

Review of the operation, effectiveness and implications of sections 119.2 and 119.3 of the *Criminal Code* – the 'declared area' provisions

Questions

Attorney-General's Department

- 1. How important have the declared area provisions been to the Government's efforts to prevent, and take action against, persons travelling to foreign countries to support terrorist organisations? Are there any ways in which the provisions could be made more effective?**

The declared area provisions serve an important purpose in deterring Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so.

Evidence given by government officials at the public hearing of the Independent National Security Legislation Monitor (INSLM) on 19 May 2017 indicated that the declared area provisions have had a strong deterrent effect beyond the prosecution of a criminal offence. Government agencies agreed with the INSLM that the provisions are also designed to protect children by discouraging their parents and guardians from taking them to the declared areas. Evidence provided by the Director-General of Security of the Australian Security Intelligence Organisation (ASIO) at the hearing was to the effect that the numbers of people going to the Middle East 'dropped off quite significantly' at about the time the declared area provisions were introduced, however noting that there were other factors – for example increased border protection and security – that may have contributed.

The Government keeps legislation and capabilities under constant review to meet the needs of Australia's evolving national security challenges.

The INSLM is currently reviewing sections 119.2 and 119.3 of the *Criminal Code*, with this report expected to be tabled in Parliament shortly. The Department will consider any recommendations made by the INSLM on ways in which the provisions could be made more effective.

- 2. For the two areas declared to date under section 119.3 of the *Criminal Code* (al-Raqqa province, Syria and Mosul district, Iraq), how has the Government informed members of the public about the facts and implications of the declaration? In particular, how has the Government engaged with the Syrian and Iraqi community, and other potential travellers to the affected regions?**

Information about the declared area offence is available on the Australian National Security website: <https://www.nationalsecurity.gov.au/>. The website includes 'Frequently Asked Questions' and travel warnings for the two declared areas, in both English and Arabic. Similar information is available on the Department of Foreign Affairs and Trade's Smartraveller website: <http://smartraveller.gov.au/>.

At the time the declarations were made, the then Australian Counter-Terrorism Centre (ACTC, now Centre for Counter-Terrorism Coordination) coordinated the development of travel warning pamphlets to provide members of the public with information about the declarations. English and Arabic versions of the pamphlet were made available electronically to members of the ACTC, including Department of Immigration and Border Protection (DIBP), Customs and the Australian Federal Police.

The Department of Immigration and Border Protection distributed the pamphlets to community organisations throughout Australia. Customs provided hard copies of the pamphlets to its regional offices for use at airports and other departure points. Customs also provided electronic versions to airlines for their use.

Immediately following the announcement of the declarations, the Department of Foreign Affairs and Trade updated the Smartraveller website, updated the country travel advice and reissued it to all of those who were subscribed to the advice at the time, emailed those Australians registered as being in, or going to, Syria and Iraq with news of the announcement with relevant links, and reached out to any additional Australian businesses or other entities known to operate in Syria and Iraq.

The Government also conducted targeted engagement with interested communities, including as part of ongoing efforts to partner with communities to counter violent extremism.

In the event of any future declarations, relevant agencies would consider what communication strategies are appropriate.

- 3. Have any concerns been expressed to the Government by members of the public about the boundaries of the areas declared to date under section 119.3 of the *Criminal Code*? If so, please provide a summary of those concerns.**

Agencies are not aware of any concerns being expressed by members of the public specifically about the boundaries of the declared areas.

However Government agencies have received queries from members of the public about whether particular cities comprise the declared areas. Agencies do not maintain records on the number of enquiries received on this issue.

4. During the Committee's review of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, the Committee was assured that the Minister for Foreign Affairs, once he or she is no longer satisfied that hostilities are occurring in a particular area, would be required under the legislation to revoke a declaration. In its report, the Committee commented that the considerable restrictions on travel associated with declarations would be open to much greater criticism if declarations were to be applied too widely, or were not to keep up with current events in the areas concerned.

- a. By what process is the Minister for Foreign Affairs kept informed about the extent to which a terrorist organisation is continuing to 'engage in a hostile activity' in a declared area?

If circumstances arise which cause agencies to form a view that a declared area no longer meets the legislative test for declaration, advice from the National Threat Assessment Centre (NTAC) within ASIO, prepared in consultation with key agencies, will be provided to relevant agencies who will subsequently advise the Attorney-General and the Minister for Foreign Affairs.

- b. What consideration has been given to amending or revoking the existing declarations under section 119.3 of the *Criminal Code* in Iraq and Syria?

Australian agencies are continuously monitoring the situation in Mosul district and al-Raqqa province to assess whether the situation continues to warrant those areas continuing to be subject to declaration.

In monitoring the situation in Mosul and al-Raqqa, ASIO must prepare an assessment of whether the observed activity in those areas satisfies the key criteria for the designation of a declared area. These are:

1. There is a listed terrorist organisation in existence; and
2. That listed organisation is engaging in hostile activity in the area of a foreign country.

While the volume and extent of Islamic State activity in al-Raqqa Province, Syria and Mosul district, Ninewa Province Iraq—and the territory under the group's control—has contracted considerably, the group continues to engage in hostile activity within the declared areas.

It is noted that changing the geographic boundary for a declared area to, for example, an individual city, or along natural features such as a river, to reflect the contraction in Islamic State control of territory within current declared areas, may not meet the requirement of the area being described in sufficient detail to ensure it is readily understood by members of the public.

- c. Why has the declaration of Raqqa province not been revised following the re-taking of large portions of that province from Islamic State?

NTAC continuously monitors the situation in the al-Raqqa Province declared area—including in response to changes in Islamic State presence there.

While the volume and extent of Islamic State activity in al-Raqqa Province—and the territory under the group's control—has contracted considerably the group continues to engage in hostile activity in al-Raqqa Province.

