of a fault element of intending to travel to a declared area for an illegitimate purpose;
  - inclusion of a defence element so that the offence does not apply if a defendant travels to a declared area solely for a purpose or purposes not connected with engaging in hostile activities;
  - expansion of the list of legitimate purposes; and

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<sup>26</sup> (INSLM report: Declared Areas 2017) p22

<sup>27</sup> The INSLM does reference the Statement of Compliance and the views of the ASPI which support his conclusion. Ibid pp21ff

<sup>28</sup> (CCLs PJCS submission FF Bill 2014)pp13-14

- giving courts the discretion to determine on a case by case basis whether an individual's purpose is valid.<sup>29</sup>

62. When considering this issue, the INSLM gives considerable attention to the second of the stated purposes of the offence, deterring travel to declared areas for the safety of the persons:

*An objective of the declared area offence is to deter Australians from travelling to areas where terrorist organisations are engaged in a hostile activity. I accept that the deterrent effect of the offence may be reduced by opening up the list of legitimate purposes in s 119.2(3).*

*I have concluded that the circumstances in which an adult person would wish to travel to either of the current declared areas other than to provide support to the terrorist organisation engaged in hostile activities in the area are extremely narrow. This is reflected by the current drafting of the legitimate purpose exception in s 119.2(3) which acknowledges that some such reasons may exist.<sup>30</sup>*

63. The INSLM recommends that consideration be given to an amendment to incorporate an individual authorisation regime:

*I also **recommend** that consideration be given... to making a regulation under, or an amendment to, these provisions to allow 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.<sup>31</sup>*

64. This is a positive proposal which could lessen problems for persons needing to travel to declared areas for reasons outside the existing list and provide them with certainty that their intended purpose was lawful.

65. However, if an individual authorisation model is to be included, **the CCLs prefer the proposal of the Law Council of Australia** to expand the list of legitimate purposes and to allow a court the discretion to determine on a case by case basis whether a person travelled to a declared area for a legitimate purpose. Having a court decide such issues rather than a Minister is consistent with the separation of powers.

**66. The CCLs recommend the list of exemptions should be amended to be as comprehensive as possible and non-exhaustive.**

### **Effectiveness**

67. The INSLM limits his finding as to the effectiveness of the legislation to a conditional affirmation:

*I conclude that the laws have the capacity to be effective (noting that no prosecution of the declared area offence has occurred).<sup>32</sup>*

68. The CCLs are not persuaded that there is evidence to indicate these provisions are likely to be effective in providing greater protection against terrorism.

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<sup>29</sup> (INSLM report: Declared Areas 2017) pp32-35

<sup>30</sup> (INSLM report: Declared Areas 2017) p34

<sup>31</sup> Ibid p38

<sup>32</sup> INSLM report: Declared Areas 2017) p34

69. The CCLs remain concerned that these provisions may result in persons who neither intended, nor engaged, in any terrorist related activity being prosecuted and found guilty of a serious criminal offence.
70. The CCLs are concerned that these provisions are likely to prevent innocent people from travelling to declared areas for fear of prosecution

#### **Grounds for declaration of an area**

71. As currently formulated, s 119.3(1) of the Criminal Code only requires as grounds for declaration of an area that a 'listed terrorist organisation is engaging in a hostile activity'. This could apply to areas where there is a very low level of activity by a terrorist organisation. It could apply to numerous regions and even countries - which we do not understand to be the Government's intention. While other factors will act as a restraining factor in the application of this provision, it is appropriate that the legislation reflect its stated intention.
- 72. The CCLs agree with the recommendation of the AHRC that s 119.3(1) be amended so that an area can only be 'declared' if the Minister is satisfied a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area**

#### **Discretionary review of declaration by PJCS**

- 73. The CCLs support the INSLM's recommendation that the continuation of the declared area provisions be subject to any declaration being reviewable by the PJCS at their discretion at any time prior to the declaration ceasing to have effect or being revoked by the Minister.**
74. This will provide a needed mechanism for ongoing oversight of the process and monitoring of the situation in declared areas.

