



Australian Government
Attorney-General's Department

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Use, proportionality and effectiveness of declared areas provisions

Joint-agency response

Use, proportionality and effectiveness of declared areas provisions

Introduction

In its February 2021 *Review of 'Declared Areas' Provisions*, the Parliamentary Joint Committee on Intelligence and Security (the Committee) recommended:

That, within 18 months of tabling this report, the Parliamentary Joint Committee on Intelligence and Security receive a briefing, from relevant government agencies on the use, proportionality and effectiveness of provisions 119.2 and 119.3 of the *Criminal Code Act 1995*.

The full recommendations of the Review are at **Attachment A**. This joint written brief has been prepared to implement that recommendation.

This brief was coordinated by the Attorney-General's Department, with input from the Australian Federal Police (AFP), Australian Security Intelligence Organisation, Commonwealth Director of Public Prosecutions (CDPP), Department of Foreign Affairs and Trade (DFAT), Department of Home Affairs, and the Department of the Prime Minister and Cabinet. Agencies welcome the opportunity to provide this brief to the Committee.

Agencies' position is that sections 119.2 and 119.3 (declared areas provisions) remain necessary as part of the suite of legislative measures required to respond to the ongoing threat posed by foreign terrorist fighters, and the risk that Australians will travel overseas to fight alongside terrorist organisations. The declared areas provisions continue to be appropriate and proportionate in the context of the current threat environment, and their fitness for purpose remains the subject of continual monitoring.

The declared areas provisions serve a dual purpose. They facilitate the ability of law enforcement to intervene and deter persons attempting to travel into a conflict zone where a listed terrorist organisation is engaged in hostile activities, where they may put their personal safety at risk, or where they may engage in hostile activity with a terrorist organisation. The provisions also provide a mechanism to manage the threat to the Australian community posed by persons who have travelled to a declared area and may return to Australia 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.

Current environment

Terrorism in Australia and the West

Intelligence indicates that the threat to Australia from Sunni violent extremist groups – such as the Islamic State and al-Qai'ida – has moderated. However, the violent extremist beliefs which motivate these groups persist, and their messaging continues to appeal to a small number of Australians. While a number of permissive environments in the world remain for terrorism to flourish, the potential for these groups to inspire Australians to travel and fight alongside them endures.

Ideologically motivated violent extremism – particularly nationalist and racist violent extremism – also remains a threat. However, nationalist and racist groups are more likely to focus on recruitment and radicalisation rather than attack planning. Intelligence indicates that the greatest concern comes from the potential of these groups to radicalise an individual who then undertakes an attack outside the group. This could happen with little or no warning.

While terrorist attacks in the early 2000s were well-planned, well-resourced and well-executed, the primary threat today is from lone actors and small cells on the periphery of established groups who are more likely to undertake low sophistication attacks. This means that attacks can occur with little to no warning, and the threat can be difficult to detect.

Travel to join extremist groups overseas

Persons who have fought overseas with terrorist organisations continue to pose a threat to the Australian community.

In 2014, terrorist organisation Islamic State controlled large regions of both Syria and Iraq. The Caliphate was defeated by 2019. Since 2012, around 230 Australians (or former Australians) travelled to Syria or Iraq to fight with or support groups involved in the conflict. Around 120 Australians (or former Australians) who travelled to Syria or Iraq are believed to be deceased. Around 55 people have returned to Australia after travelling to Syria or Iraq and joining groups involved in the conflict. As at 28 February 2023, around 60 Australian and former Australian adults linked to the Syria and Iraq conflict remain offshore.

Australian government agencies continue to collaborate with Australia’s domestic and international partners to combat the shared challenge of foreign terrorist fighters.

Overview of the declared areas provisions

The declared areas provisions commenced on 1 December 2014, following passage of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill*.

Section 119.3 authorises the Minister for Foreign Affairs to declare by legislative instrument an area in a foreign country if satisfied that a listed terrorist organisation is engaging in a hostile activity in that area. A declaration may cover areas in two or more foreign countries if one or more listed terrorist organisations are engaging in a hostile activity in each of those areas, but it cannot cover an entire country.

A declaration ceases to have effect on the third anniversary of the day on which it takes effect or when revoked by the Minister for Foreign Affairs. As declarations are legislative instruments, they may also be disallowed by either House of Parliament in accordance with section 42 of the *Legislation Act 2003*. The Minister must revoke a declaration if they are no longer satisfied that a listed terrorist organisation is engaging in a hostile activity in the area. The Minister may also revoke a declaration if they consider it necessary or desirable to do so.

