



Australian
Human Rights
Commission

Review of the 'declared areas' provisions

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUPPLEMENTARY SUBMISSION TO THE PARLIAMENTARY
JOINT COMMITTEE ON INTELLIGENCE AND SECURITY**

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1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this supplementary submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its review of the ‘declared areas’ provisions contained in Division 119 of the *Criminal Code* (Cth).
2. The purpose of this submission is to address several matters arising from the relevant report of the Independent National Security Legislation Monitor (INSLM) dated 7 September 2017 and released to the public on 16 October 2017.¹
3. The Commission has previously provided the PJCIS with a copy of its submission made to the INSLM in relation to the reviews resulting in his recent reports (the Commission’s INSLM Submission).² That submission contains a discussion of the provisions under review, the human rights they engage, and the appropriate test to apply in determining whether the limits these provisions impose on human rights are justified. The Commission relies on its INSLM Submission and does not reproduce its content in full here. Rather, this submission focusses on the question whether, in light of the INSLM’s recent reports, the identified limitations on human rights have been demonstrated to be justified.
4. In the Commission’s view, the present INSLM report serves two core functions. The first is to provide a synthesis of evidentiary material relevant to the specific counter-terrorism and national security issues that are currently at issue. This is the most valuable function of the INSLM reports because the INSLM’s role is unique in a critical sense. That is, the INSLM is privy to classified and security-sensitive information that other bodies—including legislators; other oversight bodies; the Commission itself and civil society organisations—are not. As such, the INSLM reports present a vital component of the evidentiary basis that these other bodies rely on to draw conclusions about Australia’s counter-terrorism and national security framework.
5. The second function of these reports is to communicate the INSLM’s own assessment of the evidentiary basis vis-à-vis the relevant provisions of the *Crimes Act 1914* (Cth) (Crimes Act) and Criminal Code. That assessment is made with reference to the matters set out in s 6(1) of the *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act), which inter alia directs the INSLM to conduct what amounts to an orthodox analysis of the relevant legislation as against international human rights law.
6. In fulfilling this second function, the INSLM performs an important, but not unique, role. The INSLM’s views in respect of this second function carry significant weight, but in the Commission’s view that weight should be no greater than the views of other expert bodies that have assessed the security-sensitive or classified information that the INSLM has summarised in respect of the first function referred to above.
7. With this context, the Commission notes that the present INSLM has provided an important summary of the relevant evidentiary basis and has found that all of the provisions under review are:

- consistent with a range of international obligations and contain appropriate safeguards for protecting the rights of individuals;
 - proportionate to the current threats of terrorism and to national security; and
 - necessary.
8. In this submission, the Commission has analysed the evidentiary base set out in the INSLM's reports as well as the INSLM's application of the relevant human rights-related criteria to the legislative provisions under review. The Commission respectfully concludes that, collectively, these are insufficient to establish that the limitations on human rights that result from these provisions are necessary and proportionate. Consequently, the Commission repeats, with some minor changes, the substance of the recommendations it made in its INSLM Submission.

2 Recommendations

Recommendation 1

In the event that the PJCIS is not satisfied that the declared areas provisions are necessary and proportionate to achieving a legitimate end, it should recommend that they should be repealed.

Recommendation 2

In the event that the PJCIS is satisfied that the declared areas provisions are necessary and proportionate and should not be repealed, s 119.3 of the Criminal Code should be amended so that the Foreign Affairs Minister may declare an area only if she is satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area.

Recommendation 3

In the event that the PJCIS is satisfied that the declared areas provisions are necessary and proportionate and should not be repealed, the exception contained in s 119.2(3) of the Criminal Code should be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.

Recommendation 4

In the event that recommendation 3 is not accepted:

- a. Detailed consideration be given to expanding the list of legitimate reasons for travel to declared areas in s 119.2(3) of the Criminal Code to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. The list should be made as comprehensive as possible; and

- b. Section 119.2 of the Criminal Code be amended so that it is a defence to a charge of entering or remaining in a declared area if a person establishes they were in a country for a purpose other than engaging in a hostile activity.

