



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Dear Dr Popple,

### **Review of the Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024**

The Law Society appreciates the opportunity to contribute to the Law Council's submission to the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) regarding its review of the *Counter-Terrorism Legislation Amendment (Declared Areas) Bill 2024*. The Law Society's Human Rights and Public Law Committees have contributed to this submission.

#### **Extension of the declared areas offence provision**

In our view, it is inappropriate to extend by a further three years the declared area offence provision under s 119.2 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**), which is due to sunset on 7 September 2024. We share the concerns expressed by the Law Council in its previous submissions to the PJCIS, and in the context of other inquiries on this matter, including the breadth of the offence, given the maximum penalty of 10 years' imprisonment, the narrowly drawn range of legitimate purpose exceptions, and the fact that a defendant bears the evidential burden should they wish to rely on any of the exceptions.<sup>1</sup>

#### **Current threat environment**

In previous reviews of the declared areas offence, the PJCIS has considered the current and evolving international threat and the purpose of the provisions in this context. Since the introduction of the offence in 2014, two areas have been declared by the Minister for Foreign Affairs under s 119.3(1) of the Criminal Code: Al-Raqqa province in Syria (4 December 2014) and Mosul district, Ninewa province in Iraq (2 March 2015). These declarations have since been revoked, following the territorial defeat of IS (November 2017 for Al-Raqqa, December 2019 for Mosul). No areas are currently declared under s 119.3(1).

While the Law Society is not well placed to comment on the current threat environment, we consider it appropriate for national security and other government agencies to give evidence before the PJCIS on the current threat level posed by foreign terrorist fighters to the Australian community, as compared with the concerns that led to the enactment of the declared area provisions in 2014, and when the provisions were last reviewed, in 2020. Such an examination

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<sup>1</sup> Law Council of Australia, [Submission to Parliamentary Joint Committee on Intelligence and Security](#), Review of 'declared area' provisions of the Criminal Code Act 1995 (Cth) (Submission, 25 August 2020).

is timely, given the National Terrorism Threat Level was lowered in November 2022 from 'probable' to 'possible'. An assessment of this kind would speak to the necessity of the provisions at the current time and whether they are proportionate to the objective of protecting Australia's national security interests and deterring Australians from travelling to dangerous conflict areas.

### **Placing the offence in its legislative context**

The Law Society appreciates that a robust response to national security requires a multi-pronged approach. However, this means that each separate legislative measure must be carefully considered with a view to its necessity and proportionality within the broader suite of preventive and disruptive anti-terrorism powers. As noted by the Law Council in its 2020 submission to the PJCIS, such powers include electronic surveillance, ASIO questioning powers, temporary exclusion orders, and citizenship deprivation orders, as well as investigative powers in relation to terrorism and foreign incursion offences directed to preparatory and ancillary acts.<sup>2</sup>

It is unclear in this legislative context whether s 119.2(1), an absolute liability offence which criminalises a person's mere presence in an area of a foreign country, is proportionate and necessary. If the existing suite of powers noted above, which in many cases afford broad discretion to intelligence and law enforcement agencies to undertake their investigations, are insufficient or underutilised, we consider that the Government should provide an explanation as to their shortcomings with respect to prevention, disruption and deterrence.<sup>3</sup>

In this respect, the Law Society would support advocacy by the Law Council for a holistic inquiry into Australia's counterterrorism laws. As noted by Kieran Hardy and George Williams in their 2022 analysis of Australia's legal responses to terrorism over two decades, while comprehensive reviews were undertaken by the Independent National Security Legislation Monitor (**INSLM**) in 2012 and the Council of Australian Governments (**COAG**) in 2013, the threat environment has changed significantly since that time, and yet laws have been enacted in the past decade with wider scope and greater impact on free speech, freedom of the press and privacy and data law.<sup>4</sup> It will be important in this context to also examine the operation of these laws in practice, particularly the way in which Australia uses its alliances and partnerships to conduct anti-terrorism investigations.

