AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

PO Box A147
Sydney South
NSW 1235
info@alhr.org.au
www.alhr.org.au

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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email: pjcis@aph.gov.au

Dear Committee Secretary

Submission in relation to review of 'declared areas' legislation

Australian Lawyers for Human Rights (ALHR) is grateful for the opportunity to comment on your review of offences relating to entering and remaining in 'declared areas' under div 119 [Section 119 Criminal Code (*Criminal Code Act 1995*)].

This submission draws upon our previous submission of 12 May 2017 to the Independent National Security Legislation Monitor (INSLM) and upon the Law Council's previous submission to INSLM, with which we agree. We also refer to the INSLM's report on Sections 119.2 and 119.3 (**Report No. 2**). [1]

We understand that while no prosecutions have yet been brought under the legislation, ''a number' of arrest warrants that have been issued for the declared area offence, and that a 'number of investigations' are ongoing for the declared area offence."[2]

Summary

ALHR is concerned that the legislation under consideration displays the following problems:

a) the provisions are disproportionate in effect;

b) the provisions reduce the oversight of the courts (which oversight is essential to the balance of powers in a democracy);

c) the provisions are inconsistent with accepted international human rights standards;

d) the provisions contain insufficient mechanisms for independent and comprehensive review;

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1 Commonwealth of Australia, Independent National Security Legislation Monitor, *Section 119.2 and 119.3: Declared Areas*, Australian Government, Sept 2017, Report No. 2.

2 Report No. 2, par 8.15.

e) the key terms in the provisions are not clearly or are not appropriately defined (and are thus potentially subject to arbitrary or inconsistent application - in particular in the absence of normal judicial review);

f) the provisions contain insufficient safeguards in relation to accepted standards of legal support and oversight in the light of international human rights standards.

1. ALHR's Concerns

1.1 ALHR's primary concern is that Australian legislation and judicial decisions should adhere to international human rights law and standards and preserve the rule of law.

1.2 We endorse the views of the Parliamentary Joint Committee on Human Rights (PJCHR) expressed in Guidance Note 1 of December 2014[3] as to the nature of Australia's obligations in relation to human rights, including in particular as to civil and political rights, and agree that the inclusion of human rights 'safeguards' in Commonwealth legislation is directly relevant to Australia's compliance with those obligations.

1.3 Generally, behaviour should not be protected by Australian law where that behaviour itself infringes other human rights. There is no hierarchy of human rights – they are all interrelated, interdependent and indivisible. Where legislative protection is desired for particular behaviour it will be relevant to what extent that behaviour reflects respect for the rights of others. Conversely, where legislation penalises behaviour it is relevant to what extent the offender's behaviour impacts upon the human rights of others.

1.4 Human rights entail both rights and obligations. In so far as we are ourselves entitled to the protection of human rights, we must also respect the human rights of others.[4]

1.5 Thus all rights must be **balanced** where they conflict, and as part of that balancing process must provide **reasonable accommodation** to other rights. This is commonly understood in international law and in jurisdictions where human rights are enshrined in national constitutions, such as Canada and European Community countries. In Australia, being alone amongst first world countries in not having constitutionally protected human rights, there is not a common understanding of this issue.

1.6 ALHR submits that the legislation in question does not meet the appropriate balance between competing rights and does not make reasonable accommodation for the rights and freedoms that are infringed. In our submission, these measures threaten important principles that form the fundamental structure of our justice system.

2. General observations

No alternatives proposed therefore not clear that regulation is proportionate

2.1 No examination appears to have been made in this case of legislative alternatives which were not so far-reaching. It is also notable that no other country appears to have similar legislation. As the Law Council says, this certainly raises questions as to the utility and necessity of the legislation.[5]

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3 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Guidance Note 1*: *Drafting Statements of Compatability*, December 2014, available at <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources> accessed 16 January 2015, see also previous *Practice Note* 1 which was replaced by the Guidance Note, available at< https://www.humanrights.gov.au/parliamentary-joint-committee-human-rights>, accessed 16 January 2015.

4 See generally, United Nations Human Rights Office of the High Commissioner, "What are Human Rights?" available at <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>, accessed 9 February 2017.