#### **Future sunset clause**

75. The INSLM recommends the declared area provisions be continued for another 5 years post September 2018.
76. The CCLs disagree with this time frame. We have consistently argued that lengthy sunset clauses bring a high risk of 'extraordinary' provisions becoming 'normal' provisions. We have abundant evidence in recent times of the disturbing tendency for extraordinary provisions set up to address a specific threat of terrorism to be expanded.
77. The longer extraordinary provisions exist under sunset clauses the less likely they are to be rolled back by governments. It is already obvious that this trend has disturbing implications for the long-standing principles and rights that underpin our legal system.<sup>33</sup>
78. The CCLs note the recent, distressingly cavalier, attitude that political leaders manifested in their endorsement of new national security proposals in the recent COAG meeting. The way in which some Premiers deflected any need for consideration of the impact on individual rights and liberties and the rule of law was revealing as to the 'normalisation' of extraordinary laws.<sup>34</sup>

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<sup>33</sup> See for example: George Williams: *The Legal Assault on Australian Democracy*, QUT Law Review, vol 16 No 2, 2016. <https://lr.law.qut.edu.au/article/view/651>

<sup>34</sup> Daniel Andrews Premier of Victoria: "There is going to be people out there talking about civil liberties today, they are going to be talking about the thin edge of the wedge and all this sort of stuff, well frankly, that talk ... is a luxury that might be available to them it is not available to political leaders in this country,". Gladys Berejiklian NSW Premier: "I think protecting the public is the more appropriate concern," ABC news 20/10/17

79. In the context of the ongoing absence of a Federal framework for protection of human rights such as a human rights act or charter, the CCLs maintain a serious concern about the normalisation of increasingly draconian measures.

**80. If the recommendation to repeal or allow the offence to lapse is not accepted the CCLs recommend that the legislation incorporates a sunset clause for no longer than 2 years to ensure regular review of the necessity and effectiveness of the provision, and to ensure the offence continues to be recognised as targeted extraordinary and temporary.**

## SUMMARY OF THE CCLS RECOMMENDATIONS

### Recommendation 1

81. In the absence of convincing evidence of its necessity or proportionality, the CCLs reaffirm their opposition to the declared area offence and recommend it be allowed to lapse on the prescribed sunset date of 7 September 2018.

### Recommendation 2

82. If the declared area offence is not allowed to lapse in 2018, the CCLs recommend that the legislation incorporates a sunset clause for no longer than 2 years to ensure regular review of the necessity and effectiveness of the provision and to ensure the offence continues to be recognised as extraordinary and temporary.

### Recommendation 3

83. The CCLs recommend the intention to engage in, or engagement in hostile activity, should be included as an element of the declared areas offence

### Recommendation 4

84. The CCLs recommend that the exemptions provisions be amended to allow a court to determine on a case by case basis whether a person travelled to a declared area for a legitimate purpose

### Recommendation 5

85. The CCLs also recommend the list of exemptions should be amended to be as comprehensive as possible and non-exhaustive.

### Recommendation 6

86. The CCLs support the recommendation of the AHRC that s 119.3(1) be amended so that an area can only be 'declared' if the Minister is satisfied a listed terrorist organisation is engaging in a hostile activity **to a significant degree** in that area

### Recommendation 7

87. The CCLs support the INSLM's recommendation that the continuation of the declared area provisions be subject to any declaration being reviewable by the PJCS at their discretion at any time prior to the declaration ceasing to have effect or being revoked by the Minister.

## Concluding comments

88. The joint CCLs hope this submission assists the Committee in its review process. We are available to respond to any queries or requests for clarification or additional information. We thank the

PJCIS for providing additional time for responses so that the report of the INSLM could be appropriately considered and inform our submission.

89. This submission was coordinated on behalf of the joint CCLs by Dr Lesley Lynch (Vice President NSWCCCL) and Michael Cope (President Queensland CCL). It incorporates material from previous CCLs submissions. Significant assistance in research and writing was provided by Ryan Thomson, Vanessa Lyons, Sarah Stronge and Nathan Condoleon ( interns with Queensland CCL.)

Therese Cochrane  
**Secretary**  
**NSW Council for Civil Liberties**

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**Contacts in relation to this submission.**

Dr Lesley Lynch VP NSWCCCL  
Michael Cope President Qld CCL