Submission to the Joint Parliamentary Committee on Intelligence and Security on ss 119.2 and 119.3 of the *Criminal Code*— Declared Areas.

Prepared by the International Commission of Jurists (Victoria)

28 August 2020

1. The International Commission of Jurists (Victoria) ('ICJV') is a volunteer organisation of lawyers, judges and academics. It is committed to the primacy, coherence and implementation of international legal principles that advance human rights. ICJV promotes an impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law.

2. ICJV strives to:

    a. promote adherence to, and observance of, the *Universal Declaration of Human Rights* and other international treaties;
    b. promote the conclusion, ratification and implementation of conventions, covenants and protocols protecting human rights, especially in Australia, Southeast Asia and the Pacific;
    c. provide an organisation through which the legal profession and other jurists interested in human rights can protect and sustain the rule of law and promote the observance of human rights and fundamental freedoms;
    d. help, advise and encourage all who seek to achieve, by means of the rule of law, universal respect for the observance of human rights and fundamental freedoms;
    e. co-operate with similar organisations in Australia and other countries through the channels provided by ICJ Geneva and other available means; and
    f. examine new proposals that affect the administration of justice, both domestic and abroad.

I. Introduction

3. It is submitted that the 'declared areas' provisions in the *Criminal Code* (Cth) should be allowed to expire and should not be renewed.
4. It is submitted that the provisions unacceptably infringe upon fundamental human rights and are ill-suited to their purported function.
5. This submission endorses and supports the 2017 submission of the Law Council of Australia on the human rights implications of the Declared Areas provisions,[1] in particular the human rights

[1] Fiona McLeod SC, "Law Council submission to the review of the 'declared areas' provisions" Law Council of Australia (1 November 2017). ('Law Council of Australia, 2017')

analysis which is not repeated here but provides the backdrop against which these submissions are to be read.

6. The arguments in this submission are threefold:
    a. Firstly, that the practical effect of these provisions, were they to be used, would be to prevent or punish conduct that is more properly charged under foreign incursion provisions. The declared areas offences are likely to be utilised only in cases where it cannot be proved that an individual intended to support a terrorist organisation or engage in hostile activity. It is contrary to the foundations of criminal law in Australia to extend criminal liability for a terrorism-related offence in circumstances where it cannot be proved that the person had any connection with a terrorist act or a terrorist organisation, nor held any intention to engage in hostile activities.
    b. Secondly, there are insufficient safeguards to protect the interests of innocent people. The list of exemptions is not adequate to prevent significant detriment to an individual suspected of or charged with this offence.
    c. Finally, although the stated purpose of these provisions is to protect Australia from terrorist attacks by returnees and to mitigate the flow of foreign fighters to ISIS strongholds, they are counterproductive to Australian and global interests. In practice, they have interfered with Australia's commitments to child rights and the protection of trafficked persons. As a result, there is a tragic number of Australians living in inhumane conditions in Syria today. These provisions have exacerbated a humanitarian crisis, and consequently have undermined prospects of security in the region.

II. Declared area versus Foreign Incursion offences

7. The declared areas provisions are unpredictable and overly broad. They are contingent upon a general power of the Minister to declare an area, and create an offence that does not rely on proof of culpable conduct or intention to prove guilt. The arbitrariness is at least partially avoided in other offences in the Part 5 of the *Criminal Code* (Cth) that address more specifically the conduct the government seeks to prevent or punish.

8. Section 119.3 of the *Criminal Code* gives the Minister of Foreign Affairs the power to "declare an area" for the purposes of s 119.2. Section 119.2(1) makes it an offence to travel to a declared area, but for a limited range of legitimate purposes listed in s 119.2(3). This declared area offence sits

in Division 119, Foreign Incursions and Recruitment. It follows the offence of entering a foreign country for the purpose of engaging in hostile activities (s 119.1); and precedes the offence of preparing to enter a foreign country for the purpose of engaging in hostile activities (s 119.4). There are other offence provisions in Part 5.3, Div 102 of the *Criminal Code* that criminalise specific acts of engagement with a terrorist organisation, including directing, membership, recruiting, training, funding, supporting or associating with a terrorist organisation.

