

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

Questions for the Australian Federal Police

1. Could you update the Committee on the application of the declared area offence provisions to date?

a. How many AFP investigations have been connected with a possible breach of section 119.2 of the *Criminal Code* to date, and what are the statuses of those investigations?

The AFP is investigating a number of individuals who have potentially breached section 119.2 of the Criminal Code.

b. How many arrest warrants have been issued in relation to the offence under section 119.2 of the *Criminal Code*?

Five arrest warrants have been issued in relation to the offence under section 119.2 of the Criminal Code.

c. How many people have been charged and prosecuted in relation to the offence under section 119.2 of the *Criminal Code*?

To date, there have been no prosecutions for 'declared area' offences under section 119.2 of the Criminal Code.

2. Compared to the previously existing foreign incursions offences, how important is section 119.2 of the *Criminal Code* in enabling the AFP to take action against suspected foreign fighters?

The 'declared area' offence in section 119.2 of the Criminal Code forms part of a suite of legislative measures designed to deter Australians from travelling to areas where terrorist organisations are engaged in hostile activity.

The offence recognises that people who enter, or remain in, a declared area put their own personal safety at risk. This risk exists regardless of whether or not the individual intends to engage in hostile activities. There are also broader reasons to criminalise entering or remaining in a declared area, including the risk of a person being captured by Islamic State and held for ransom.

The declared area offence also plays a critical role in preventing persons from travelling to a conflict zone to engage in a hostile activity. The offence has a strong deterrent effect and provides a useful disruption tool for police.

Finally, the declared area offence plays a critical role in ensuring Australia is able to manage the terrorist threat posed by the widespread return of Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas.

3. Is the AFP confident that it will be able to meet evidentiary thresholds to obtain successful prosecutions for the offence under section 119.2 of the *Criminal Code*, should suspected foreign fighters return to Australia?

Obtaining foreign evidence is a difficult and complicated process, particularly when evidence is located in an area outside the control of any legitimate government.

In particular, where evidence or intelligence suggests a person has been located in a declared area, it can be difficult to prove:

- o The person was located within the precise boundaries of the declared area; and
- o The area was a declared area at the time the person was located there.

The AFP continues to work with the Attorney-General's Department and government partners to consider options to address challenges in obtaining foreign evidence.

As there have been no prosecutions, it has not been possible to test the evidential thresholds.

4. What process does the AFP go through in order to investigate whether a person entering or remaining in a declared area has done so for a 'legitimate purpose' or not?

A defendant bears the evidential burden as section 119.2 is an absolute liability offence. The legitimate purposes are:

- o Providing aid of a humanitarian nature;
- o Satisfying an obligation to appear before a court or other body exercising judicial power;
- o Performing an official duty for the Commonwealth, a State or a Territory;
- o 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;
- o Performing an official duty for the United Nations or an agency of the United Nations;
- o 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;
- o Making a bona fide visit to a family member;

- o Any other purpose prescribed by the regulations (there are none currently prescribed).

All available lines of enquiry will be investigated to prove/disprove any legitimate purpose; however obtaining evidence to support a declared area charge is difficult.

Partner agencies may hold intelligence on Australian foreign fighters that will support a declared area charge. Converting this information into an evidential format is not always possible due to the potential to reveal sensitive methodology and capability.

- a. **Have there been any practical difficulties in interpreting the list of 'legitimate purposes' at subsection 119.2(3) of the *Criminal Code*?**

AFP is not aware of any practical issues interpreting the legitimate purposes.

- b. **Have there been instances in which a person has been investigated for a possible breach of section 119.2 of the *Criminal Code*, but investigations have found that the person was in the declared area solely for 'legitimate purposes'?**

There have been none to date.

- 5. **Would you recommend any amendments to the declared area provisions to improve their effectiveness as a counter-terrorism tool?**

The AFP works closely with the AGD to ensure that legislation remains contemporary and fit-for-purpose and does not have any recommendations or amendments to the declared area provisions at this time.