Section 119.2 provides for the declared areas offence, which can be applied to Australian citizens and residents who enter or remain in an area in a foreign country, where that area has been declared by the Minister for Foreign Affairs on the basis of terrorist organisation activity. The offence does not prevent a person from travelling to a declared area for a specified legitimate purpose. Legitimate purposes include to provide humanitarian aid, work as a journalist, or visit a family member.

The offence carries a maximum penalty of 10 years' imprisonment.

Section 119.11 provides that proceedings for the commitment of a person for trial for an offence against Division 119 must not be instituted without the written consent of the Attorney-General.

Use of the declared areas provisions

The Minister for Foreign Affairs has declared two areas since the legislation commenced in 2014:

- Mosul district, Ninewa province in Iraq was declared on 2 March 2015 and re-declared on 2 March 2018. The declaration was revoked by the Minister for Foreign Affairs on 19 December 2019.
- Al-Raqqa province in Syria was declared on 4 December 2014. The declaration was revoked by the Minister of Foreign Affairs on 27 November 2017.

There are currently no declared areas in force.

To date, four individuals have been charged with offences under section 119.2 of the *Criminal Code Act 1995*:

- Two individuals are currently before the court, including one woman who was repatriated from Syria in late 2022. One individual is charged with a s 119.2 offence only, the other individual is also charged with other terrorism offences.
- One individual's charge was withdrawn by the CDPP due to a belief there were insufficient prospects of securing a conviction for the specific offence. This individual is before the court for other terrorism-related offences.
- One individual's prosecution, *R v Betka* [2020] NSWSC 77, was finalised with the offender receiving a term of imprisonment of 3 years and 8 months. This sentence incorporated other offences as well as the declared areas offence.

The declared areas offence has also been the subject of advice from the CDPP in numerous investigations, and may be one of several possible charges considered in any prosecutions following the return of Australians from Syria and Iraq.

Effectiveness

While there have only been two declarations made, 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.

There was a significant reduction in Australians travelling to the Syria/Iraq conflict zone after the declarations were made. Agencies consider that 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.

The AFP continues to conduct active investigations into Australian foreign terrorist fighters and will consider the appropriateness of proceeding with charges where sufficient admissible evidence exists.

Necessity

The objective of provisions enabling the Minister to declare an area, and the associated declared areas offence, is to deter Australians from travelling to areas where a listed terrorist organisation is engaged in hostile activity unless they have a legitimate purpose to do so. This both prevents Australians from putting their own safety at risk, and prevents Australians from providing support to terrorist organisations. The provisions also remain an essential part of the suite of legislative mechanisms that keep Australians safe from the threat of foreign terrorist fighters who may adhere to either religiously or ideologically motivated violent extremism.

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.

The declared areas offence s119.2 is often one of the first offences considered by the AFP when conducting foreign terrorist fighter investigations. It requires law enforcement to establish that the person intentionally entered and 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).

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.

Although there are currently no declared areas, further declarations may become operationally necessary in the current threat environment. We are unlikely to see the number of Australians who travelled to the Syria/Iraq conflict zone replicated in the foreseeable future, as not all of the characteristics that drew international recruits – including but not limited to sophisticated and extensive facilitation networks, relatively easy physical access and an effective recruitment narrative – are likely to be present in conflict zones or permissive operating environments in the near future.

Intelligence indicates that some Australian religiously motivated violent extremists continue to seek out opportunities to travel offshore to build networks and capabilities, including in emerging or enduring conflict zones. Religiously motivated violent extremist groups (such as Islamic State and their affiliates, and al-Qa'ida) maintain global networks exploiting local conflicts and continue to inspire terrorist attacks around the world.

Intelligence indicates that violent extremist groups will almost certainly continue to exploit unstable security environments in parts of the Middle East, Africa and South Asia to build capability and influence in pursuit of their regional grievance-based objectives and broader anti-Western agenda.

Security and law enforcement agencies continue to monitor global developments to assess the legal and operational grounds for any future declarations.

Proportionality and compatibility with human rights

The declared areas provisions engage, and in some cases place limitations on, a number of rights in the *International Covenant on Civil and Political Rights* (ICCPR), and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). However, these limitations are permissible as they are aimed at achieving a legitimate objective - ensuring the protection and safety of the Australian community, both in Australia, and by preventing Australians from travelling to such a dangerous area without a legitimate purpose. The provisions are rationally connected to that objective; and are reasonable, necessary and proportionate to the achievement of that objective.