3 Permissible limitations on human rights

9. A more detailed discussion of the principles that are to be applied in assessing whether legislative measures that limit human rights may be justified is contained in the Commission's INSLM Submission. In summary, it is permissible for a measure to limit human rights where the measure is expressed in clear and unambiguous terms, is directed towards a legitimate aim, is necessary to achieve that aim, and is proportionate. A measure which limits a human right may not 'jeopardise the essence of the right concerned'. Limitations on human rights must not be arbitrary.
10. There is some overlap between a number of these criteria.³ In particular, the concept of 'arbitrariness' in human rights law includes notions of 'inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality'.⁴
11. Any assessment as to the necessity of a limitation is to be made on objective considerations. The burden of justifying a limitation of a human right lies with the State.⁵
12. The Commission provides the following further comments about some aspects of the proportionality analysis that are relevant to matters discussed in the recent INSLM reports.

3.1 Legitimate aims

13. Human rights may be limited where that is necessary and proportionate to achieving a legitimate aim.
14. It is not in dispute that protecting the human rights of citizens endangered by acts of terrorism is a legitimate aim.
 - (a) *'National security'*
15. A number of the human rights protected in the *International Covenant on Civil and Political Rights* (ICCPR)—for example, the right to freedom of movement enshrined in article 12—contain a list of the legitimate aims that may justify their limitation.⁶ One example is that rights may be limited to protect national security. Limitations for this purpose must meet the criteria above, including those of necessity and proportionality.
16. The term 'national security', as used in the ICCPR, relates to matters which threaten the existence of the State, its territorial integrity or political independence.⁷ This is a high threshold and not every law criminalising conduct can properly be described as protecting national security simply because the conduct prohibited is designated a 'terrorist' act in the relevant

statute. (Such measures may, of course, be justified in the same way as other criminal laws, if they are necessary and proportionate to some other legitimate aim such as protecting the rights of others or protecting public safety.)

3.2 Necessity

17. A measure which restricts human rights cannot be justified unless it is necessary. For the purposes of human rights law, a measure will not be necessary unless it responds to a pressing public or social need. Nor can it be regarded as necessary for the achievement of a specified purpose if the purpose could be achieved through alternative, less restrictive means. Similarly, a restrictive measure cannot be said to be necessary if it essentially duplicates existing measures. Claimed justifications for measures, such as that they 'provide an additional tool in the toolbox',⁸ are not on their own sufficient to satisfy this criterion. They must be closely scrutinised to determine whether they go beyond being potentially useful, to reach the threshold of necessity.
18. There is a real risk that human rights will be limited to a greater degree than is necessary through what some refer to as 'legislative creep', whereby intrusive powers become normalised, each set of extraordinary powers is used as a precedent to justify subsequent powers, and rather than new, more targeted, powers leading to the repeal of existing powers, the number of counter-terrorism powers is continually multiplied. The proportionality of limits on human rights effected by counter-terrorism powers must be considered not just with respect to each counter-terrorism power, but in the context of the totality of counter-terrorism powers.
19. The newly-appointed Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism recently explained:

Limitations on rights are not open-ended and not absolute; they must always be legitimate, proportionate and necessary and must never impair the essence of the right.

....

Temporary arrangements have a peculiar tendency to become entrenched over time and thus normalised and made routine.

....