5 Op cit, par 26 p 13.

2.2 This omission is contrary to Article 4(1) of the *International Covenant On Civil And Political Rights* ('ICCPR') which contemplates that a State will take measures derogating from its obligations under the ICCPR only:

- 'in time of public emergency which threatens the life of the nation,' and
- 'to the extent strictly required by the exigencies of the situation,' and
- for so long as that emergency lasts.

2.3 ALHR believes that reasonable, necessary and proportionate legislation will not:

- detract from established principles of the Australian criminal justice system,
- fail to comply with international human rights standards, nor
- abrogate rule of law principles;[6]

and is concerned that generally the Federal Government has not established that the legislation in question meets these tests.

2.4 In the words of Dr. Binoy Kampmark:

> *It is no exaggeration to suggest that the current swathe of proposed laws risk placing Australia, not merely on a police state footing, but a garrisoned footing. Terrorism, for all its fearful properties, remains an idea, a tactic and a method. The consequences of responding to it are quite something else. Shredding civil liberties is the first step to admitting a failure in dealing with the very problem a society should resist.*[7]

2.5 ALHR is particularly concerned at the emerging trend (evidenced further in the first week of October 2017 in comments that under changes to Commonwealth legislation children as young as ten could be held for up to 14 days without charge), whereby the Federal Government:

(1) legislates to impose disproportionately severe penalties (described as 'horrific over-reach'[8]), without allowing any 'public benefit,' public domain or 'whistleblower' defences, for a wide range of matters;

but then

(2) states publicly that the government is unlikely to encourage prosecutions under the legislation against certain classes of person - as it has done in the context of disclosure by journalists of security operations.[9]

2.6 ALHR endorses the comments of Bret Walker SC that enacting disproportionately severe legislation as a purported disincentive can, ironically, give rise to a situation where any legal safeguards included in the legislation will effectively be useless. This is because the legislation can be used to intimidate those people who could

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6 See generally Law Council of Australia, *"Anti-Terrorism Reform Project"* October 2013, <http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Oct%202013%20Update%20-%20Anti-Terrorism%20Reform%20Project.pdf> accessed 2 October 2014.

7 "Winding back the Liberties: The New Anti-Terror Laws in Australia,"25 September 2014, Rule of Law Institute website, accessed 28 September 2014, http://www.ruleoflaw.org.au/anti-terror-laws-in-australia/

8 Michael Bradley, 'What Brandis won't tell us about S35P', *ABC* at <http://www.abc.net.au/news/2014-11-06/bradley-what-brandis-wont-tell-us-about-s35p/5871684> accessed 9 November 2014 and see Simon Breheny, 'George Brandis's Solution A Cure Worse than the Disease', *Institute of Public Affairs Website* at <http://ipa.org.au/news/3198/george-brandis%27s-solution-a-cure-worse-than-the-disease> accessed 9 November 2014, being a reproduction of an article originally published in *The Australian* on 7th November 2014.

9 Bradley, op cit;

conceivably be prosecuted under it - in which circumstances the legislative safeguards will not be available to those persons.

2.7 Thus in responding to a question as to whether there is 'basically no harm in having [particular crimes] on the statute books because they might come in handy at some stage', Mr Walker said (emphasis added):

> *"I am revolted by that approach to lawmaking, particularly when one is talking about infringements of what would otherwise be civil liberties. I like being in a society where we have something called criminal justice, which involves a trial in which the state bears the onus of proof beyond reasonable doubt. I think all departures from that, however necessary, should be only so great as circumstances require.* ***It cannot be the requirement of circumstances that it would be nice to have something on the shelf though you cannot think of what to use it for at the moment.***
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> *… We should never countenance the idea of having things on the books so that they can be the subject of threats by officers,* ***bearing in mind that all our safeguards, of course, are absolutely useless in the face of such informal and, in my view, dishonest use of such powers."***[10]

2.8 ALHR is concerned that an increasing number of pieces of legislation are being passed which overturn the crucial presumption of innocence, our civil liberties and our human rights purely on the basis that they might be useful. We understand that the legislation we are discussing here has only been used to make two declarations, in relation to:

- Mosul district, Ninewa province in Iraq
- Al-Raqqa province in Syria.