The provisions engage the right to a fair trial and presumption of innocence in Article 14 of the ICCPR

Article 14 of the ICCPR provides the right to fair hearing by a competent, independent and impartial tribunal established by law and Article 14(2) provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. It imposes on the prosecution the burden of proving a criminal charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt.

Offences that contain a 'reverse burden', particularly a legal, as opposed to an evidential burden, may affect the presumption of innocence. This includes a situation where the defendant has to provide evidence in relation to an offence-specific defence. This is because a defendant's failure to discharge a legal or evidential burden may lead to their conviction.

To the extent that the declared areas provisions place a limitation on Article 14 of the ICCPR, those limitations are reasonable, necessary and proportionate to countering the risks of travelling to such a dangerous area, and the threat posed to Australia and its national security interests by foreign fighters returning to Australia from areas where the Minister for Foreign Affairs is satisfied that a listed terrorist organisation is engaging in a hostile activity.

The declared areas offence does not reverse the onus of proof as guilt is not presumed.

The exceptions to the offence require the defendant to provide evidence of that their entry into a declared area was solely for one or more legitimate purposes, which shifts the evidential burden to the defendant. This requires the defendant to adduce evidence that suggests a reasonable possibility that they have a sole legitimate purpose or purposes for entering the declared area. Once that evidence has been advanced by the defendant, the burden shifts back to the prosecution to disprove that evidence beyond reasonable doubt.

The defendant may adduce evidence to justify his or her presence in a declared area on two bases. The first is where the individual is solely there in the course of the person's service with the armed forces of the government of a foreign country or any other armed force if a declaration under subsection 119.8(1) covers the person and the circumstances of the person's service in or with the force. The second is where the defendant is in the declared area solely for one or more 'legitimate purposes'. A list of legitimate purposes is outlined in subsection 119.2(3).

Imposing an evidential burden on the defendant is in line with section 13.3(3) of the Criminal Code, which provides that a defendant who wishes to rely on an exception bears an evidential burden in relation to that matter. The reasons for the defendant's presence in the declared area are particularly within their knowledge, and the circumstances in which a person would legitimately travel to a declared area are by nature narrow. Therefore, it is appropriate and reasonable that the defendant provide evidence that their presence in the area was for a legitimate purpose.

The provisions engage the right to freedom from arbitrary detention in Article 9 of the ICCPR

Article 9 of the ICCPR provides that no-one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. The UN Human Rights Committee has stated that 'arbitrariness' includes the elements of inappropriateness, injustice and a lack of predictability. Arbitrariness can result from a law that is vague and provides for the exercise of powers in a broad range of circumstances that are not sufficiently defined. However, arrest or detention may be considered reasonable and necessary where it is required in the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime.

In relation to the declared areas offence, arrest, detention or the deprivation of liberty of a convicted person is not 'arbitrary' in the sense that the offence is established by law and its application is clear and predictable. The legislative framework and requirements necessary for a prosecution are clearly outlined.

The provisions engage the prohibition on cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and CAT

Article 7 of the ICCPR and CAT prohibits conduct which is regarded as cruel, inhuman or degrading treatment or punishment.

While the maximum penalty imposed by the offence is ten years' imprisonment, the period of imprisonment does not include a mandatory minimum sentence and the presiding judicial officer has discretion to impose a penalty that reflects the gravity of the offence, taking into account the nature of the conduct and the particular circumstances of the defendant.

If convicted, defendants will be sentenced to imprisonment in a state or territory facility and will not be treated any differently to other prisoners. As such, any penalty imposed would not constitute cruel, inhuman or degrading treatment.

The penalty implements a gradation consistent with established principles of Commonwealth criminal law policy, as documented in the *Guide to Framing Commonwealth offences, Infringement notices and Enforcement Powers*. The Guide suggests that the maximum penalty should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme.

The provisions engage the right to freedom of movement in Article 12 of the ICCPR

Article 12(1) of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. Article 12(2) provides that everyone shall also be free to leave any country, including their own. This right also extends to the right of the person to determine the country of destination. Article 12(3) provides that these rights can be permissibly limited if the limitations are provided by law and are necessary to advance a legitimate objective, including to protect national security.

The declared areas offence may limit the freedom of movement of persons who wish to travel to a declared area. This limitation is justified on the basis that it achieves the legitimate objective of deterring Australians from travelling to areas where a listed terrorist organisation is engaged in a hostile activity, unless they have a legitimate purpose to do so. People who enter, or remain in a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes may engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be used to facilitate terrorist or other acts in Australia. The radicalisation of these individuals abroad may enhance their ability to spread extremist messages to the Australian community which increases the likelihood of terrorist acts being undertaken on Australian soil. Therefore, the limitation on freedom of movement is necessary to protect Australia's national security.