9. The purpose of the "declared areas" offence is to prevent the provision of support for or assistance to a terrorist organisation; and also to prevent the risk that persons in such areas may subsequently return to Australia with "enhanced capabilities" to commit "terrorist or other acts" in Australia, or disseminate extremist messages.[2] The provision is also intended to have a deterrent effect to protect people's safety by discouraging travel to that part of the world generally.[3]

10. The only criterion upon which the power to declare is based is that the Minister must be satisfied that a listed terrorist organisation is engaging in hostile activities in that area. "Hostile activities" is defined in the act to include an extremely broad range of activity.

11. It is noted that there are currently 26 listed terrorist organisations, operating in several countries around the world. However, since the commencement of this provision in 2014, only two areas have been declared: Mosul, Iraq and Raqqa, Syria. Whilst the power to declare has been used with restraint, the single statutory criterion provides little guidance as to how the Minister will exercise this power, and consequently, under what circumstances criminal liability may arise.

12. Further, the sheer breadth of the offence captures all manner of people, conduct and intentions. Mosul and Raqqa are two major urban centres in their respective countries. Figures vary, but some estimates cite 10 million people in all areas under all ISIS control at its peak;[4] and another source references 1.5 million people in Mosul under ISIS rule.[5] In gaining effective control over these

---

2 *Counter-Terrorism Legislation Amendment Act 2014*, Statement of Compatibility, Revised Explanatory Memorandum [234].

3 Ibid; Independent National Security Legislation Monitor, Dr James Renwick SC, "Sections 119.2 and 119.3 of the Criminal Code: Declared Areas", 3rd INSLM, Report no 2 (September 2017) [8.11]-[8.12]. ('INSLM 2017')

4 "Islamic State and the crisis in Iraq and Syria in maps" (British Broadcasting Corporation, 28 March 2018) https://www.bbc.com/news/world-middle-east-27838034

5 R Lafta, V Cetorelli and G Burnham, "Living in Mosul during the time of ISIS and the military liberation: results from a 40-cluster household survey" (12: 31) *Conflict and Health* (2018): https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6069716/ ('Lafta et al, 2018')

areas in 2014-15, ISIS co-opted public infrastructure, bureaucracies and public servants of the previous government, and adapted them to serve the political objectives of the movement.[6] "Morality police", *hisba* or *khansaa*, paroled the streets and inflicted severe and violent sanctions on individuals who did not show a commitment to their stringent moral code. Whilst ISIS may have enjoyed a degree of support, those who failed to obey the strictures of the Islamic State were severely punished.

13. Many people who lived in these areas lived in fear of the Islamic State. There are reports that many people who travelled to these areas with an intention to support ISIS defected upon witnessing the manner in which ISIS governed. Further, leaving was not generally possible for those who wished to defect or flee– there are accounts of individuals being caught after leaving or feeling too afraid of the consequences to try. Therefore, it cannot be assumed that everyone in those areas was loyal to Islamic State or adhered to violent ideology. This is the case even for those who worked in administration or police under the regime who may well have been coerced or co-opted into doing so.[7] And this is almost certainly the case for the women and children who were coerced or deceived into entering Islamic State controlled territory by their family members or other associates.

14. An offence constituted merely of being in an area upon a determination made by the Executive government criminalises an individual for the mere possibility that they could have been exposed to negative influences whilst in these populous urban centres—a possibility that need not be proven but would prejudice an accused in any trial.