Not all relevant International agreements considered

2.9 While the explanatory memorandum for the legislation under consideration refers to the need for the Parliamentary Joint Committee on Human Rights **(PJCHR)** to comply with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011,* and the international agreements to which that Act refers, the memorandum does not appear to take all of these matters into account.

Judicial review required

2.10 Australian society must take into account that the manner in which we respond to crimes is in itself a measure of the strength and nature of our society. It is particularly concerning that the legislation under consideration continues the existing practice of removing all terrorism-related matters from the ambit of the *Administrative Decisions (Judicial Review) Act* (AD (JR) Act). The legislation adds to the already long lists in Schedules 1 and 2 of that Act of decisions which either cannot be reviewed at all under that Act[11], or for which reasons do not have to be given[12]– effectively making it impossible for the court to carry out any contextual review.[13]

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10 Commonwealth of Australia, Hansard, *Parliamentary Joint Committee on Intelligence and Security*, 8 October 2014, p 45, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;adv=yes;orderBy=priority,doc_date-rev;page=6;query=Dataset%3AcomJoint;rec=8;resCount=Default> Accessed 9 November 2014.

11 See Schedule 1 of the Act. This includes all decisions under the *ASIO Acts* 1956 and 1979, *Intelligence Services Act* 2001, *Inspector-General of Intelligence and Security Act* 1986, *Telecommunications (Interception and Access) Act 1*979, and *Telephonic Communications (Interception) Act* 1960

12 See Schedule 2 of the Act.

13 Paragraph 273.

2.11 Whether or not one believes that the legislation under consideration is either (1) morally correct and/or (2) desirable in practical terms, there can be no justification for restricting full judicial review of decisions made under that legislation. Without full judicial review there is no accountability and no transparency. A government that places its administrative officials above the courts is not properly or fully democratic.

2.12 Full judicial review is fundamental to the structure of a democratic society and it is arguably a 'subversion' of Australian society for Parliament to remove that safeguard and that balance of powers.

Restrictions on civil liberties and common law rights

2.13 Ironically, the legislation under consideration severely limits a number of essential common law rights which the Attorney-General of Australia has promoted elsewhere including:

- the presumption of innocence
- the prosecution carrying the burden of proof
- the presumption against construing laws so as to allow for arbitrary or unrestricted power
- the right to a fair trial, and
- the tradition of independent judicial review of law and executive action

as well as the rights to freedom from arbitrary detention and freedom of movement.

3. Offences relating to entering and remaining in 'declared areas' under Section 119.2 of the Criminal Code

3.1 We assume that the reference to 'div 119' is to section 119.2 and following of the Criminal Code under the *Criminal Code Act 1995*. ALHR is particularly concerned that the draconian provisions of the legislation relating to 'declared areas' are far in excess of any appropriate response to the presence of Australian civilians in an area of fighting.

3.2 Under section 119.2 it is an absolute liability offence, punishable by up to 10 years' imprisonment, for Australian citizens, residents, visa-holders or persons under Australian 'protection' to enter or remain in a 'declared area' of a foreign country. The onus of proof is on the 'offender' to prove that an exemption exists. No *mens rea* is relevant, and the offence is still made out even if the offender was completely unaware that they were in a declared area, and even though their presence in that area caused no harm to any person. In ALHR's view, such legislation imposes an inappropriate and unreasonable restriction on Australians' freedom of movement and human rights.

3.3 The explanatory memorandum relating to this offence explained that the legislation was intended '*to deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity.'* If this was the real aim of the legislation then logically the legislation should be tailored to that end and the normal concept of *mens rea* should be an essential part of the offence. There is no reason for making the offence an absolute one which applies irrespective of the offender's knowledge that they have entered a 'declared area' for the purposes of the legislation. The legislation is a completely disproportionate response to the possibility of a very small number of Australians becoming involved with any listed terrorist organisation.

