



Australian Government
Attorney-General's Department

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Parliamentary Joint Committee on Intelligence and Security

**Review of the Counter-Terrorism Legislation Amendment (Declared
Areas) Bill 2024**

Attorney-General's Department Submission

Introduction

1. The Attorney-General's Department (the department) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (the Committee) Review of the Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024 (the Bill).
2. The Bill, introduced into Parliament by the Attorney-General on 27 March 2024, would extend for a further three years the declared areas offence in section 119.2 of the *Criminal Code Act 1995* (Criminal Code) that is scheduled to sunset on 7 September 2024. The Bill would also provide that section 119.3 – the provision under which the Minister for Foreign Affairs can declare an area for the purpose of the offence in section 119.2 – ceases to have effect on 7 September 2027.
3. The Bill would additionally amend the *Intelligence Services Act 2001* (ISA) to remove now obsolete paragraph 29(1)(bbaa) which provides for the Committee to review the declared areas provisions (sections 119.2 and 119.3) before 7 January 2024. The Intelligence Services Legislation Amendment Bill 2023, which is currently before the Parliament, would empower the Committee to review these provisions before they sunset, ensuring that due consideration is given to the continued utility of the provisions.

Part 1: Context and development of the Bill

Context

4. While Australia's current National Terrorism Threat Level remains 'POSSIBLE', Director-General of Security, Mike Burgess has stressed that terrorism is an enduring and evolving threat. In his 2022 public address, Mr Burgess stated that ASIO's assessment to lower the threat level "assumes there are no radical shifts in these policies, processes, laws or investments". In his 2023 public address, Mr Burgess noted that lowering the threat level does not mean that the threat of terrorism is extinguished, and that counter-terrorism remains challenging and the operational demands are not diminishing. The maintenance of counter-terrorism powers is a key factor in managing the overall risk of terrorism.
5. The declared areas provisions in the Criminal Code are an important part of the Australian Government's efforts to stop the flow of foreign fighters, and mitigate the risk they pose to Australia on their return. Where an area is declared by the Minister for Foreign Affairs under section 119.3, it is an offence to enter, or remain in that area without a legitimate reason (section 119.2). A declared area is a place where terrorist organisations are engaging in hostile activity.
6. There are limited legitimate reasons for entering such an area. The offence recognises this by providing (in subsection 119.2(3)) that an individual will not contravene the declared areas offence if they have entered or remained in the declared area solely for one or more of the following purposes:
 - providing aid of a humanitarian nature
 - satisfying an obligation to appear before a court or other body exercising judicial power
 - performing an official duty for the Commonwealth, a State or a Territory

- performing an official duty for the government of a foreign country or the government of part of a foreign country (including service in the armed forces of the government of a foreign country), where that performance would not be a violation of the law of the Commonwealth, a State or a Territory
 - performing an official duty for the United Nations, or an agency of the United Nations, or the International Committee of the Red Cross
 - making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist
 - making a bona fide visit to a family member, or
 - any other purpose prescribed by the regulations (none are currently prescribed).
7. The declared areas offence was designed to fill a crucial gap in the disruption and prosecution of returning foreign terrorist fighters by reducing the ability of offenders to contribute to conflict in foreign countries. It was also designed to deter persons from travelling to conflict zones overseas where a listed terrorist organisation is engaged in a hostile activity. Where this deterrent effect is realised, it reduces access to training, tools and motivation to carry out terrorism offences in Australia, and protects Australians by preventing them from travelling to a dangerous area without a legitimate purpose.
8. Persons who return from a declared area could return with enhanced capabilities, skills, expertise and knowledge; and the ideology and motivation to facilitate acts of terrorism or related harms in Australia, thereby endangering the Australian community. Persons returning from a declared area may have developed or maintained connections with other violent extremists in different parts of the world. The enduring power of violent extremist ideologies means that some behaviours, connections or networks may only emerge in the future. The seriousness of the threat posed by these individuals will depend on their experiences, capability, ideology at the time of their return and in future, and their inclination to participate in or support violence in Australia.
9. The declared areas offence requires law enforcement to establish that the person intentionally entered or remained within the precise boundaries of the declared area; and to establish the period of time when the person was alleged to be in the declared area. Other foreign incursion offences within Division 119 require law enforcement to establish factors such as the intention behind a person's travel (s 119.1(1) offence of incursions into foreign countries with the intention of engaging in hostile activities) or the activities that a person engaged in (119.1(2) offence of engaging in a hostile activity in a foreign country). These factors can be difficult to establish given the challenges with obtaining admissible evidence from other jurisdictions or from ungoverned spaces such as active conflict zones.
10. While there have only been two declarations made (Mosul district, Ninewa province in Iraq on 2 March 2018 and Al-Raqqa province in Syria on 4 December 2014), and four Australians charged under the declared areas offence, this is not an indication of a lack of utility. The limited number of areas that have been declared, and the limited use of the offence to date are indicative of its exceptional nature and judicious use of this power and associated offence.
11. There was a significant reduction in Australians travelling to the Syria/Iraq conflict zone after the declarations were made. The provisions are likely to have contributed to discouraging people who might otherwise have considered entering Mosul and al-Raqqa while the respective declarations were in effect, and discouraging parents from taking their children into those areas.