15. Its breadth suggests that this offence is intended to be used as a 'catch-all' charge in cases where the prosecution lacks evidence of malicious intent or conduct.[8] Whilst it may be the intention of security agencies to only charge in cases where it is suspected that a person had ties to ISIS, leaving

---

6 See eg, Anne Speckhard and Ahmet S Yayla, "Eyewitness Accounts from Recent Defectors from Islamic State: Why They Joined, What They Saw, Why They Quit" 9(6) *Perspectives on Terrorism* (2015) 95, 99. ('Speckhard 2015'); Rukmini Callimachi, "The ISIS Files" (Online, *New York Times*, 4 April 2014) https://www.nytimes.com/interactive/2018/04/04/world/middleeast/isis-documents-mosul-iraq.html. ('The ISIS Files')

7 See generally: Speckhard 2015, above n 6; The ISIS Files, above n 6; Anne Speckhard and Molly D Ellenberg, "ISIS in their own words: Recruitment History, Motivations for Joining, Experiences in ISIS, and Disillusionment over Time – Analysis of 220 In-Depth Interviews of ISIS Returnees, defectors and Prisoners" 13(1) *Journal of Strategic Security* (2020), 82. ('Speckhard 2020').

8 This conclusion is supported by the 2017 INSLM review of the declared areas provisions, citing submissions from the AFP and ASPI to the effect that the broad provision is designed to overcome evidential difficulties associated with prosecuting these kinds of extraterritorial terrorism offences: INSLM 2017, above n 3, [8.10].

such a decision not to legislators or jury, but to an exercise of non-reviewable prosecutorial discretion undermines the right to due process and certainty of the law.

More suitable offences—

16. It is submitted that the foreign incursions offence in ss 119.1 and 119.4, and the membership or support provisions in Part 5.3 Div 3 address the same intended mischief and serve the same preventive function as the declared area offence, but in a more targeted manner. These other offences include the additional safeguard of requiring the prosecution to prove an intention to engage in or support hostile activity—thereby requiring some evidence that the charged act or intention may in fact refer to morally culpable conduct. The terrorism offences in Part 5.3 also have very broad application and a preventive function as well, capturing membership in a terrorist organisation, or the provision or support for a terrorist organisation.

17. These other preventive offences have been interpreted broadly by the courts. The case of *Cerantonio* and five co-accused produced Court of Appeal authority in Victoria as to the particularisation of s 119.4, [9] allowing a charge to proceed on the basis of conspiring to provide support to another person, in circumstances where the other person intended to enter a foreign country for the purposes of providing support or encouragement to unknown people, in an unknown fashion, but in support of a particular political outcome.

18. The case of *Abdirahman-Khalif*[10] in South Australia is currently before the High Court. In that case a young woman was convicted at trial of membership of ISIS for downloading and possessing ISIS material and contemplating travelling overseas to provide support. Whilst it was overturned on appeal, the proper construction of 'membership' awaits determination by the High Court. Whilst the High Court decision is pending, Ms Abdulrahman is now subject to control orders.

19. These cases show that the current framework for preventing and prosecuting terrorism offences is already very broad. The declared areas offences widen the field to such an extent that it usurps fundamental principles of legality and places unwarranted criminal liability in circumstances where no tangible wrong is in evidence.

---

9 *Dacre & Ors v R* [2019] VSCA 150 (7 June 2018).

10 [2019] SASCFC 133. High Court proceedings: Case A5/2020.

III. Statutory exemptions—an insufficient safeguard

20. Whilst the 'declared areas' offence contains legislated exemptions under s 119.2(3), these are inadequate safeguards. The limited reasons listed in the subsection that do not cover all possible legitimate or innocuous purposes.[11] For example, it does not create an exemption for children born in that area or trafficked persons, particularly women and girls.

21. The limited exemptions and statutory defences provide for a reverse burden of proof, requiring an accused to prove their innocence in circumstances where the state holds any limited ability to investigate. In effect, being charged with this offence, even in cases where an exemption may be available, can and would have catastrophic consequences for an individual and their family. They would still be subject to exceptional powers and restrictions which are enlivened for the purposes of investigating terrorism-related offending.