The legislative instruments declaring an area cease to have effect three years after they take effect ensuring there is regular review as to whether the area continues to meet the legislative criteria. The al-Raqqa Province declared area will cease to have effect in December 2017.

Agencies are considering advice to Government on whether to re-declare al-Raqqa Province.

d. Why is the declaration of Mosul district, Iraq, still in force now that the Iraqi Government has regained control of Mosul and the surrounding region?

NTAC continuously monitors the situation in the Mosul district, Ninewa Province declared area—including in response to changes in Islamic State presence there and in response to the July 2017 announced liberation of Mosul city.

While Mosul city has been liberated from Islamic State control the group continues to engage in hostile activity in the Mosul district, Ninewa Province.

The Mosul district, Ninewa Province declared area will cease to have effect in March 2018.

Agencies are considering advice to Government on whether to re-declare Mosul district.

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5. How many Australians, to the extent of the Government's knowledge, have travelled to the declared areas in Iraq or Syria for solely 'legitimate purposes'? Could you outline the types of 'legitimate purposes' that are being used?

The Government is aware that, since 2012, around 220 Australians have travelled to Syria and/or Iraq to fight with or support groups involved in the conflict. Agencies are not in a position to advise how many Australians have travelled to the declared areas in Iraq or Syria for solely legitimate purposes, given the inherent difficulties in monitoring an individual's plans and actions abroad (and particularly in a conflict zone).

6. What evidence can you provide as to whether the declarations of Mosul and al-Raqqa province have had the desired effect of deterring Australians from travelling to those areas?

While it is inherently difficult to prove an individual's intentions *not* to undertake travel, the view of agencies is that the declared area provisions may have had an effect of very strongly discouraging people who might otherwise have considered going into the area to not go there, and to discourage parents and guardians from taking their children to those areas.

Evidence provided by the Director-General of Security of ASIO at the INSLM hearing was to the effect that the numbers of people going to the Middle East 'dropped off quite significantly' at about the time the declared area provisions were introduced, however noting that there were other factors – for example increased border protection and security – that may have contributed.

7. Since the two current areas have been declared, has the Government been contacted by persons seeking authorisation to enter or remain in a declared area, or seeking assurance about their ability to enter or remain in a declared area for specific 'legitimate purposes'? If so,

a. How many such contacts have there been?

The Government has been contacted by several organisations, including media outlets that contacted DFAT and Defence seeking guidance concerning the operation of the offence and the 'legitimate purposes' exception. The declared area offence has also arisen in discussion with at least one individual and one other organisation concerning planned travel to Iraq.

In addition, AGD has received queries from members of the public including correspondence seeking advice on whether it was possible to travel to Syria to visit family.

Agencies do not maintain records on the number of enquiries received on this issue.

b. Has the Government been able to give clear advice to such persons about whether their proposed activities will fall within the list of 'legitimate purposes' in subsection 119.2(3) of the *Criminal Code*?

In response to enquiries, agencies have directed those with questions to the DFAT Smartraveller website and Australian National Security website (<https://www.nationalsecurity.gov.au/WhatAustraliaisdoing/Pages/DeclaredAreaOffence.aspx>) and advised to seek independent legal advice.

c. What department is responsible for providing this advice?

DFAT, Defence and AGD have provided the advice above when approached.

- 8. Have non-Government organisations contacted the Government regarding their presence in declared areas, or sought clarity on the position of their personnel with respect to the offence in section 119.2 of the *Criminal Code*? If so, please provide details.**

At least one non-government organisation has contacted the Government seeking advice on the legal implications of operating in Iraq or Syria. In response, DFAT directed the non-government organisation to the DFAT Smartraveller website and Australian National Security website.

9. **Has the list of 'legitimate purposes' in subsection 119.2(3) of the *Criminal Code* proven to be workable in practice?**
- a. **Are you aware of any instances in which there has been confusion or a lack of clarity about whether a proposed activity falls within the list of 'legitimate purposes'? If so, please provide details.**

See the response to questions 7 and 8 above. By way of general comment, the legitimate purpose exception was the subject of significant parliamentary debate when the declared area provisions were enacted and has continued to attract academic commentary on its operation and content. The exception has been criticised including for its requirement that the defendant enter or stay in the declared area 'solely' for a listed purpose and that the list of legitimate purposes is too narrow.

Public submissions received by the INSLM in his current review included a suggestion by the Law Council of Australia (the LCA) that the list of legitimate purposes be expanded to include (i) providing legal advice to a client, (ii) making a bona fide visit to a friend, partner or business associate, and (iii) performing bona fide business, teaching or research activities.

Similarly, the Australian Human Rights Commission submitted that consideration should be given to expanding the list to include the purposes of visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs.

The Department will consider any recommendations made by the INSLM on ways in which the provisions could be made more effective.

- b. **Are there any 'legitimate purposes' that should be amended, added to, or removed from the list?**

Agencies are of the view that the operation and content of the legitimate purpose exception remains an appropriate and proportionate response to concerns of protecting the safety of all Australians and of deterring Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity.

Broadening the scope of the legitimate purpose exception would possibly lessen the deterrent effect of the offence.

- c. **Has the regulation-making power in paragraph 119.2(3)(h), which enables additional 'legitimate purposes' to be prescribed, been used to date?**

As at 13 October 2017, the regulation making power in paragraph 119.2(3)(f) of the *Criminal Code* has not been used.

10. Has the Attorney-General's consent been sought for any prosecutions for offences under section 119.2 of the Criminal Code? Have any prosecutions commenced?

As at 13 October 2017, the Attorney-General's consent has been sought on one (1) occasion for the prosecution of an offence under section 119.2 of the *Criminal Code*. No prosecutions have commenced.