12. Declarations have only been used in the context of the Islamic State, as this has been the only conflict since the commencement of the declared areas framework which warranted the use of the power. The framework is, however, designed in such a way that it would be capable of being used in response to future conflicts. Having this well considered and understood framework available to be utilised in response to a future crisis will greatly assist the Government's ability to rapidly respond in an appropriate and measured manner.

Development of the Bill and consultation

13. In developing the measures in the Bill, the department consulted the Australian Federal Police, the Australian Security Intelligence Organisation, the Commonwealth Director of Public Prosecutions, the Department of Home Affairs, the Department of Foreign Affairs and Trade and the Department of the Prime Minister and Cabinet.
14. There was unanimous agreement from all agencies consulted that the offence provision should be extended, and the declared areas regime is otherwise fit for purpose in light of the current and evolving threat environment. This is consistent with the advice agencies provided to the Committee in its written briefing of March 2023 on the use, proportionality and effectiveness of the declared areas provisions.

Part 2: Details of measures

15. The Bill would extend for a further three years the declared areas offence in section 119.2 of the Criminal Code that is scheduled to sunset on 7 September 2024. A three-year extension would reflect the continued appropriateness of the provision and be consistent with the previous two extensions made in 2018 and 2021 in accordance with recommendations made by the Committee. It would also allow for continued, periodic review of the appropriateness of this framework.
16. The Bill would also provide that section 119.3 – the provision under which the Minister for Foreign Affairs can declare an area for the purpose of the offence in section 119.2 – ceases to have effect on 7 September 2027. This would align the relevant declaration and offence provisions in the Criminal Code, reflecting that there is no utility in empowering the Minister to declare an area, without a mechanism for enforcing the declaration.
17. The Bill would amend the ISA to repeal paragraph 29(1)(bbaa) which provides for the Committee to review the declared areas provisions (section 119.2 and 119.3) before 7 January 2024, should it elect to do so. As the Committee did not resolve to conduct this review, and the specified time period has elapsed, this provision is now obsolete.
18. The Intelligence Services Legislation Amendment Bill 2023, currently before the Parliament, would amend the ISA to allow the Committee to review and inquire into any counter-terrorism or national security legislation prior to its sunset, removing the requirement for a bespoke mandate to be provided to the Committee to review the declared areas provisions ahead of sunset in 2027.