Pre-charge—

22. Where someone is reasonably suspected of having information or material relevant to a terrorism offence, special powers for search, questioning and detention apply. There are powers under a great range of legislation, including but not limited to:
    a. Part 1AA, Div 3A of the *Crimes Act 1914* (Cth)—exceptional stop and search powers; seizure of property; warrantless (delayed notification) searches;
    b. Part IC, Div 2, Sub-div B—an allowance that a person may be questioned for up to 20 hours and detained in police custody for that purpose, for up to 7 days;
    c. Part 3, Div 3 of the *ASIO Act 1979* (Cth)—special questioning and detention warrants issued by the office of the Attorney-General, that include provisions whereby an individual may be prevented from contacting their lawyer.
    d. *Terrorism (Community Protection) Act 2003* (Vic)—covert search warrants, preventive police detention for up to 4 days for questioning.

23. In addition to this, regular investigative powers of the AFP and ASIO apply. It has been reported by families of those who have travelled to Iraq or Syria, that their homes were subject to searches conducted by large numbers of armed police.[12] Even if the purpose of the searches was to collect

---

11 See also Law Council of Australia 2017, above n 1 for discussion of other possible exemptions that could be included.

12 Reported to the author of this submission in private consultation.

evidence that might be used to prosecute those abroad upon their return, this involves a highly invasive approach not just against perceived suspects, but their families.

Pre-trial—

24. Under s 15AA *Crimes Act 1914* (Cth), a person charged with a terrorism offence does not have a right to bail, but must demonstrate exceptional circumstances. The practical consequence is that a bail application will require time to prepare, if it is made at all. Due to the high threshold for bail and the stigma associated with the charge, an individual is not likely to be granted bail.

25. Foreign incursions and other terrorism offences are difficult and time-consuming to prosecute. A range of evidential problems are likely to arise that must be litigated. In circumstances where the person charges It could be years before a charge for a declared areas allegation goes to court. If the person is not granted bail, it may be years that they will be kept on remand. Although there have not yet been any prosecutions for a 'declared areas' offence, other foreign incursions allegations forewarn of the problems that are likely to be faced.

26. The exceptions under s 119.2(3) are little consolation for someone who may have a need for state protection and / or have a substantive defence available to them, but await state assessment of their status or prove a defence to a jury on the balance of probabilities in order to properly try the issues which arise. Even if they ultimately raise a successful defence, they may have already spent years on remand. The situation is worsened by the fact that an accused person will have considerable difficulty in preparing their defence whilst in custody and where subjected to sensitive disclosure processes. They will face considerable evidential difficulties with significantly fewer resources available to them.

27. The combination of the low threshold for prosecution, the high threshold for defence and the limited prospects of bail undermine the suggested "safeguard" of s 119.2(3).

Sentence and Post-sentence—

28. In the 2017 report, the INSLM noted that the sentencing discretion of a judge is sufficient to properly address the broad range of conduct, and thus culpability, that the offence captures.[13]

[13] INSLM 2017, above n 3, [8.36]-[8.43].

The INSLM refers to the case of *R v Vinayagamoorthy*[14] where three individuals were convicted under the *United Nations Act* for providing funds collected from the Tamil community in Australia to the Tamil Tigers for the provision of medical and food aid in war-torn Sri Lanka, in circumstances where the Tamil Tigers were a proscribed organisation. They were spared a jail sentence and released on a recognizance release order, with an undertaking to be of good behaviour for 4 years. This is instructive but not sufficient.

29. Firstly, the availability of a recognisance release order does not mitigate against any time spent in custody. More concerning still is the availability of control orders. In the same 2014 amendments to the *Criminal Code* (Cth) that created the declared areas offence, the grounds upon which a control order may be made were expanded to include conviction of an offence 'related to' terrorism. An offence in the terrorism Part of the *Criminal Code* would be sufficient to satisfy this criterion. Although it must then be proven that the controls are reasonably necessary and reasonably appropriate and adapted, this test is vague. In practice, contesting a control order is very costly and time-consuming, and adequate legal aid funding is not available.