Even with the existence of a legitimate objective, any restriction on the freedom of movement must still be reasonable, necessary and proportionate. Several factors indicate that the restriction achieves an appropriate balance between securing Australia's national security and preserving an individual's civil liberties.

The sole legitimate purpose defence provides an appropriate safeguard for individuals who have entered or remained in a declared area. Individuals may lead evidence highlighting that their presence in a declared area was for a legitimate purpose and the prosecution is then required to prove that the person was not in the declared area solely for a legitimate purpose. Legitimate purposes include the provision of humanitarian aid, undertaking official duty for a government or the United Nations or an agency of the United Nations, performing official duty for the International Committee of the Red Cross, making a news report of events in the area by a professional journalist and making a genuine visit to a family member. Further legitimate purposes may be prescribed by regulations should additional grounds be required.

The general defences under Division 10 of the Criminal Code (intervening conduct or event, duress and sudden or extraordinary emergency) are also available in relation to the declared areas offence. In a conflict zone where a terrorist organisation is engaged in hostilities, circumstances may arise where an individual can reasonably claim that they have acted under duress (for example, under the threat of physical harm) or in response to a sudden and extraordinary emergency (for example, the closure of safe routes of departure).

The impact of the declared areas provisions on individuals' freedom of movement is additionally limited by the requirements that a declaration must not cover an entire country, may only cover areas in two or more foreign countries if the Minister for Foreign Affairs is satisfied that one or more listed terrorist organisations is engaging in hostile activity in each of those areas, and ceases three years after it takes effect. The three-year time limitation ensures that there is regular review and re-evaluation as to whether the area continues to meet the legislative criteria for the declaration, and that the declaration therefore continues to be required to achieve the legitimate objective of keeping the Australian community safe.

Further safeguards

The provisions contain safeguards that ensure the declaration and prosecution processes are rigorous.

A declaration requires that the Minister for Foreign Affairs be 'satisfied' that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country. As such, a declaration will not be made in an arbitrary manner. The Minister must also arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed declaration.

Parliament is able to disallow a declaration if it considers this appropriate. The Committee is able to review a declaration before the end of the disallowance period and at any time a declaration is in effect. The Independent National Security Legislation Monitor (INSLM) reviews Australia's national security and counter-terrorism legislation, including the declared areas provisions.

The CDPP must be satisfied that it is in the public interest to pursue a prosecution, and the Attorney-General's consent is required prior to the institution of proceedings in respect of offences in relation to the declared area.

The regular sunseting of the declared areas provisions provides an additional point of review and means the provisions are only in place for a finite time. The provisions will next sunset at the end of 7 September 2024.

These features ensure that a declaration is only made when necessary, and is subject to appropriate scrutiny.

Conclusion

The declared areas provisions remain necessary and proportionate in the current threat environment, as terrorism remains an enduring risk and there is the potential for conflict zones to emerge overseas in future.

The provisions provide a tool to deter Australians from travelling to a declared area where a listed terrorist organisation is engaged in hostile activity, unless they have a legitimate purpose to travel to the area. This mitigates the threat posed to the Australian community by persons who could return to Australia from these areas with enhanced capabilities that could be used to facilitate terrorist activities on our shores. The provisions also protect Australians who would put their personal safety at risk by travelling to the area without a legitimate purpose. Robust limitations and safeguards in the legislation ensure that the provisions remain proportionate to the objective of keeping the Australian community safe, and compliant with Australia's human rights obligations.

Attachment A – Recommendations of Parliamentary Joint Committee on Intelligence and Security (Committee)

Review of ‘Declared Areas’ Provisions

Recommendation 1

The Committee recommends that section 119.2 and 119.3 of the Criminal Code Act 1995 be extended a further three years, with a new sunset date of 7 September 2024.

Recommendation 2

The Committee recommends that the Criminal Code Act 1995 be amended to provide that the Parliamentary Joint Committee on Intelligence and Security may review the operation, effectiveness and proportionality of the ‘declared areas’ provisions prior to the new sunset date.

Recommendation 3

The Committee recommends that, within 18 months of tabling this report, the Parliamentary Joint Committee on Intelligence and Security receive a briefing, from relevant government agencies on the use, proportionality and effectiveness of provisions 119.2 and 119.3 of the Criminal Code Act 1995.

Recommendation 4

The Committee recommends that the Criminal Code Act 1995 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 Committee recommends that the Minister for Foreign Affairs’ decision is not subject to merit review.