



THE LAW SOCIETY  
OF NEW SOUTH WALES

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Ms Margery Nicoll  
Acting Chief Executive Officer  
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Dear Ms Nicoll,

### **Review of Declared Area Provisions**

Thank you for the opportunity to provide input for the Law Council's submission to the Parliamentary Joint Committee on Intelligence and Security ("PJCS") in relation to the declared area provisions under ss 119.1 and 119.3 of the *Criminal Code Act 1995* (Cth) ("Criminal Code").

The Law Society's Human Rights Committee has contributed to this submission.

### **Background to the declared areas provisions**

The declared area provisions were introduced as part of the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). The stated objective of the provisions is to deter Australian citizens from travelling to areas where listed terrorist organisations are engaged in hostile activities unless they have a legitimate reason to do so.<sup>1</sup> The rationale for this objective, outlined in the Explanatory Memorandum to the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth), is as follows.

People who enter, or remain in, a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes might engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be employed to facilitate terrorist or other acts in Australia.<sup>2</sup>

The declared area provisions provide for the prosecution of people who intentionally enter an area in a foreign country where they know, or are aware of a substantial risk, that the Australian Government has determined that terrorist organisations are engaging in a hostile activity and the person is not able to demonstrate a legitimate purpose or purposes for entering, or

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<sup>1</sup> Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 48.

<sup>2</sup> Ibid.

remaining in, the area.<sup>3</sup> The maximum penalty available under the provisions is ten years' imprisonment.<sup>4</sup>

The declared area provisions contain a sunset clause of 7 September 2021 at which point, if not renewed, the provisions will cease to have effect. The Law Society's submission focusses on the desirability or otherwise of renewing this sunset clause.

### **The continued operation of the declared area provisions**

It is the opinion of the Law Society that the declared area provisions' sunset clause should not be extended or alternatively, the declared area provisions should be repealed before the sunset clause takes effect. The Law Society's position rests on the following three points.

#### **1. The adequacy of other federal legislation and powers**

Since the introduction of the declared area provisions in 2014 there has been federal legislation passed which can achieve the stated objective of the provisions. One example is the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) ("TEO Act"). The TEO Act created a scheme by which the Minister for Home Affairs may make Temporary Exclusion Orders ("TEO") or provide Return Permits to Australian citizens returning from a "conflict zone".<sup>5</sup> "Conflict zone" is not defined in the TEO Act, however Syria and Iraq were referred to in the Minister's second reading speech accompanying the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) ("TEO Bill").<sup>6</sup> A TEO may be made where the Minister suspects on reasonable grounds that it is necessary to substantially assist in preventing terrorism-related activity upon a citizen's return to Australia.<sup>7</sup> A contravention of an Order or Permit may attract penalties including imprisonment.

The Law Society and the Law Council did not support the establishment of the TEO scheme,<sup>8</sup> however the TEO Bill was passed by both Houses of Parliament and assented to on 30 July 2019. As the TEO scheme is now in effect, we are of the view that it is unnecessary to retain the declared area provisions. Risking imprisonment for breaching conditions granted in a TEO or Return Permit should serve as an adequate deterrent for citizens considering travelling to areas where listed terrorist organisations are engaged in hostile activities, unless they have a legitimate reason to do so.

The *Australian Citizenship Act 2007* (Cth) ("Citizenship Act") also provides a mechanism to prevent Australian citizens who have engaged in hostile activity with a terrorist organisation from returning to Australia, in order to limit the risk of terrorist acts in Australia. Section 35 of the Citizenship Act, which was expanded by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth), states that:

- (1) A person aged 14 or older ceases to be an Australian citizen if:
  - (a) the person is a national or citizen of a country other than Australia; and
  - (b) the person:

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<sup>3</sup> Ibid.

<sup>4</sup> *Criminal Code Act 1995* (Cth) s 119.2(1).

<sup>5</sup> *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 3.

<sup>6</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 297 (Peter Dutton).

<sup>7</sup> Ibid s 10(2).

