



**Australian Government**

**Department of Foreign Affairs and Trade**



# **PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY**

## **REVIEW OF THE COUNTER-TERRORISM LEGISLATION AMENDMENT (DECLARED AREAS) BILL 2024**

April 2024

## INTRODUCTION

1. The Department of Foreign Affairs and Trade (DFAT) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security (the Committee) Review of the *Counter-Terrorism Legislation Amendment (Declared Areas) Bill* 2024 (the Bill).
2. This Bill, which was introduced by the Attorney General in March 2024, seeks the continuation of the declared areas offence in section 119.2 of the *Criminal Code Act* 1995 (The Criminal Code), which is due to sunset on 7 September 2024. The Bill would also amend section 119.3, extending the provision under which the Minister for Foreign Affairs can declare an area under section 119.2 to 7 September 2027.
3. The Bill would also amend the *Intelligence Services Act* (ISA) 2001 by removing the obsolete paragraph 29(1)(bbaa) that empowered the Committee to review sections 119.2 and 119.3 before 7 January 2024. Instead, it is proposed that the Committee would be empowered to review sunset provisions on its own motion, through the *Intelligence Service Legislation Amendment Bill* (ISLAB) 2023.

## BILL CONTEXT

4. Despite the defeat of the self-declared caliphate of the Islamic State of Iraq and the Levant (ISIL) in 2019, the potential for Australians to travel offshore to fight for or engage with a terrorist organisation continues to be a focus for our national security agencies. The declared areas provisions in the Criminal Code are critically important to these agencies efforts to manage the risk foreign fighters pose to Australia.
5. Since 2012, around 230 Australian men and women have travelled to Syria/ Iraq to fight with or support terrorist organisations. The declared areas offence, outlined in section 119.2 of the Criminal Code, makes it a criminal offence for a person to enter, or remain in, a declared area of a foreign country. Section 119.3 empowers the Minister for Foreign Affairs, to declare an area for the purposes of section 119.2 of the Criminal Code if satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of a foreign country.
6. The declared areas offence is established if law enforcement agencies can prove that a person intentionally entered or remained within the precise boundary of the declared area; and can establish the period of time when the person was alleged to be in the declared area. Division 119 sets out other foreign incursion offences, however, these can be difficult to establish due to challenges obtaining admissible evidence, including from ungoverned spaces.
7. To date, there have only been two instances where the Minister for Foreign Affairs has made a declaration for the purposes of section 119.2. These declarations were in respect of al-Raqqa province in Syria (4 December 2014); and Mosul District, Ninewa Province in Iraq (2 March 2015). The al-Raqqa province declaration was revoked by the Minister for Foreign Affairs on 29 November 2017, the declaration for Mosul district was renewed on 2 March 2018, before it was revoked on 19 December 2019.
8. The declared areas provisions are used infrequently, and only four Australians have been charged under the declared areas offence to date. They remain an important element of Australia's counter-terrorism policy response however. Having this framework available, should it be required, allows the Government to respond to evolving circumstances in an appropriate and measured way. The limited use of the declared areas provisions is reflective of its exceptional nature and the judicious use of the powers.
9. The Minister for Foreign Affairs must revoke a declaration if no longer satisfied that a listed terrorist organisation is engaging in hostile activity in the area. A declaration can also be revoked at any time prior to the expiry of the declaration. This ensures that the limitations operate for no longer than necessary to achieve the legitimate objective of preventing Australians from travelling to conflict areas.
10. The offence does not prevent a person from travelling to a declared area, for a legitimate purpose. An individual will not have committed an offence if they enter or remain in a declared area for the purposes set out in subsection 119.2(3) of the Criminal Code. Examples of a legitimate purpose include, providing aid of a humanitarian nature, performing an official duty for the Commonwealth, a State or Territory or making a bona fide visit to a family member.
11. DFAT was one of several agencies consulted in developing the measures in the Bill. The Attorney General's Department led the consultation process which included the Australian Federal Police, the Australian Security Intelligence Organisation, the Commonwealth Director of Public Prosecutions, the Department of Home Affairs and the Department of the Prime Minister and Cabinet.

## AMENDMENTS TO THE CRIMINAL CODE AND THE ISA

12. The Bill would extend the offence in section 119.2 for three years, to 7 September 2027. A three-year extension reflects the continued appropriateness of the provisions and is consistent with the previous recommendations made by the Committee. This will be the third time the provision has been extended (2018 and 2021).
13. 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—also ceases to have effect on 7 September 2027. This will align the relevant declaration and offence provisions in the Criminal Code.
14. The Bill would additionally repeal paragraph 29(1)(bbaa) of the ISA, which provides that the Committee may, should it resolve to do so, review the operation, effectiveness, and proportionality of sections 119.2 and 119.3 of the Criminal Code prior to 7 January 2024. The Committee did not resolve to undertake such a review. As this mandate is exhausted, it is appropriate that this provision is repealed.
15. The ISLAB, 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.

## HISTORY AND TIMELINE

16. The *Counter-Terrorism Legislation (Foreign Fighters) Act 2014* commenced on 1 December 2014 and introduced the declared areas provisions with a sunset date of 7 September 2018. A ten-year sunset period was initially introduced, but this was later changed to two years based on an advisory report from the Committee.
17. In 2017, a mandatory review by the National Security Legislation Monitor recommended that the provisions be extended for a further five years. A mandatory review by the Committee in 2018 under the ISA recommended a three-year extension of the provisions (2018 Review).
18. In 2018, The *Counter-Terrorism Legislation Amendment Act (No. 1) 2018*, amended the Criminal Code to extend the operation of the declared areas offence for 3 years until 7 September 2021. The ISA was also amended to have the Committee review the declared areas provisions ahead of their sunset date.
19. 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 extended the sunset date of the declared areas provisions to 7 September 2024.

## CONCLUSION

20. The declared areas provisions remain a necessary tool to manage the threat to the Australian community that is posed by persons who have travelled to a declared area and serve as a deterrent to those who may travel. The proposed extension (three years) of the offence and declaration provisions is consistent with previous extensions (made in 2018 and 2021), and consistent with the duration recommended by the Committee in its 2021 report. Paragraph 29(1)(bbaa) of the ISA is obsolete and should be repealed. There remains strong agreement across relevant agencies that the declared areas regime is fit for purpose based on the current and evolving threat environment.