17 August 2020

Committee Secretary

Parliamentary Joint Committee on Intelligence and Security

PO Box 6021

Canberra ACT 2600

Dear Committee Secretary

Review of the 'declared area' provisions

Thank you for the opportunity to make a submission to this inquiry into the declared area offence, and associated provisions, in sections 119.2 and 119.3 of the *Criminal Code Act 1995* (Cth) (Criminal Code). We make this submission in our personal capacity, and are solely responsible for the views and content contained therein.

In a submission to this Committee in 2014, we opposed the introduction of the declared area offence by the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth). The arguments which we made in that submission have been repeated in subsequent submissions to: the Australian Law Reform Commission's Freedoms Inquiry on 25 February 2015; the Independent National Security Legislation Monitor (Monitor), Dr James Renwick SC, on 27 April 2017; and, finally, this Committee' Review of the Declared Area Regime on 22 September 2017. In the last of these submissions, we recommended that the sections should be allowed to lapse at the end of the sunset period (then, 7 September 2018). However, this Committee recommended an extension of three years, which was accepted by the federal Government, and thus the sections are currently due to expire on 7 September 2021. We again recommend that the sections should be allowed to lapse at the end of the sunset period.

Section 119.2 of the Criminal Code makes it an offence punishable by 10 years' imprisonment to enter or remain in a declared area.[1] The Minister for Foreign Affairs may declare an area of a foreign country as a 'declared area' if they are satisfied that a listed terrorist organisation is engaging in hostile activity in that area.[2] To date, only two areas have been declared. On 2 December 2014, the Minister declared al-Raqqa province in Syria. This declaration was revoked on 29 November 2017. On 2 March 2015 (and subsequently on 2 March 2018), Mosul district in the Ninewa province of Iraq was declared. This declaration was revoked on 19 December 2019.

It is a defence to the declared area offence for the defendant to show that they entered or remained in the area solely for a legitimate purpose.[3] The legislation provides an exhaustive list of legitimate purposes, including bona fide family visits, making news reports and providing humanitarian aid.[4] It imposes a significant burden upon the freedoms of movement and association by preventing individuals from travelling to areas designated by the Minister for Foreign Affairs as 'no-go zones'. Such a burden might be justified if there was evidence that restricting the freedoms was a necessary and proportionate response to the threat posed by foreign fighters. There are, however, several reasons why the current offence is not sufficiently targeted to the threat of terrorism.

First, the offence does not technically reverse the onus of proof and nor is it an offence of strict or absolute liability. However, it has essentially the same effect; criminal liability will be prima facie established wherever a person enters or remains in a declared area. No other physical elements are required in order for the offence to be made out. The prosecution need not establish, for example, that the person travelled to the area for the purpose of engaging in terrorism. This is problematic because it is that malicious purpose – rather than the mere fact of travel – which renders the conduct an appropriate subject for criminalisation. In recognition of this, the Scrutiny of Bills Committee queried 'why it is not possible to draft the offence in a way that more directly targets culpable and intentional actions'.[5]

1 *Criminal Code Act 1995* (Cth) s 119.2(1).
2 *Criminal Code Act 1995* (Cth) s 119.3(1).
3 *Criminal Code Act 1995* (Cth) s 119.2(3).
4 *Criminal Code Act 1995* (Cth) sub-ss 119.2(3)(a),(f),(g).
5 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Report Relating to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (October 2014) 58.

Secondly, the legislation contains a 'very limited list of permitted defences to what is effectively a blanket prohibition'.[6] These defences do not capture the wide range of legitimate reasons for which a person might travel to a foreign country in a state of conflict – such as undertaking a religious pilgrimage, conducting business or commercial transactions, or visiting friends. The legislation provides that additional legitimate purposes may be specified in the regulations.[7] However, it would be impossible as a matter of practicality to prospectively specify *every* legitimate reason for travel.

The third – and related reason – concerns the burden of proof which is placed on defendants to establish that their travel was for one of the specified legitimate purposes. In order to displace the required evidentiary burden, it would be necessary for the defendant to demonstrate a reasonable possibility that they travelled to the declared area *solely* for a legitimate purpose. It is not clear how this would be interpreted by a court, but it could very well mean that defendants are placed in the very difficult position of needing to prove a negative. That is, a defendant may be required to adduce evidence not only that they travelled to the area for one of the enumerated purposes but also that this was the *only* purpose for travel. This would require the defendant to provide factual evidence that they did *not* travel to the area with the intention of engaging in a terrorism-related purpose. It is not clear what evidence a defendant would be able to adduce to establish the absence of such an intent. The difficulties for the defendant are compounded in relation to the purpose of 'making a *bona fide* visit to a family member' (emphasis added). How would a defendant adduce evidence that they were visiting their family for 'genuine' reasons, as opposed to visiting them in order to, for example, provide a cover for engaging in terrorism? Presumably, a defendant would need to demonstrate some evidence that they were *not* intending to become involved in foreign conflict. This would put them in a very difficult position and, indeed, it is difficult to see how such a requirement would work in practice.