<sup>8</sup> Law Society of NSW, 'Counter-Terrorism (Temporary Exclusion Orders) Bill 2019' (6 March 2019), Letter to the Law Council of Australia; Law Council of Australia, 'Counter-Terrorism (Temporary Exclusion Orders) Bill 2019' (8 March 2019), submission to the Parliamentary Joint Committee on Intelligence and Security.

- (i) serves in the armed forces of a country at war with Australia; or
- (ii) fights for, or is in the service of, a declared terrorist organisation (see section 35AA); and

(c) the person's service or fighting occurs outside Australia.

Note 1: The Minister may, in writing, exempt the person from the effect of this section in relation to certain matters: see subsection (9).

Note 2: This section does not apply to conduct of Australian law enforcement or intelligence bodies, or to conduct in the course of certain duties to the Commonwealth: see section 35AB.

(2) The person ceases to be an Australian citizen at the time the person commences to so serve or fight.

While the cessation of citizenship currently occurs automatically, the Minister is required to make reasonable attempts to give notice to the former citizen as soon as he or she becomes aware of conduct by which a person has ceased to be an Australian citizen (s 35(5)). The definition of declared terrorist organisation for the purposes of the Citizenship Act is borrowed from s 102.1(1) of the Criminal Code. The purpose of the powers in s 35, as outlined in the Explanatory Memorandum to the Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 ("Allegiance to Australia Bill"), is as follows.

The cessation of a person's formal membership of the Australian community is appropriate to reduce the possibility of a person engaging in acts or further acts that harm Australians or Australian interests. The cessation of a person's Australian citizenship will also have a deterrent effect by putting radicalised persons on notice that their citizenship is in jeopardy if they engage in terrorist-related conduct contrary to their allegiance to Australia.

While the Law Society and the Law Council opposed aspects of the Allegiance to Australia Bill in 2015,<sup>9</sup> the Bill was nonetheless passed in December 2015. A 2019 review by the Independent National Security Legislation Monitor ("INSLM") found that the self-executing provisions introduced by the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth):

do not pass muster under the INSLM Act and should, with some urgency, be repealed with retrospective effect, but be simultaneously replaced by a Ministerial decision-making model (and thus with constitutionally entrenched judicial review), coupled with merits review as to the conduct (s 33AA), fighting or service (s 35) by the Security Appeals Division of the Administrative Appeals Tribunal, and using the special advocate model which now exists for control orders.<sup>10</sup>

In response to the INSLM recommendation, the Government introduced the Australian Citizenship Amendment (Citizenship Cessation) Bill 2019 (Cth) ("Citizenship Cessation Bill"), which proposes to replace the current automatic operation of law provisions in the Citizenship Act with provision for ministerial decision-making with respect to the cessation of Australian citizenship. The Law Council's submission on the Citizenship Cessation Bill welcomed the

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<sup>9</sup> Law Society of NSW, 'The Australian Citizenship Amendment (Allegiance to Australia) Bill 2015' (14 July 2015), Letter to the Law Council of Australia, 4, Law Council of Australia, 'Australian Citizenship Amendment (Allegiance to Australia) Bill 2015' (17 July 2015), submission to the Parliamentary Joint Committee on Intelligence and Security, 9.

<sup>10</sup> Dr James Renwick SC, *Report to the Attorney-General: Review of the operation, effectiveness and implications of terrorism-related citizenship loss provisions contained in the Australian Citizenship Act 2007*, 2019, xi.

proposal to repeal the Citizenship Act's self-executing provisions, while recommending that the Ministerial decision-making model be coupled with the availability of merits review.<sup>11</sup> The PJCIS is currently reviewing the Citizenship Cessation Bill alongside the ongoing Review of the Australian Citizenship Renunciation by Conduct and Cessation provisions, and have not yet published their report. Regardless of whether s 35 remains self-executing, or is replaced with a Ministerial decision-making model as proposed by the Citizenship Cessation Bill, the clear overlap between the objective of the citizenship cessation provisions in the Citizenship Act and the objective of the declared area provisions will remain. The continued operation of the declared area provisions is, therefore, arguably unnecessary.