### **Impact of offence on women and children**

It is also important to consider some of the unintended consequences that may arise from the enforcement of this legislation. For example, it may adversely impact those persons who have been coerced or trafficked into declared zones, in particular women and girls. In the context of the Syrian crisis, for example, a 2021 report by Reprieve documented the experiences of British victims of trafficking in North East Syria, finding that ISIS recruited hundreds of women and girls who were forced into 'marriage, sexual slavery, domestic servitude and other forms of exploitation'.<sup>5</sup> Additionally, this risk has been raised by the UN Special Rapporteur on counterterrorism and human rights, for example by way of amicus curiae in the matter of *H.F. and M.F. v. France* (App. No. 24384/19) and *J.D. and A.D. v. France* (App. No. 44234/20)

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<sup>2</sup> Ibid.

<sup>3</sup> For example, it is noted that there will be cases where suspects will voluntarily agree to the use of the additional preventive measures, such as control orders. In 2019, 36 women and children detained in camps in Syria offered to be put under control orders, while agreeing to be subject to any further criminal investigations, to assist with their return home. This offer was not accepted by the Australian government. See The Guardian, ['Australian families trapped in Isis camps offer to be put under control orders if they can return'](#) (26 October 2019).

<sup>4</sup> Kieran Hardy and George Williams, ['Two Decades of Australian Counterterrorism Laws'](#) (2022), Vol 46, Melbourne University Law Review, 78.

<sup>5</sup> Reprieve, ['Trafficked to ISIS, British families detained in Syria after being trafficked to Islamic State'](#) (30 April 2021).

before the European Court of Human Rights. These matters have also been raised directly with the Australian Government in communications from UN special mandate holders.<sup>6</sup>

Since the Law Council's last submission to the PJCIS on this matter, there has been a further case of an Australian woman charged with offences under s 119.2 of the Criminal Code.<sup>7</sup> It is possible that further Australians will be charged under these offences, particularly those who have been repatriated from Syria or who may be repatriated in the future. While in some cases the evidence will demonstrate that persons went willingly to declared areas, there is a risk of these prosecutions criminalising persons who were subject to coercion and trafficking, in particular women and children. The legislation requires the consent of the Attorney-General for prosecutions, but does not provide any other safeguards for this category of vulnerable individuals.

### **Suggestions if the offence is renewed**

If the regime is to be maintained, we support the Law Council's suggestions of tightening the elements of the offence, including requiring proof of a person's intent to travel to a declared area with an illegitimate purpose, expanding the legitimate purpose exception, and strengthening the statutory criteria and process by which the Minister for Foreign Affairs may prescribe and review a declared area. We consider that the Law Council should continue to advocate for a 'reasonable excuse' defence modelled on subsection 58B(2) of the *Terrorism Act 2000* (UK).

Thank you for the opportunity to contribute. Questions at first instance may be directed to Sophie Bathurst, Policy Lawyer, at (02) 9926 0285 or [sophie.bathurst@lawsociety.com.au](mailto:sophie.bathurst@lawsociety.com.au).

Yours sincerely,



**Brett McGrath**  
**President**

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<sup>6</sup> See, for example, UAAUS 4/2022, UAAUS 2/2022, ALAUS 1/2022 and ALAUS 1/2022. For example, in UAAUS 2/2022, it was stated: "We understand that some of the women may have been coerced or trafficked into Syria. We urge your Excellency's government to be conscious of the gender-specific traumas experienced by women and girls, as well as the various human rights violations that they are subjected to in the context of their arbitrary detention and the impact of those conditions on their mental and physical health. It is imperative that State responses do not perpetrate or contribute further harm to those who have already experienced profound violence and trauma".

<sup>7</sup> NSW Police, '[NSW woman charged for allegedly entering Syria when occupied by Islamic State](#)' (Media Release, 5 January 2023).