There is a grave danger that where national security powers are piled up, essentially in a constant state of ratcheting powers upwards, government will take as its starting point the experience of extraordinary powers and authority granted and exercised during previous emergencies rather than judging the needs of new challenges in light of a sober assessment of the capacity of ordinary legal process to cope. Much like the need to gradually increase the dosage of a heavily used medication in order to experience the same level of relief, so too with respect to national security powers: the perception may be that new, more radical powers are needed every time to fight impending crises. In turn, new extraordinary counter-terrorism measures confer an added

degree of ex post legitimacy and respectability, as well as a sense of normality, to previously used, less drastic emergency measures. What were deemed exceptional emergency actions in the past may now come to be regarded as normal, routine, and ordinary, in light of more recent and more dramatic counter-terrorism powers.⁹

3.3 Proportionality

20. Assessing whether limitations on human rights are proportionate to the pursuit of a legitimate objective requires an assessment to be made of both the nature and extent of any limitation on human rights, the urgency of the objective, and the degree to which the rights-limiting measure is likely to achieve that objective.
21. It follows that two key issues in determining whether counter-terrorism and national security measures are consistent with human rights are the nature and extent of the risk to the community and the nation posed by terrorism, and the likely effectiveness of the measures in reducing that risk. An informed assessment of those issues will necessarily depend to some degree on consideration of classified security material. The INSLM is therefore uniquely placed to provide an evidentiary basis that the PJCIS, and others, can consider in assessing the proportionality of the relevant provisions. In this submission, the Commission draws on the discussion of these matters contained in the recent INSLM reports.
22. It is important to note that an examination of the nature and extent of risks relating to terrorism and the potential effectiveness of counter-terrorist legislation is not the end of the relevant inquiry. It is also necessary to consider the nature and extent of the impact the measures will have on human rights.

4 The functions and findings of the INSLM

23. The INSLM has recommended that all of the provisions under review be retained for a further period of five years, subject to certain further recommendations.
24. These recommendations are informed by the INSLM's findings that all of the provisions are:
 - a. consistent with Australia's human rights, counter-terrorism and international security obligations, and contain appropriate safeguards for protecting the rights of individuals
 - b. proportionate to the current threats of terrorism and to national security
 - c. necessary.¹⁰
25. These findings mirror the wording of the INSLM's functions under s 6(1)(b) of the INSLM Act, as informed by s 8 of that Act.

26. These findings address some of the key factors relevant to assessing whether the counter-terrorism measures under review impermissibly burden human rights. However, the Commission considers that the evidence summarised by the present INSLM is insufficient to establish that the resultant limitations on human rights are necessary and proportionate. In the event that there may be further evidence supporting the INSLM's conclusions, the Commission submits that the PJCIS should scrutinise it closely to consider whether the laws are necessary and proportionate, applying the human rights analysis in the Commission's INSLM submission and the present submission.
27. The Commission submits it is not always clear how the INSLM has reached his conclusions that restrictions on the human rights he identifies are proportionate to the need to protect the community from terrorism. Further, there are reasons to think that the assessment of necessity and proportionality undertaken by the present INSLM in exercising his functions differs to some extent from the required approach under human rights law. For example:
- a. The onus is on the State to demonstrate that limitations on human rights are justified. Persuasive and objective reasons are needed to justify such limitations. It is therefore not enough for the government to 'make the case' for interference with rights. In the Commission's view, the INSLM's reports do not appear to establish that the government has adduced sufficiently persuasive and objective reasons.
 - b. The INSLM's apparent focus on whether various provisions are susceptible to arbitrary application is a relevant consideration.¹¹ However, it is also necessary to consider whether the measures themselves constitute an arbitrary or disproportionate means to achieve their objective.
 - c. It is not clear that in assessing the 'necessity' of the provisions, the INSLM has considered whether each of the provisions is the least intrusive method available to satisfactorily address a relevant aspect of the risk posed by terrorism.
28. In conclusion, the Commission considers that the discussion of the current security situation contained in the recent INSLM reports, and the discussion of the justifications for the provisions contained in them, are, without more, insufficient to support a finding that all of the provisions under review are necessary and proportionate responses to terrorist threats by reference to the human rights law considerations adverted to in s 6(1) of the INSLM Act.

4.1 Assessment of security landscape

29. The current INSLM states that he is entitled to form his own opinion on the counter-terrorism and national security landscape.¹² The Commission supports this. It is vital to the independence of the INSLM, and indeed of the PJCIS, that each must form their own view of the matters within their jurisdiction – informed, but not restricted, by the assessments made by Australia's intelligence agencies and others.