3.4 It is also quite unclear how "deterring Australians from travelling to declared areas" by deeming them to be criminals unless they can demonstrate otherwise on a very narrow basis is itself a proportionate response to national security issues. It is said that "the

offence responds to a continuing threat of returning foreign fighters"[14] but if that is the threat that is to be addressed by the legislation, then the legislation should deal only with people who actually carried out such activities, and not with anybody who happened to be in the vicinity for possibly legitimate purposes. The fact that it is difficult to obtain evidence about overseas events[15] does not justify treating all Australian travellers to an area as criminals unless they can prove otherwise. The effectiveness of the legislation is unclear in terms of meeting its stated aims. The fact that the legislation has a unique purpose[16] does not demonstrate that it is a proportionate response. Similarly, the fact that the legislation may have had a 'cooling effect' on the transmission of money to declared areas[17] does not justify the legislation being drafted so as to remove *mens rea* as an essential part of the offence and does not justify the narrow ambit of the exemptions.

3.5 The ambit of section 119 is overbroad because of the issues mentioned above. In particular:

- There is a very limited list of legitimate exceptions, not including business or various humanitarian purposes other than direct aid. This is quite different from the broad 'creditable purpose' test in Denmark referred to by the INSLM[18]. While paragraph 235 of the Explanatory Memorandum argues that '*The legitimate purpose defence captures common reasons for travelling*' this is not correct and the list is very limited, as other submissions has noted. Section 119 effectively limits the previous **'humanitarian aid exception'** which did not require the aid to be the sole reason that the conduct in question is undertaken. It is submitted that there could be many additional legitimate reasons why a person needs or wishes to be in a declared area that are not related to terrorist activities. It is quite inappropriate for the test to be so narrow. The Law Council of Australia recommends adding the following exemptions at a minimum: "(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."[19]
- It is perfectly possible that an Australian could be in a declared area with no knowledge that it has been made illegal for Australians to be there and no with no guilty intent. **However under section 119.2 they could be imprisoned for 10 years, despite having caused no harm and having had no intent to cause harm.**
- The INSLM report notes that "some 70 Australian children are known to be in conflict zones where ISIL is engaged in hostile activity"[20]. Presumably these children had no control over being brought into declared areas, but would also be *prima facie* guilty under the current section 119, contrary to the *Convention on the Rights of the Child* and the *International Covenant on Economic, Social and Cultural Rights.* [21]

3.6 The Explanatory Memorandum for this provision appeared to argue that there is no infringement of Article 14(2) of the ICCPR (which provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty

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14 Report No. 2, par 8.17
15 Report No. 2, par 8.18.
16 Report No. 2, par 8.10.
17 Report No. 2, par 8.13.
18 Report No. 2, par 8.7(c).
19 Report No. 2, par 8. 19(b).
20 Report No. 2, par 5.31.
21 See Report No. 2, par 5.20 and following.

according to law)[22] because the burden 'shifts back' again to the prosecution once the defendant demonstrates that they fall within one of the exemptions, or at least that they have a 'legitimate' reason for being in the area.

3.7 However because the exemptions are so narrowly drafted, the defendant may not be able to demonstrate that they fall within the exemptions, despite having a 'legitimate' reason for being in the area. And given that the exemptions do not cover all 'legitimate' reasons for being in the area, the argument in the Explanatory Memorandum appears to follow the worrying trend identified previously, being that government on the one hand legislates to impose disproportionately severe penalties but on the other hand makes public statements that it will not enforce the legislation where there are 'legitimate' excuses for the offender. We concur with other commentators that this is an inappropriate way in which to make law.

3.8 It is clear from paragraph 228 of the Explanatory Memorandum and the text of the legislation that the effect of the legislation is to place the burden of proving their innocence upon the defendant. As such, the legislation is antithetic to the ICCPR.

3.9 As the Law Council says:

> *31. … Even within the limited list of exceptions, the defendant may be unable to show that there is a reasonable possibility that travel was solely for a legitimate reason because of a lack of capacity to explain their reasons due to age, cultural and linguistic background or physical or mental capacity, inability to call as witnesses people in the declared area to corroborate the exception, or a lack of record keeping.*
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> *32. As such, the offence may also have the unintended effect of preventing and deterring innocent Australians from travelling abroad for legitimate purposes (such as assisting friends who may have a disability or otherwise require assistance) out of fear that they may be prosecuted for an offence, subjected to a trial and not be able to adequately discharge the evidential burden.*[23]

3.10 As the Law Council points out, this might have the counterproductive effect of alienating the very people whose cooperation is essential to curbing terrorism.