30. Finally, extra-curial consequences of a terrorism related investigation cause further human rights violations through discriminatory financial and documentary hardships. This might, for example, include cancellation of bank accounts and the impossibility of opening a new one; possible passport cancellation; social stigma that may hinder access to employment, religious practice and education.

IV. The impact of the declared areas provisions to date

31. The purpose of the 'declared areas' provisions is suggested to be preventive. It is meant to discourage people from travelling to certain parts of the world and to prevent people from committing terrorist attacks or spreading extremist ideology upon their return. However, it has a punitive element which rests on an assumption, not proof, that those who do travel to prohibited or declared areas do so with malicious intent, and are likely to carry that malice back to Australia upon their return. That assumption is unfounded, counterproductive and potentially arbitrary.

[14] [2010] VSC 148. INSLM 2017, above n 3, [8.40].

32. With respect to the deterrent rationale of the provision, it is unlikely that the 'declared areas' offence would itself prevent individuals who are committed to certain ideological goals from venturing abroad or trafficking in persons. Whilst it might disincentivise the merely curious, there is no reason to think that the range of other provisions in the *Criminal Code* directed towards foreign incursions and supporting or joining a terrorist organisation would not be sufficiently discouraging.

33. Further, it is an unsound assumption that anyone travelling to a declared area is likely to become increasingly radicalised and would pose a threat to the security of Australia upon their return. Studies on returned foreign fighters support the opposite conclusions: firstly research suggest that most domestic terrorist offences are committed by people who chose to remain in place, not by those who returned from ISIS controlled territory.[15] Second, it is commonly the case that exposure to ISIS has a deradicalizing effect. Many who have been motivated to join the Caliphate for ideological or religious reasons defect once they witness the manner in which ISIS actually governed.[16] In some cases, such "defectors" have become valuable voices in deradicalization and disengagement counternarratives.[17]

34. It is also important to note that not all Australians or other foreigners who travel to Syria and Iraq are "foreign fighters"—insofar as they do not travel with an intention to engage in or commit terrorist acts,[18] nor do they engage in violence they once they have arrived. This is especially the case for women and children.

35. It is reported that in some cases, Australian women were brought to Iraq and Syria at the behest of their husbands or other male family members, unaware they would be travelling to Syria, and unaware of the circumstances they would find themselves in once they arrived.[19] And yet they feared prosecution and imprisonment upon return. The danger is that women and children are doubly victimised by perpetrators and these state powers.

---

15 Lorne L Dawson, *The Demise of the Islamic State and the Fat eof Its Western Foreign Fighters: Six Things to Consider (*International Centre for Counter Terrorism, 21 Feb 2018) , 3. See also, Mark Sexton, "What's in a Name: proposing new typologies for foreign fighters" 162(5) *The RUSI Journal* (2017), 34. ('Sexton 2015')

16 Ibid; Richard Barrett, *Beyond the Caliphate: Foreign Fighters and the Threat of Returnees* (The Soufan Centre, 2017), 18-20. ('Barrett 2017'); Speckhard 2015, above n 6; Speckhard 2020, above n 7.

17 See eg, International Centre for the Study of Violent Extremism, "Breaking the ISIS Brand—videos" online at https://www.icsve.org/project/breaking-the-isis-brand/.

18 UN Security Council Resolution 2178, UN Doc S/RES/2178 (24 September 2014), definition of foreign fighter. See also, Sexton 2015, above n 15, 35.

19 "Married to Islamic State," (Four Corners, Australian Broadcasting Corporation, 30 September 2019) https://www.abc.net.au/4corners/married-to-islamic-state/11560850 .