4.2 The current security landscape

30. The present INSLM has summarised the current security landscape as follows:
- a. the credible threat of one or more terrorist attacks will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future
 - b. while more complex or extensive attacks cannot be ruled out and must be prepared for, attacks by lone actors using simple but deadly weapons, with little if any warning, are more likely
 - c. there can be no guarantee that the authorities will detect and prevent all attacks.¹³
31. The principal change to the threat posed by terrorism that is identified in the recent INSLM reports is that there is an increased risk of terrorist acts by lone actors, using simple but deadly weapons, with little if any warning. If the retention of counter-terrorism powers is to be justified by this change, it must be demonstrated that the powers are necessary and proportionate to addressing the identified increased risk.
32. The present INSLM observes that there can be no guarantee that all terrorist attacks will be detected and prevented.¹⁴ This is cited by the INSLM as a factor supporting the retention of, at least, the control order regime.¹⁵ However, this fact is, of itself, neutral as to the necessity and proportionality of counter-terrorism measures, considered either separately or as a whole. The corollary of this observation is that, while it is important to ensure that intelligence and law enforcement agencies have appropriate powers to prevent and respond to acts of terrorism, it is not possible to entirely eliminate the risk that these attacks may occur, no matter what laws may be enacted. Further, the fact that current powers may not have prevented certain attacks is not, of itself, a justification for more extensive powers. The likely effectiveness of each power, and its intrusiveness on the rights of individuals, must be assessed on its own merits.

5 Declared areas

33. As the present INSLM observes,¹⁶ UN Security Council Resolution 2178¹⁷ states that all States must establish criminal offences to penalise nationals who travel internationally to engage in terrorist acts, including partaking in planning, preparation and training related to such acts.
34. When the provisions were first introduced, the relevant Explanatory Memorandum stated that the provisions were intended to
- equip law enforcement and prosecutorial agencies with the tools to arrest, charge and prosecute those Australians who have committed serious offences, including associating with, fighting, or providing other support for terrorist organisations overseas.¹⁸

35. It is uncontroversial that deterring Australians from travelling abroad to engage in terrorism is a legitimate objective. As the INSLM also observes, the declared areas provisions cannot readily be characterised as implementing Resolution 2178.¹⁹ Neither engaging in terrorist activity nor intent to engage in terrorist activity is an element of the offence created by s 119.2 of the Criminal Code.
36. In assessing whether the limits the declared areas provisions place on human rights can be justified, it is first necessary to identify whether they are directed to a legitimate objective, and then to ask whether they are necessary and proportionate to achieving that objective.
37. The Commission has previously expressed its concern that the declared areas provisions criminalise conduct that is not related to terrorism, and are therefore not necessary and proportionate to combating their stated goal.²⁰
38. The INSLM report identifies a number of other purposes the legislation is said to serve. The Commission submits that it is not clear that the material discussed by the INSLM supports the conclusion that the declared areas provisions, and their concomitant restriction of human rights, are necessary and proportionate to achieving any legitimate objective. The Commission makes the following observations about a number of objectives identified by the INSLM that the provisions are said to serve.

5.1 *Protecting children at risk of being taken to declared areas by their parents*

39. While the protection of the best interests of the child is clearly a legitimate objective, the INSLM report does not refer to evidence in support of the claim that the declared areas provisions are likely to be effective in achieving this goal. It is not self-evident that a parent willing to take their child to an extremely dangerous area will be deterred from doing so by s 119.2. That is particularly so in cases where the parent is motivated by an extremist ideology.
40. Further, the INSLM has not referred to evidence that supports the view that this objective could not be achieved in less restrictive ways. Even if a criminal provision were warranted, a specific provision prohibiting taking children to particularly dangerous areas would appear to be less restrictive and better adapted to achieving its objective.
41. In response to a question taken on notice in the course of the present INSLM's review of the declared areas provision, the Human Rights Commissioner, Edward Santow, stated:

The Commission recognises the importance and validity of the objective of child protection. The preamble to the *Convention on the Rights of the Child* (CRC) states that in light of their physical and mental immaturity, children have special need of safeguards, care and protection. Further, article 3 of the CRC provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The policy objective of child protection clearly would be a legitimate aim of government and an important consideration in the human rights analysis of this counter-terror measure. As a general observation, declared areas have been assessed by the Australian Government to be highly dangerous places and, while there might be exceptions, generally taking a child into a highly dangerous place would be contrary to the child's best interests.