Given the very considerable incursions which the declared area offence makes into human rights, its retention can only be justified if a clear case is made that this offence is necessary to respond to the threat of terrorism and also effective in combating that threat. The problem is that its use to date points to the opposite. Since late 2014, more than 80 people have been charged with terrorism and/or foreign incursions offences in Australia. The declared area offence has been used on one occasion only. In December 2017, Belal Betka became the first person to be charged with the offence of entering into or remaining a declared area. What this demonstrates is that – in contrast to the claim

6 Australian Lawyers for Human Rights, Submission, Australian Law Reform Commission, Freedoms Inquiry, 27 February 2015, 11.

7 *Criminal Code Act 1995* (Cth) s 119.2(3)(h).

made in the Second Reading Speech – the declared area offence is not required in order for 'law enforcement agencies to bring to justice those Australians who have committed serious offences, including associating with, and fighting for, terrorist organisations overseas'.[8] This is so not just because the declared offence has been used on one occasion only, but also because Betka was charged with another offence – that of engaging in hostile activities in a foreign country – to which he ultimately pleaded guilty. He was sentenced to three years and eight months in jail. Therefore, in this case, the declared area offence was ultimately superfluous.

Of course, the lack of use of a legislative provision is not determinative. There are two alternative arguments which might be relied upon to support the retention of the declared area offence. These are spelt out in the submission made by Jacinta Carroll to this Committee's previous review of the declared area offence on 18 May 2017. On the basis of these, Carroll concludes that '[o]verall, Australia's declared area offence legislation is a novel but effective approach to the complex challenge of foreign fighters'.[9]

First, Carroll writes that any impact of the offence upon human rights, including the freedoms of movement and association, is proportionate to its 'important deterrence effect' in 'clarifying to Australians that being engaged with a terrorist group in these areas is a criminal offence, and that they may face prosecution'.[10] One major difficulty with this reasoning is that the declared area offence is not restricted to engagement with a terrorist organisation, but criminalises the mere act of travel to a declared area. This is explicitly acknowledged in the evidence given by the Commonwealth Attorney-General to the Scrutiny of Bills Committee in 2014. He stated that 'the declared area provisions are designed to act as a deterrent to prevent people from travelling to declared areas'.[11] This is undoubtedly a worthy goal. The State has a responsibility to take steps to protect the physical safety of its citizens, including deterring them from travelling to dangerous areas. However, it does not justify the criminalisation of travel in the absence of any proof of engagement, or, at the very least, an intention to engage, in terrorism-related activities. The imposition of criminal sanctions should always be a last resort and, in this case, there are other less coercive means of achieving the same deterrent effect, such as travel warnings, suspension or cancellation of travel documents, and possibly even issuing control orders.

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8 Commonwealth, Senate, *Parliamentary Debates*, 24 September 2014, 7001 (George Brandis).

9 Jacinta Carroll, Submission, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Declared Area Regime*, 18 May 2017, 10.

10 Ibid 9.

11 Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *14th Report of 2014* (October 2014) 59.

Another difficulty is that the deterrent effect identified by Carroll is already achieved by other offences with a more limited effect upon human rights, such as the foreign incursions offences of engaging in, or preparing to engage in, hostile activities in a foreign country. The only additional effect of the declared area offence is to deter people from travelling overseas for a reason unrelated to involvement in terrorism-related activities. Thus, the Law Council submitted to the Australian Law Reform Commission that the offence may have the 'unintended effect of preventing and deterring innocent Australians from travelling abroad and associating with persons for legitimate purposes out of fear that they may be prosecuted for an offence, subjected to a trial and not be able to adequate displace the evidential burden'.[12] The lack of any clear relationship between this deterrent effect and the protection of national and global security necessarily leads to the conclusion that the very significant impact of the declared area offence upon the freedoms of movement and association is disproportionate.

Second, Carroll attributes the charging of only one person with the declared area offence to practical difficulties associated with its use, 'including the difficulty of obtaining evidence to a prosecution standard in a conflict environment; that the offence doesn't apply retrospectively; and that perpetrators may still be with terrorist organisations overseas and unable to have charges laid'.[13] There is undoubtedly some truth to this. However, the reality is that no change to the legislative regime would address the third of these issues. An inherent weakness of the criminal law is that it can only target individuals where they voluntarily return to Australia or are forced to do so as a result of extradition proceedings. It is for this reason that the offence of *preparing* to engage in hostile activities in a foreign country, as well as mechanisms for suspending or cancelling travel documents, exist. In relation to the first and second issues, the problem is different. To address these issues would require what is already an overly-broad offence to be further expanded, and the evidentiary standard of beyond a reasonable doubt to be lowered. The impact of this on human rights would be out of proportion to its utility in responding to the terrorist threat.

For these reasons, we recommend that the declared area offence should be allowed to lapse at the end of the sunset period. The only viable alternative would be if the government specified some illegitimate purpose as part of the actus reus of the offence. However, if such an amendment were

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12 Law Council of Australia, Submission, Australian Law Reform Commission, Freedoms Inquiry, March 2015, 11.

13 Jacinta Carroll, Submission, Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Declared Area Regime*, 18 May 2017, 9.

adopted, the offence would be superfluous as it would overlap very significantly with the foreign incursions and recruitment offences in the *Criminal Code*. Those offences already have a broad scope and cover the kinds of activities to which the declared area offence is directed – namely, to prevent individuals from participating in hostilities overseas.

Please do not hesitate to contact Dr Nicola McGarrity [redacted] if you have any queries.

Yours sincerely,

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