Part 3: Background - Previous reviews and extensions of the provisions

19. The *Counter-Terrorism Legislation (Foreign Fighters) Act 2014*, which commenced on 1 December 2014, introduced the declared areas provisions with a sunset date of 7 September 2018. The Bill was originally introduced with a ten-year sunset period, but was amended following an Advisory Report from the Committee, which recommended that the provisions should sunset two years after the next Federal election.
20. In 2017, the Independent National Security Legislation Monitor conducted a mandatory review of the provisions under the *Independent National Security Legislation Monitor Act 2010* and, amongst other things, recommended that they be extended for a further five years.
21. In 2018, the Committee conducted a mandatory review of the provisions under the ISA and recommended a three-year extension of the provisions (2018 Review recommendation 1).
22. The *Counter-Terrorism Legislation Amendment Act (No. 1) 2018*, which commenced on 25 August 2018, amended the Criminal Code to extend the operation of the declared areas offence for 3 years until 7 September 2021 and also amended the ISA to require the Committee to review the declared areas provisions ahead of their sunset date (implementing 2018 Review recommendation 1). Additionally, the Bill created an exception to the offence for individuals performing an official duty for the International Committee of the Red Cross (implementing 2018 Review recommendation 2), enabled the Minister for Foreign Affairs to revoke a declaration of an area prior to the expiry of the declaration (implementing 2018 Review recommendation 4), and enabled the Committee to review a declaration of an area at any time while it is in effect and table a report in both Houses of Parliament following its review (implementing 2018 Review recommendation 5).
23. In 2021, the Committee conducted a mandatory review of the provisions under the ISA (2021 Review). The *Counter-Terrorism Legislation Amendment (Sunsetting Review and other Measures) Act 2021*, which commenced on 3 September 2021, extended the sunset date of the declared areas provisions to 7 September 2024 (implementing 2021 Review recommendation 1) and provided that the Committee may review the provisions prior to 7 January 2024 (implementing 2021 Review recommendation 2).
24. The 2021 Review further recommended that the Committee receive a briefing from relevant government agencies on the use, proportionality and effectiveness of provisions 119.2 and 119.3 of the Criminal Code. The brief provided is at **Attachment A**.
25. The then Government did not accept recommendation 4 of the 2021 Review, which recommended that the Criminal Code be amended to allow Australian citizens to request an exemption from the Minister for Foreign Affairs to travel to a declared area for reasons not listed in section 119.2, but which are not otherwise illegitimate under Australian Law. The Government response to this recommendation was as follows:

The Government considered a similar recommendation made by the Independent national Security legislation Monitor following their 2017 review of these provisions. This recommendation was not accepted. The reasons for not accepting the 2017 recommendation remain applicable. The Government considers that a pre-authorisation scheme could not be effectively implemented and monitored, and it would be contrary to Government travel advice to issue a pre-authorisation.

Government would have limited information to assess an application, including to consider whether the intended travel was for a genuine reason. The time and resources required to obtain information to assess an application would be significant, and would divert national security and intelligence resources from other national security priorities. There would also be significant practical difficulties in monitoring and determining whether a person authorised to travel to a declared area had complied with any conditions to which their travel was subject.

It is likely that any declared area would also be recommended as 'do not travel destinations' under Australian Government travel advice. This is because declared areas are, by their nature, dangerous conflict zones, and persons who travel there do so at significant risk to their personal safety. It would be contrary to Government travel advice to implement a pre-authorisation regime that would consider whether to permit Australians to travel to such a destination.

Legislation currently provides for a range of exceptions including for bona fide visits to family members, journalism, a range of official duties and the provisions of humanitarian aid. There is provision to prescribe additional exceptions through regulations. The Government is not aware of any cases where a person has sought to travel to a declared area, for a reason otherwise legitimate under Australian law, and was unable to do so due to the current scope of the legitimate purpose exceptions.

26. In the course of developing the Bill, and following consultation with the Department of Foreign Affairs and Trade, the Department of Home Affairs, the Australian Federal Police and the Australian Security Intelligence Organisation on this recommendation, the department remains of the position that it would not be appropriate to include a provision allowing an individual to request an exemption for the reasons previously set out.
27. Both declarations made to date under the regime in 2015 and 2018 (and the re-declaration of Mosul) were reviewed and supported by the Committee.

Attachments

Attachment A: 2023 Joint Agency Written Briefing to the Committee