The Commission does not have access to the Australian Government's evidence base supporting this stated policy objective. However, even if the INSLM is of the opinion that there is cogent evidence of a widespread risk to children currently resident in Australia of being removed to a declared area, the Commission does not consider a broadly defined counter terrorism offence with inadequate safeguards for human rights protection to be a well-targeted or proportionate response.

It is rare that the best way of protecting a person's human rights is to criminalise their, or their parent's or guardian's, behaviour. The Commission considers the best interests of the child would be more appropriately and effectively addressed with a more targeted measure within the context of Australia's child protection framework, in particular, the National Framework for Protecting Australia's Children (National Framework). This would provide a more considered, longer-term and practical approach to managing any such risk and thereby better considering and protecting the rights of the child. The Commission considers that the National Children's Commissioner, as well as the Commonwealth Minister for Social Services and the State and Territory Ministers for the portfolio of child protection (who contribute to overseeing the overall direction of the National Framework), should be consulted on this matter.

The Commission's recommendations in relation to the declared area offence, therefore, as articulated in its written submission, remain unchanged.

Further, in weighing up this policy justification for the offence, the INSLM should also consider the particular vulnerability of children at risk of removal to a declared area and the adverse impact on them of any subsequent prosecution of their parent or guardian. As stated in the Commission's written submission, the breadth of this offence, with limited grounds of defence, means that potentially innocent conduct will be captured. Given the severe penalties for breach of the declared area offence, a successful prosecution will have a significant impact on the family unit, likely to involve separating a child from their parent. This is a relevant, and important factor that should also be considered when assessing the human rights impact of the declared area offence provisions.

42. The Commission reiterates those views.

5.2 *Protecting individuals from harm, by deterring them from travelling to dangerous places*

43. The present INSLM notes submissions by the Australian Federal Police and the Attorney-General's Department that the declared areas provisions have
- the potential to protect the personal safety of individuals by discouraging or deterring them from travelling to areas where terrorist organisations are engaged in hostile activity.²¹
44. As noted above, it is rare that the best way of protecting a person's human rights is to criminalise their behaviour. The Commission has not seen a compelling justification that the most appropriate means of protecting people from themselves, in these circumstances, is to criminalise their behaviour with a risk of life imprisonment. The INSLM report does not address what would appear to be a common-sense alternative approach: that the Government adopt less draconian measures—such as education campaigns and travel warnings—to deter or dissuade people with no intention of becoming 'foreign fighters' from travel to relevant areas. It is difficult to see how the declared areas provisions can be characterised as proportionate to the objective of protecting would-be innocent travellers from harm.

5.3 *Overcoming difficulties in proving other offences*

45. The Commission acknowledges that there may be significant difficulties in obtaining evidence that people who have travelled abroad have engaged in terrorist activities. It is plausible to say that these difficulties will be amplified in the case of travel to areas of conflict or areas controlled by terrorist organisations. However, it does not follow that maintaining an offence that potentially criminalises innocent conduct is a proportionate response to this difficulty.

5.4 *Conclusion and recommendations*

46. The Commission considers that the INSLM's recent report does not contain compelling evidence demonstrating that the declared areas provisions are necessary and proportionate to achieving an identified legitimate objective. The Commission repeats the substance of the recommendations made in its INSLM Submission.

Recommendation 1

In the event that the PJCIS is not satisfied that the declared areas provisions are necessary and proportionate to achieving a legitimate end, it should recommend that they should be repealed.