36. Whilst there are women who gravitated towards ISIS for ideological reasons and took up operational positions, there is evidence that many women living amongst ISIS were forced into marriages, sometimes repeatedly, and were victims of rape and sexual assault.[20] Many women had the role of caring for their husbands and have children,[21] not engaging in terrorist operations. As such, they were not 'foreign fighters", and some may well be victims of human trafficking as per the U.N. definition.[22] Even if there is evidence that they did engage, they are entitled to the protection of legality through domestic prosecution pursuant to extra territorial jurisdiction, which allows for due process in which decisions as to engagement can be properly tried in a judicial, not an executive process.

37. In such cases, the "deterrent" effect of the declared area provisions is counter-productive: instead of preventing people from travelling to those areas, it prevents persons worthy of Australian state protection, who do not subscribe to ISIS rhetoric, from returning home. This in itself is an egregious consequence of the provision, which contributes to the humanitarian catastrophe that currently exists at Al-Hawl refugee camp.

38. Preventing Australian citizens from returning to Australia is also counter-productive to this country's commitments under international law to mitigate the rise of violent extremism in the region—the very commitments that justify the foreign incursions offences in the first place. Australian children currently living in Al-Hawl refugee camp in North Eastern Syria are growing up knowing nothing other than war and hardship and are living without the protection of their home state. Researchers are already warning of a resurgence of Islamic extremism as a direct result of conditions in these camps.[23] Instead of facilitating the return of these children and young and

---

20 See eg, *ISIS's Persecution of Women* (Counter Extremism Project, July 2017): https://www.counterextremism.com/sites/default/files/ISIS%20Persecution%20of%20Women_071117.pdf .

21 Speckhard 2020, above n 7, 108, showing that 97.5% of women interviewed reported their role to be wife/mother.

22 Art 3(a), *Protocol to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children*.

23 Shoresh Khani, "Al Hawl Camp and the Potential Resurgence of ISIS" (Online: Washington Institute, 29 June 2020) https://www.washingtoninstitute.org/fikraforum/view/Al-Hawl-Camp-ISIS-Resurgence-Extremism-Syria-Iraq; Himbervan Kose, "Al-Hawl Camp: A Potential Incubator for the Next Generation of Extremism" (Online: Washington Institute, 13 September 2019) https://www.washingtoninstitute.org/fikraforum/view/al-hawl-camp-a-potential-incubator-of-the-next-generation-of-extremism; Hassan Mneimneh "Response to 'Al-Hawl Camp: A Potential Incubator for the Next Generation of Extremism" (Online: Washington Institute, 10 October 2019) https://www.washingtoninstitute.org/fikraforum/view/response-to-al-hawl-camp-a-potential-incubator-of-the-next-generation-of-ex.

vulnerable adults to Australia where they can access proper mental health support and de-radicaisation services, where needed, they remain exposed and vulnerable to negative influences.

39. Whilst it cannot be argued that the 'declared areas' offence caused the humanitarian crisis at Al-Hawl refugee camp, it is a significant contributing factor. The situation may have been avoided had those provisions not been on foot. Rather than measures that threaten incarceration and further stigmatisation, mitigation of the crisis in Syria requires protection of Australians through repatriation and justice processes, which allow for differentiation between perpetrator, victim and trafficked persons.

V. Conclusion

40. In conclusion, it is submitted that the declared areas provisions do not serve any useful or legitimate purpose. The proposal to extend is effective only to investigate and / or prosecute a wide range of people in situations where it cannot be proven that they engaged in, nor were complicit in nor did they intend any actual wrongdoing and in circumstances where many are more worthy of protection. Fundamentally, the 'declared areas' offence provision risks capturing a broad range of non-criminal conduct. The statutory exceptions are inadequate to mitigate against the prejudice that such a charge would inflict upon a person so accused, even in cases where a defence would be available. Worse still, the provisions have already had harmful consequences for women and children who have not engaged in combat, who were trafficked into entering Syria and caused to be fearful of Australian law enforcement upon return. Not only has Australia failed in its duty to protect its citizens, but on account of these provisions, it has kept them in harm's way. The provisions should to be left to expire.

Felicity Gerry QC

Isabelle Skaburskis

International Commission of Jurists (Victoria)