## 2. Low utilisation of the declared area provisions

The only judicial decision the Law Society could identify that referred to the declared area provisions is *Re Commissioner of Australian Police (No 3)* [2016] NSWSC 759 which concerned an application for the forfeiture of assets under the *Proceeds of Crimes Act 2002* (Cth). While any deterrent effect of the declared area provisions is difficult to measure, the fact that the provisions have only been used to support a civil application for asset forfeiture and not a criminal prosecution calls their necessity into question. The lack of prosecutions also suggests that other terrorism-related offences, such as the strict liability offence of associating with a member of a terrorism organisation,<sup>12</sup> are sufficient for the prosecution of foreign fighters as originally envisaged by the introduction of the declared area provisions. The low utilisation of the provisions also lends support to the above argument regarding the sufficiency of existing powers and legislation in this area.

On this point of low utilisation, it is significant to note that there are currently no active declared areas. The declarations relating to formerly declared areas – the Mosul District in the Ninewa province in Iraq and the al-Raqqa Province in Syria – were revoked by the Minister of Foreign Affairs under sub-s 119.3(5) of the Criminal Code with effect from 19 December 2019 and 29 November 2017 respectively.<sup>13</sup>

## 3. Disproportionate impact on human rights

Though their utilisation has been low, the declared area provisions have the potential for significant and, in our view, disproportionate impact on human rights. The provisions place an evidentiary burden on the defendant to establish that he or she entered or remained in a declared area solely for a legitimate purpose. Having the evidentiary burden rest with the defendant rather than requiring the prosecution to prove the defendant entered or remained in a declared area for an illegitimate purpose conflicts with the presumption of innocence in criminal matters provided for at Article 14(2) of the International Covenant on Civil and Political Rights ("ICCPR").

The declared area provisions are also arguably incompatible with citizens' right to freedom of movement as contained at Article 12 of the ICCPR. As the Parliamentary Joint Committee on Human Rights ("PJCHR") noted in its consideration of the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), there are significant numbers of Australians with connections to countries that may be subject to a declaration. These individuals may have legitimate and innocent reasons to travel, yet be deterred from doing so due to risk of

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<sup>11</sup> Law Council of Australia, 'Australian Citizenship Amendment (Citizenship Cessation) Bill 2019', (17 October 2019), submission to the Parliamentary Joint Committee on Intelligence and Security, 6.

<sup>12</sup> Australian Government, 'Declared area offence'

<<https://www.nationalsecurity.gov.au/WhatAustraliaisdoing/Pages/DeclaredAreaOffence.aspx>>.

<sup>13</sup> Department of Home Affairs, 'Declared areas' *National Security* available at:

<https://www.nationalsecurity.gov.au/WhatAustraliaisdoing/Pages/DeclaredAreaOffence.aspx>

prosecution.<sup>14</sup> Section 119.2(3) of the Criminal Code outlines a limited number of “legitimate purposes” that an individual can use in their defence, if charged under the declared area provisions. However as the PJCHR noted, it is not a defence to visit friends, transact business, retrieve personal property, attend to personal or financial affairs or to undertake a religious pilgrimage.<sup>15</sup> The PJCHR also noted the potential impacts of the provisions on the right to equality and non-discrimination given that “criminalising access to certain counties by declaration... [may] have a greater effect on certain individuals based on their ethnicity and/or country of birth”.<sup>16</sup>

In the view of the Law Society, the potential impact of the declared area provisions, in their current form, on Australians’ right to freedom of movement, presumption of innocence, and equality before the law is disproportionate to the objective of the provisions.

For the reasons outlined above, the Law Society supports the repeal of the declared area provisions or alternatively, would support the declared area provisions being allowed to lapse in September 2021.

Should you have any questions or require further information about this submission, please contact Andrew Small, Policy Lawyer, on (02) 9926 0252 or email [andrew.small@lawsociety.com.au](mailto:andrew.small@lawsociety.com.au).

Yours sincerely,



Richard Harvey  
**President**

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<sup>14</sup> Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of Legislation in Accordance with the Human Rights (Parliamentary Scrutiny) Act 2011*, 14th Report of the 44th Parliament (2014) [1.197].

<sup>15</sup> *Ibid* [1.199].

<sup>16</sup> *Ibid* [1.209].