Recommendation 2

In the event that the PJCIS is satisfied that the declared areas provisions are necessary and proportionate and should not be repealed, s 119.3 of the Criminal Code should be amended so that the Foreign Affairs Minister may

declare an area only if she is satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area.

Recommendation 3

In the event that the PJCIS is satisfied that the declared areas provisions are necessary and proportionate and should not be repealed, the exception contained in s 119.2(3) of the Criminal Code should be amended so that s 119.2(1) does not apply to a person if that person enters, or remains in, an area solely for a purpose or purposes not connected with engaging in hostile activities.

Recommendation 4

In the event that recommendation 3 is not accepted:

- a. Detailed consideration be given to expanding the list of legitimate reasons for travel to declared areas in s 119.2(3) of the Criminal Code to include, for instance, visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs. The list should be made as comprehensive as possible; and
- b. Section 119.2 of the Criminal Code be amended so that it is a defence to a charge of entering or remaining in a declared area if a person establishes they were in a country for a purpose other than engaging in a hostile activity.

¹ Dr James Renwick SC, Sections 119.2 and 119.3 of the Criminal Code: Declared Areas (7 September 2017) (3rd INSLM Declared Areas Report). This submission also refers to Dr James Renwick SC, *Review of Division 3A of Part IAA of the Crimes Act 1914: Stop, Search and Seize Powers* (7 September 2017) (3rd INSLM SSS Report) and Dr James Renwick SC, *Review of Divisions 104 and 105 of the Criminal Code (including the Interoperability of Divisions 104 and 105A): Control Orders and Preventative Detention Orders* (7 September 2017) (3rd INSLM CO & PDO Report).

² The Commission's INSLM Submission was attached to its submission to the PJCIS in relation to the present inquiry dated 22 September 2017.

³ United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* UN Doc E/CN.4/1985/4, Annex (1985), (Siracusa Principles), [2].

⁴ UN Human Rights Committee, *General Comment 35—Article 9 (Liberty and security of person)*, UN Doc CCPR/C/GC/35, (2014), [12].

⁵ Siracusa Principles, [12].

⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁷ Siracusa Principles, [29]-[32].

⁸ Cf the submission of the Australian Federal Police cited in the 3rd INSLM Declared Areas Report, [8.10].

⁹ Fionnuala Ní Aoláin, Special Rapporteur of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Promotion and protection of human rights and fundamental freedoms while countering terrorism* (Advance Unedited Version), (27 September 2017), UN Doc A/72/43280, [14]-[16].

¹⁰ 3rd INSLM CO & PDO Report, [11.21]; 3rd INSLM SSS Report, [9.4]; 3rd INSLM Declared Areas Report, [9.7].

¹¹ 3rd INSLM SSS Report, [5.30]; CO & PDO Report [5.38], Declared Areas Report [5.32].

¹² 3rd INSLM SSS Report, [2.1]; CO & PDO Report [2.1], Declared Areas Report [2.1].

¹³ 3rd INSLM SSS Report, [2.8]; CO & PDO Report [2.9], Declared Areas Report [2.8].

¹⁴ 3rd INSLM Declared Areas Report, [2.8].

¹⁵ 3rd INSLM CO & PDO Report, [8.13.d].

¹⁶ 3rd INSLM Declared Areas Report [5.4].

¹⁷ Adopted 24 September 2014, UN Doc S/RES/2178 (2014).

¹⁸ Explanatory Memorandum to the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, p 139 [827].

¹⁹ INSLM declared areas [5.36]

²⁰ See the Commission's INSLM Submission, [33]-[45]; also Australian Human Rights Commission, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014—Australian Human Rights Commission Submission to the Parliamentary Joint Committee on Intelligence and Security* (2 October 2014) available at

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/Counter-Terrorism_Legislation_Amendment_Foreign_Fighters_Bill_2014/Submissions (viewed 29 October 2017).

²¹ 3rd INSLM Declared Areas Report, [8.11].