3.11 ALHR notes that the Australian Law Reform Commission's report, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Report 129), suggests that section 119 of the *Criminal Code Act 1995* warrants further consideration or review given its effect on traditional rights and freedoms. In particular, the ALRC recommended that section 119 be reviewed by the Independent National Security Legislation Monitor (INSLM) and the Intelligence Committee with respect to the legislation's impact on the freedom of association and assembly, freedom of movement, and the burden of proof.

3.12 The review by INSLM has now taken place and has endorsed the continuation of the legislation, with a suggestion that consideration be given to making a regulation under, or an amendment to, the 'declared area' provisions to allow an individual to seek permission from the Foreign Affairs Minister (following advice from the Attorney-General) to enter into and remain in a declared area for such period and on such conditions as the Minister may choose to impose.

3.13 If the legislation is to continue, ALHR would support such a regulation as a starting point. However it is the view of ALHR that, as recommended by the Law Council, it

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22 Paragraph 227

23 op cit, p 14.

would be preferable if the offence in s 119.2 were removed and reliance placed instead on the offences of entering a foreign country with the intention of engaging in hostile activity (subsection 119.1(1)), or preparing to do so (section 119.4), which are sufficiently broad to cover travel for the purpose of engaging in terrorist activities, and do not have the negative civil liberties consequences of s 119.2.

3.14 ALHR agrees with the Australian Human Rights Commission that at the very least, if the legislation is to continue, the exception contained in s 119.2(3) of the Criminal Code be amended so as to be inclusive rather than exclusive, so that section 119.2(1) does not apply to a person if that person enters, or remains in, an area for a purpose or purposes not connected with engaging in hostile activities.[24]

3.15 ALHR notes that a number of other submissions have identified legitimate reasons for entering a declared area in addition to those identified in s 119.2(3)(a) of the legislation. For example, the Centre for Military and Security Law within the Australian National University has submitted that 'providing aid of a humanitarian nature' should be broadened so as to clearly include persons engaged in related humanitarian work other than direct aid, such as the delivery of training that has a humanitarian purpose, such as compliance training on the laws of armed conflict.[25] The Law Council of Australia recommends adding the following exemptions at a minimum: "(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."[26] It is not clear why these proposed exemptions are regarded by the INSLM as invalid.

4. Conclusion

ALHR acknowledges that it is vital to achieve a proportionate and effective balance between the government's domestic and international obligations to protect its citizens from terrorism and its international obligations to preserve and promote its citizens' fundamental human rights.

However it is also essential that anti-terrorism laws adhere to the Australian government's international legal obligations under various binding instruments and accord with agreed norms of human rights, civil liberties and fundamental democratic freedoms. If legislative provisions do not accord with these standards they should not be adopted.

Australia was at the forefront of the development of the modern international legal system post-World War Two, which included designing and implementing the architecture of international human rights law. We have signed and ratified the core international human rights law instruments. ALHR believes that a human rights framework will strengthen counter-terrorism and national security laws in Australia by appropriately balancing the various obligations. The existing legislation under consideration does not reflect an appropriate balance.

The danger in overly hasty, populist and crude responses to the terrorism threat is a loss of fundamental rights for all Australians. Any such loss changes our society and the nature of our democracy and in fact represents a victory for terrorism.

5. ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote

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24 Australian Human Rights Commission, *Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Submission to the Parliamentary Joint Committee on Intelligence and Security*, 2 October 2014, page 11, par 50.

25 Commonwealth of Australia, Independent National Security Legislation Monitor, *Section 119.2 and 119.3: Declared Areas*, Australian Government, Sept 2017, Report No. 2, par 8.21.

26 Report No. 2, par 8. 19(b).

international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au.

Yours faithfully

Benedict Coyne
President
Australian Lawyers for Human Rights

Contributors: Nathan Kennedy, Dr Tamsin Clarke